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RECORDS AND  
REPORTING

June 11, 1999

Mrs. Blanca S. Bayo  
Director, Division of Records and Reporting  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399

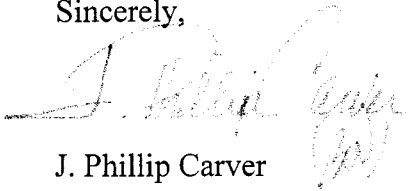
RE: Docket No. 981121-TP

Dear Mrs. Bayo:

Enclosed are an original and fifteen copies of BellSouth Telecommunications, Inc.'s Motion for Reconsideration. Please file this in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served on the parties shown on the attached Certificate of Service.

Sincerely,



J. Phillip Carver

Enclosures

- AFA \_\_\_\_\_
- APP \_\_\_\_\_
- CAF \_\_\_\_\_
- CMU 5
- CTR \_\_\_\_\_
- EAG \_\_\_\_\_
- LEG 5
- MAS \_\_\_\_\_
- OPC \_\_\_\_\_
- RRR \_\_\_\_\_
- SEC 1
- WAW \_\_\_\_\_
- OTH \_\_\_\_\_

cc: All Parties of Record  
M. M. Criser, III  
N. B. White  
W. J. Ellenberg (w/o enclosures)

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FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Request for arbitration	)	
Concerning complaint of MCIMetro	)	Docket No. 981121-TP
Access Transmission Services LLC	)	
for enforcement of	)	
Interconnection agreement with	)	Filed: June 11, 1999
BellSouth Telecommunications, Inc.	)	
_____	)	

BELLSOUTH TELECOMMUNICATIONS, INC.'S  
MOTION FOR RECONSIDERATION

BellSouth Telecommunications, Inc., ("BellSouth") hereby files, pursuant to Rule 25-22.060(1), Florida Administrative Code its Motion for Reconsideration by the Florida Public Service Commission ("Commission") of Order No. PSC-99-1089-FOF-TP ("Order"), issued on May 27, 1999. In support thereof, BellSouth states the following:

Concise Statement of the Grounds For Reconsideration

1. The Commission should reconsider the Order because it is premised upon fundamental error, both of law and fact, that arises from matters that the Commission appears to have overlooked or failed to consider. Specifically, in this Order, the Commission found that the subject combination of unbundled network elements that MCI seeks to purchase from BellSouth does not recreate BellSouth's MegaLink service. This decision appears to be premised largely, if not entirely, upon the language of the tariff--in other words, tariff restrictions. However, the Commission appears to have overlooked the fact that it has previously ruled that these restrictions do not apply to MCI's resale of BellSouth's tariffed services. Further, the legal effect of this Commission's prior ruling was raised by BellSouth in

its Brief, and, therefore, squarely before the Commission for consideration. Nevertheless, the Order makes no reference to the effect, or even the existence, of the Commission's prior ruling. Thus, this is truly a situation in which the Commission has overlooked the dispositive legal authority and facts.

### Legal Standard

2. The controlling cases for the resolution of motions for reconsideration, which are frequently cited by this Commission, are Diamond Cab Co. of Miami v. King, 146 So 2d 889 (Fla. 1962), Stewart Bonded Warehouse, Inc. v. Beavis, 294 So 2d 315 (Fla. 1974) and Pingree v. Quaintance, 394 So 2d 161 (Fla. First DCA 1981)<sup>1</sup> "In Diamond Cab, the Florida Supreme Court declared that the purpose of the petition for reconsideration is to bring to an agency's attention a point of law or fact which it overlooked or failed to consider when it rendered its order." (Order No. PSC-99-0081-FOF-TP, Page 2).

### Background

3. In the subject Order, the Commission articulated the dispositive question in this case as follows:

Does the combination of unbundled network elements consisting of 4-wire DS1 loops and DS1 dedicated transport recreate an existing BellSouth retail service known as MegaLink?

(Order, p. 2).

The Commission began its effort to resolve this question by noting that it was essentially uncontroverted that the combination of elements in question is functionally the same as MegaLink. (Order, p. 3). The Commission also stated, however, that to consider whether a

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<sup>1</sup> See, for example, the standard of review described in a number of recent Commission decisions (Order Nos. PSC-99-0047-FOF-TP, PSC-99-0081-FOF-TP, and PSC-99-0582-FOF-TP).

service has been recreated, it is necessary to “consider other aspects of the services in question beyond just the functionality of the facilities involved.” (Order, p. 4). Accordingly, the Commission noted the need to consider “both the nature of the incumbents’ tariffed retail service as well as the competitor’s intended use of the requested UNE combination to determine whether the one recreates the other.” (Id.)

