

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

REBUTTAL TESTIMONY OF

JOSEPH GILLAN

ON BEHALF OF

MCIMETRO ACCESS TRANSMISSION SERVICES, INC.

DOCKET NO. 981121-TP

December 16, 1998

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Q. Please state your name and business address.

A. My name is Joseph Gillan. My business address is PO Box 541038, Orlando, Florida, 32854.

Q. What is the purpose of your rebuttal testimony?

A. The purpose of my rebuttal testimony is to address BellSouth's contention that MCI is "recreating" a BellSouth service when it proposes to use a loop/transport network element combination purchased from BellSouth, in combination with MCI's own local switch, to provide retail service. This claim goes much farther than BellSouth's previous objections to network element combinations and would render BellSouth's contractual obligation to combine network elements virtually irrelevant.

In prior testimony, BellSouth opposed the particular configuration of an entrant providing service *entirely* using network elements purchased from BellSouth. Here, BellSouth seeks to extend this opposition to an totally new category of services --

1 services that the entrant creates by combining network elements with its own facilities.
2 With its new position, BellSouth renders *irrelevant* the distinction it had previously
3 insisted was *essential* -- i.e., that the entrant should *only* use network elements in
4 connection with entrant-provided facilities.

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6 The rebuttal testimony of MCI witness Ron Martinez explains *why* the loop/transport
7 network element arrangement requested by MCI is not equivalent to BellSouth's
8 Megalink service. More fundamentally, my rebuttal testimony explains why the
9 Megalink comparison is *irrelevant*. To determine whether MCI "recreates" a
10 BellSouth service requires a comparison that considers the service MCI offers. The
11 service offered by MCI uses network elements in *exactly* the way BellSouth has (until
12 now) argued that it should -- in combination with MCI's own facilities -- and
13 BellSouth's instant claim that even this arrangement "recreates" a BellSouth service
14 should be rejected.

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16 **Q. What has been (until now) BellSouth's objection to network element combinations**
17 **that it claims "recreate" BellSouth service?**

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19 **A.** BellSouth has continuously objected to a particular network configuration, the so-called
20 network element "platform", wherein the entrant provided its service entirely using
21 network elements obtained from BellSouth. This is the fundamental position that
22 BellSouth expressed during the AT&T/MCI Arbitration (Docket No. 960833-TP):

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24 Issue: Should AT&T be allowed to combine BellSouth's unbundled network elements
25 to recreate existing BellSouth services?

1 BellSouth Position: ALECs should be able to combine BellSouth provided elements
2 with their own capabilities to create a unique service. However,
3 they should not be able to use only BellSouth's unbundled
4 elements to create the same functionality as a BellSouth existing
5 service.

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7 Direct Testimony of Robert Scheye, filed August 12, 1996, page
8 57, Tr. 1657, (emphasis in the original).

9
10 Mr. Varner provided additional clarity to BellSouth's position through supplemental
11 testimony which added:

12
13 BellSouth Position: ALECs should be able to combine BellSouth provided elements
14 with their own capabilities to create a unique service. However,
15 they should not be able to use only BellSouth's unbundled
16 elements to create the same functionality as a BellSouth existing
17 service, *i.e., it is not appropriate to combine BST's loop and*
18 *port to create basic local exchange service.*

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20 Supplemental Direct Testimony of Alphonso Varner, filed
21 August 23, 1996, page 29, Tr. 1477, (*emphasis added*).

22
23 It is not the purpose of my testimony to address *why* BellSouth's historic position was
24 (and still is) wrong as a matter of law, economics and policy. My point is that its
25 position has been clear (and unyielding) with respect to a single application, i.e.,

1 instances where the entrant provides service entirely using network elements obtained
2 from BellSouth. In contrast, as the above position statements show, BellSouth
3 *affirmatively endorsed* the use of network elements in connection with the entrant's
4 own facilities to provide service. This is precisely the manner in which MCIIm intends
5 to use the network element combination requested here.

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7 **Q. Did the Commission adopt BellSouth's proposal to limit network elements to *only***
8 **those instances where they would be used with the entrant's own facilities?**

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10 A. No. As required by effective federal rules (later endorsed by the Eight Circuit) the
11 Commission determined that entrants are entitled to provide service entirely using
12 network elements provided by BellSouth. During reconsideration, however, the
13 Commission conclude that the price that would apply to this contested configuration
14 had not been determined (Order PSC-97-0298-FOF-TP, page 8, emphasis added):

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16 ... it is not clear from the record in this [arbitration] proceeding that our
17 decision included rates for all elements necessary to recreate a complete
18 retail service. Thus, it is inappropriate for us to make a determination
19 on this issue at this time.

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21 Consistent with the issue as BellSouth *then* framed it, the sole issue deferred at the
22 conclusion of the arbitration proceeding were the rates to be charged when "...all
23 elements ... recreate a complete retail service." BellSouth never raised a more general
24 objection that *any* combination -- including combinations that are far less than the
25 service provided to the end-user — should be held to a different pricing standard under

1 the Act.

2

3 **Q. Are there other examples of BellSouth equating "service-recreation" to instances**
4 **where the service is provided entirely using network elements obtained from**
5 **BellSouth?**

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7 **A. Yes. During Docket 971140-TP (the Combinations Proceeding) BellSouth consistently**
8 **characterized the issue as arising when the entrant provided service entirely using**
9 **network elements obtained from BellSouth, but not applying if the network elements**
10 **were combined with other facilities owned by the entrant:**

11

12 If AT&T were to use unbundled network elements combined with
13 facilities of its own, unique services could be developed. However, by
14 simply using combined UNEs that recreate retail services, no additional
15 capabilities beyond resale can be gained. (Varner, Tr. 419).

16

17 And, when discussing one of BellSouth's proposed consequences for using network
18 elements to "recreate" a retail service (the extension of the joint-marketing restriction
19 to the "recreated" service), Mr. Varner made clear:

20

21 ... if they were to do like other ALECs have done and purchase UNEs,
22 combine them with their own facilities, they can joint market that. They
23 can joint market that arrangement with whatever it is that they want.
24 The only thing they could not joint market would be this combination
25 of UNEs that's solely provided by BellSouth that replicates the retail

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service. (Varner, Tr. 542).

Q. Has BellSouth previously suggested an objective standard to determine when a service is "recreated" that would clearly exclude services offered in the manner requested by MCI in this proceeding?

A. Yes. During the Combinations Proceeding, BellSouth witness Hendrix cited the Georgia decision which states:

... when AT&T recombines unbundled elements to create services identical to BellSouth's retail offerings, the prices charged to AT&T for the rebundled services should be computed as BellSouth's retail price less the wholesale discount and offered under the same terms and conditions, including the same application of access charges and the imposition of joint marketing restrictions. In this situation, "identical" means that AT&T is not using its own switching or other functionality or capability together with unbundled elements in order to produce its service.

Georgia Commission Order Docket No. 6801-U (emphasis added).

Q. How do these positions differ from BellSouth's new position in this proceeding?

A. BellSouth now maintains that the fact the CLEC uses the network elements in

1 combination with its own facilities is irrelevant (Milner, page 8):

2

3 "Q. Does the use to which MCI would place the requested
4 combined arrangement make a difference in whether the
5 arrangement recreates an existing BellSouth service?

6

7 "A. No. Combining a high-speed transport facility to a
8 switch does not alter the nature of the transport facility."

9

10 Under BellSouth's new position, it makes no difference that a network element
11 combination is being used in connection with the entrant's own facilities to provide
12 service.

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14 **Q. Is BellSouth's new position even consistent with the *reasons* that BellSouth had
15 used to justify its prior position?**

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17 **A. No. BellSouth had offered essentially three reasons for its position that the terms,
18 conditions and prices for resale should apply to network element combinations that
19 recreated a retail service:**

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21 * To maintain inflated prices that had been established to achieve a "social
22 agenda" by the Commission.

23

24 * To apply the joint-marketing restriction to network element combinations that
25 would otherwise apply to resold services.

1 * To assure that BellSouth retained the entitlement to access charges.

2

3 None of these explanations, however, apply to the configuration being discussed here.
4 BellSouth has never claimed that Megalink service is priced artificially high to promote
5 a Commission social agenda. Even BellSouth would admit that the service *MCIm* will
6 offer does not "recreate" BellSouth's basic local service; consequently, nothing should
7 prevent MCIm from jointly marketing its local service with other products. Finally, like
8 any other ALEC that uses its own local switch to provide local exchange service, MCIm
9 is entitled to the access charges from other interexchange carriers. It is hard to
10 understand how BellSouth can possibly argue that a "recreated service" *conclusion* is
11 appropriate (with its accompanying limitations) when none of the claimed
12 "*justifications*" for such a restrictive interpretation apply.