4. The Commission applied the above-described approach to conclude that the total service BellSouth offers through its MegaLink tariff is not consistent with MCI’s intended use of the UNE combination. BellSouth offers MegaLink service only to private line customers.” (Order, p. 5). Accordingly, the Commission found as follows:

The evidence shows that BellSouth’s private line MegaLink service is intended to connect locations of the same customer, or a customer and an affiliated authorized user. MCI intends to connect unrelated business customers to the public switched network to provide local service not to provide private line service. Therefore, the language in BellSouth’s private line services tariff would prohibit MCI from providing the service it intends to provide.

(Order, p. 6) (emphasis added).

5. Based on the foregoing, it is obvious that the Commission premised its decision in large part upon a finding that the restrictions in the MegaLink tariff would prohibit MegaLink from being used in the manner that MCI intended to use the combined UNEs. If there is any doubt as to how fundamentally the Order is based upon the presumed effect of the tariff restrictions, this doubt is dispelled by a review of the discussion at the May 4, 1999 Agenda Conference that preceded to the Commission’s vote in this matter. In this conference, the Commission Staff stated the viewpoint that “the key thing is [that] the application (by MCI) is not consistent with the restrictions in the MegaLink tariff.” (Transcript, p. 10). Likewise, Commissioner Deason subsequently stated in the Agenda Conference, the following:

COMMISSIONER DEASON: . . . [I]f the economics of this were such that MCI wanted to purchase this as MegaLink and apply a resale rate to that, they would be—for their intended purpose that they wanted to use it, they would be prohibited from the tariff, BellSouth’s own tariff, from doing that because there are restrictions in the tariff which says you can only use MegaLink for these type services, which are basically private line.

(Agenda Transcript, p. 15).

Finally, Commissioner Clark, opined as to the correctness of the Staff Recommendation as follows:

COMMISSIONER CLARK: . . . [I]f you look [at] their conclusion, I think that is exactly what should be in it, is that the notion that you shouldn’t just look at the functionality, you have to look and see if the intended use is consistent with the tariff. And in this case it is not. Functionality alone is not a determining factor.

(Transcript, p. 25).

Thus, based on both the language of the Order and the discussion at the Agenda, it is very clear that the Commission’s Order is premised squarely upon the presumed effect of the restrictive language of the tariff. What the Commission failed to consider is that it has already ruled that these tariff restrictions do not apply.

6. During the hearing, evidence was presented by BellSouth witness, Mr. Milner, to the effect that there were no restrictions in the tariff that would prohibit MCI from using MegaLink service in precisely the same way that MCI intended to utilize the recombined network elements. There was no other evidence on point. The Order did state that “MCI pointed out at the hearing” restrictive language in Section B2.1.1 of BellSouth’s Private Line Services Tariff (Order, p. 6), but there is no citation to any testimony from a particular witness on this point. Nevertheless, even though BellSouth obviously does not agree with the Commission’s decision to reject Mr. Milner’s testimony despite an apparent lack of testimony

to the contrary, this is not the basis for BellSouth's motion to reconsider. Instead, BellSouth is moving for reconsideration because the Commission has failed entirely to consider the ramifications of a previous Order that it has issued, in which the Commission ruled that end and end user tariff restrictions do not apply to MCI's resale of BellSouth's services.

#### Discussion

7. The pertinent FCC Rules state specifically that restrictions on resale that actually appear in a tariff may, nevertheless, be inapplicable unless they are one of two specific types of restrictions, or, alternatively, are proven by the incumbent to be reasonable and nondiscriminatory. (FCC 97-295, § 51.613)<sup>2</sup>. In the arbitration proceeding between MCI and BellSouth, BellSouth attempted to sustain the burden of making that showing so that certain restrictions on the resale of its tariffed services would apply to MCI. MCI claimed that there should be virtually no restrictions on MCI's resale of tariffed BellSouth services, and the Commission accepted this position. As set forth previously, BellSouth pointed out this fact specifically in its brief. The section of BellSouth's brief in which it raised expressly this same point stated as follows:

Specifically, in the Final Order on Arbitration issued December 31, 1996 (Order No. PSC-96-1579-FOF-TP) in Docket Nos. 960833-TP, 960846-TP and 960916-TP, this Commission began its analysis of restrictions upon the resale of BellSouth's services by noting that, under the applicable FCC rules, resale restrictions are presumptively unreasonable, and that the burden is upon an incumbent LEC to rebut this presumption of unreasonableness. (Arbitration Order, p. 57.) BellSouth attempted to do so by arguing that the use and user restrictions in the tariff are essentially class of service restrictions that are appropriate under the Act (Order, p. 58). MCI responded by arguing, through its witness, that the only resale restrictions should be those that limit the resale of

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<sup>2</sup> Section 51.613 lists the exceptions to the general rule of § 51.605 that (subject to certain qualifications), "[a]n incumbent LEC shall offer to any requesting telecommunications carrier any telecommunications service that the incumbent LEC offers on a retail basis to subscribers that are not telecommunications carriers . . . ." (§ 51.605(a)). (emphasis added).

“grandfathered service, residential services and lifeline/link-up services of end-users who are eligible to purchase such service directly from BellSouth.” (Order, p. 59.) MCI’s witness further stated “that any other usage or user restriction, or other limitation, would impede MCI’s ability to compete through service resale.” (Id., p. 59.) The Commission accepted MCI’s position in toto, and held that “no restrictions on the resale of services are allowed, except for . . . [the limited exceptions noted-above].” (Id., p. 60).

(BellSouth Brief, pp. 5-6).

8. BellSouth went on to note that, in another, later case, some of its tariff restrictions were ruled to pertain. The fact remains, however, that virtually no restrictions were placed upon MCI’s resale of BellSouth services. Accordingly, BellSouth also argued in its Brief that, “having argued for, and obtained, a near total prohibition by this Commission of the application of any resale restriction, MCI should not be allowed to prevail on a fallacious argument that simply assumes that these resale restrictions would apply to MCI in the current circumstances.” (Id., p. 6). Nevertheless, this erroneous assumption appears to be one of, if not the only, basis that fundamentally underlies the Commission’s decision in this case. Further, the restriction regarding MegaLink that this Commission relied upon to distinguish that service from the UNE combination at issue is precisely the type of use and user restriction that the Commission rejected in Order No. PSC-96-1579-FOF-TP over two years ago.

9. It appears to be fairly obvious that this Commission has simply overlooked the fact that it has previously ruled that resale restrictions of this type do not apply to MCI, even though BellSouth expressly pointed this fact out in its Brief as set forth above. In the Staff Recommendation, there is no mention whatsoever of the Commission’s prior ruling regarding resale restrictions. There was no discussion of the effect of this previous Order during the Agenda Conference, and no mention of it appears in the Final Order. Thus, the Commission appears to have truly overlooked the crucial question of how it can premise a decision on the

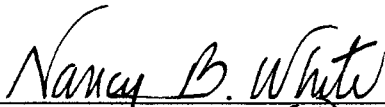
assumption that restrictions upon the resale of MegaLink service apply when the Commission has entered a previous Order that holds that use and user restrictions of this type do not apply.

Conclusion

10. BellSouth submits that this is a case that is squarely within the ambit of Diamond Cab, et al. The Commission has premised its decision on the assumption that the resale restrictions on MegaLink apply, and that, therefore, MCI could not purchase MegaLink and use it in the same way as the subject unbundled network element combination. Thus, under this logic, the unbundled network element combination, although functionally identical, does not recreate MegaLink service. Factoring in, however, the fact that resale restrictions have previously been ruled by the Commission not to apply, the logical foundation of the Commission's decision does not hold. Having ruled that these restrictions do not apply, this Commission cannot, at the same time, hold that resale restrictions do apply to render MegaLink service distinguishable from a UNE combination that is functionally identical.

WHEREFORE, BellSouth respectfully requests the entry of an Order reconsidering the Commission's decision in Order No. PSC-99-1089-FOF-TP, ruling that the UNE combination in question recreates MegaLink service, and directing the parties to negotiate the rate to apply to this combination of UNEs.

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**CERTIFICATE OF SERVICE**  
**Docket No. 981121-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by

U.S. Mail this 11th day of June, 1999 to the following:

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