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14 **Q. What is the practical effect of BellSouth's new position?**

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16 **A.** The practical effect of BellSouth's new position is to render the *entrant's* service -- as
17 well as the network configuration used to provide it -- irrelevant to the determination
18 of whether a BellSouth service is being "recreated." BellSouth now argues that the
19 comparison should be between two *BellSouth* arrangements -- (1) the requested
20 network element combination, and (2) *any* BellSouth retail service (in this instance,
21 Megalink), even if it bears *no* similarity to the retail service offered by the entrant. Such
22 a unilateral approach, however, is contrary to FCC rules, the Eight Circuit's opinion,
23 and this Commission's orders.

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25 According to BellSouth, BellSouth's obligation to provide a network element

1 combination should be constrained by whether BellSouth offers some similar retail
2 service. Under this logic, BellSouth could evade its contractual obligations simply by
3 offering "retail" services functionally equivalent to any requested combination. The
4 FCC recognized the inherent danger of such an approach and found:

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6 We [the FCC] disagree with those incumbent LECs which argue that
7 features that are sold directly to end users as retail services, such as
8 vertical features, cannot be considered elements within incumbent LEC
9 networks. If we were to conclude that any functionality sold directly to
10 end users as a service ... cannot be defined as a network element, then
11 incumbent LECs could provide local service to end users by selling them
12 unbundled loops and switch elements, and thereby entirely evade the
13 unbundling requirement in Section 251(c)(3).

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15 First Report and Order, Docket 96-98, Adopted August 1, 1996,
16 paragraph 263.

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18 Similarly, the Eighth Circuit concluded:

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20 Simply because these capabilities can be labeled as "services" does not
21 convince us that they were not intended to be unbundled as network
22 elements ... We agree with the FCC that such an interpretation would
23 allow the incumbent LECs to evade a substantial portion of their
24 unbundling obligation under subsection 251(c)(3).

1 The fears of the FCC and Eighth Circuit are particularly acute here where the
2 Commission's authority to review BellSouth's proposed retail offerings is seriously
3 limited by price-cap regulation. Even if the Commission ultimately rejected BellSouth's
4 claim that a new "retail" offering duplicated a network element combination, BellSouth
5 could succeed in delaying (as it has here) the entrant's ability to use the network
6 elements in the requested manner.

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8 **Q. Do the Florida Commission's orders support the view that only BellSouth**
9 **offerings are relevant to determining whether a service is being "recreated"?**

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11 A. No. To the contrary, the Commission's Orders indicate that the Commission was
12 concerned with how the *entrant* used a network element combination and whether the
13 *entrant* recreated a BellSouth service. For instance (*emphasis added*):

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15 ... since it appears, based on the above, that the FCC's Rules and Order
16 permit AT&T and MCI to combine unbundled network elements in *any*
17 *manner that they choose, including recreating existing BellSouth*
18 *services*, that they may do so for now.

19

20 Arbitration Order, page 38.

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22 We continue to find it troublesome that a *service provisioned* through
23 unbundled network access would have all the attributes of service resale
24 but not be priced based on the Act's resale price standard.

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Combinations Order, page 25.

BellSouth's position that it is not obligated to provide MCIIm with usage data for intrastate interLATA calls rests on its contention *that the service MCIIm provides* when provisioned with a BellSouth loop and port combination recreates an existing BellSouth retail service.

Combinations Order, page 31.

BellSouth would render these passages meaningless by eliminating the role of the entrant's configuration -- including whether the entrant was using its own facilities -- in determining whether the entrant recreated a BellSouth service. Where before BellSouth had insisted that an entrant *must* combine network elements with its own facilities, it now claims that the entrant's configuration has *no* bearing on whether a BellSouth service is being recreated. There is no room for an interpretation that MCIIm recreates Megalink service when it connects the requested loop/transport combination to the MCIIm local switch to provide local service.

Q. Does this conclude your rebuttal testimony?

A. Yes.