

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

BellSouth Telecommunications, Inc.,

CASE NO. 4:99cv450-WS
4:99CV450-WS

Plaintiff,

vs.

MCImetro Access Transmission Services, LLC, the Florida Public Service Commission, the Honorable Susan F. Clark, in her official capacity as a Commissioner of the Florida Public Service Commission, the Honorable J. Terry Deason, in his official capacity as a Commissioner of the Florida Public Service Commission, the Honorable Joe Garcia, in his official capacity as a Commissioner of the Florida Public Service Commission, the Honorable E. Leon Jacobs, in his official capacity as a Commissioner of the Florida Public Service Commission, and the Honorable Julia L. Johnson, in her official capacity as a Commissioner of the Florida Public Service Commission,

Defendants.

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FLORIDA PUBLIC SERVICE COMM.
DIVISION OF APPEALS

COMPLAINT

Nature of the Action

1. BellSouth Telecommunications, Inc. ("BellSouth") brings this action to seek review of orders of the Florida Public Service Commission (the "PSC") under the federal Telecommunications Act of 1996 (the "1996 Act"). The PSC orders at issue require BellSouth to

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provide defendant MCImetro Access Transmission Services, LLC ("MCI") access to a combination of two of BellSouth's local exchange network elements at the sum of the unbundled network element prices for those two elements. The decision further orders BellSouth to refund to MCI part of the price MCI paid for use of a service that MCI has ordered since November 1997. Both aspects of the PSC's decision are inconsistent with the 1996 Act, with BellSouth's agreements with MCI pursuant to the 1996 Act, and with the PSC's prior orders. They are also arbitrary and capricious, result from a failure to engage in reasoned decision-making, and are not supported by the record developed by the PSC. The orders should be declared unlawful, and all parties to this case should be enjoined from enforcing them against BellSouth.

Parties, Jurisdiction, and Venue

2. Plaintiff BellSouth is a Georgia Corporation with its principal place of business in Georgia. BellSouth provides local telephone service throughout much of the State of Florida.

3. MCI is an affiliate of MCI Worldcom. MCI is a Delaware corporation with its principal place of business in the District of Columbia. MCI provides local telephone service in Florida.

4. Defendant PSC is an agency of the State of Florida. The PSC is a "State commission" within the meaning of 47 U.S.C. §§ 153(41), 251 and 252.

5. Defendant Susan F. Clark is a Commissioner of the PSC. Commissioner Clark is sued in her official capacity for declaratory and injunctive relief only.

6. Defendant J. Terry Deason is a Commissioner of the PSC. Commissioner Deason is sued in his official capacity for declaratory and injunctive relief only.

7. Defendant Joe Garcia is a Commissioner of the PSC. Commissioner Garcia is sued in his official capacity for declaratory and injunctive relief only.

8. Defendant E. Leon Jacobs is a Commissioner of the PSC. Commissioner Jacobs is sued in his official capacity for declaratory and injunctive relief only.

9. Defendant Julia L. Johnson is a Commissioner of the PSC. Commissioner Johnson is sued in her official capacity for declaratory and injunctive relief only.

10. This Court has subject matter jurisdiction over the action pursuant to both 28 U.S.C. § 1331 and the judicial review provision of the 1996 Act, 47 U.S.C. § 252(e)(6).

11. Venue is proper in this District pursuant to 28 U.S.C. § 1391. Venue is proper under section 1391(b)(1) because the Commissioner Defendants reside in this District. Venue is proper under section 1391(b)(2) because a substantial part of the events giving rise to this action occurred in this District, in which the PSC sits.

The 1996 Act

12. Prior to this decade, local telephone service was generally provided in Florida and in other States by a single, heavily regulated company like BellSouth that held an exclusive franchise to provide such service. Congress enacted the 1996 Act in order to replace this exclusive franchise system with competition for local service. *See* 47 U.S.C. §§ 251-253. As Congress explained, the 1996 Act creates a "pro-competitive, de-regulatory" framework for the provision of telecommunications services. S. Conf. Rep. 104-230, at 113 (1996).

13. To achieve that goal, Congress not only preempted all state and local exclusive franchise arrangements (47 U.S.C. § 253), but also placed certain affirmative duties on incumbent local exchange carriers such as BellSouth to assist new entrants in the local market. Among those duties is BellSouth's obligation to allow new entrants to lease BellSouth's unbundled "network elements" at cost-based rates. *See* 47 U.S.C. §§ 251(c)(3) and 252(d)(1). The 1996 Act defines

"network element" to include "a facility or equipment used in the provision of a telecommunications service." 47 U.S.C. § 153(29).

14. The terms under which BellSouth must provide access to unbundled network elements to a potential local entrant such as MCI are determined in the first instance through negotiation. *See* 47 U.S.C. § 252(a). In the event that BellSouth and the entrant cannot reach agreement, either party may petition the appropriate State commission to arbitrate the dispute in accordance with the terms of the 1996 Act. *See id.* § 252(b)(1). Additionally, after the parties have reached a full agreement -- as a result of either negotiation or arbitration -- the State commission must approve or reject that entire agreement based on whether it meets the criteria set out in sections 251 and 252. *Id.* § 252(e).

15. Any party aggrieved by a State commission determination has a statutory right to bring suit in a federal district court. *Id.* § 252(e)(6).

Prior Proceedings and the PSC Decisions at Issue Here

16. Under the terms of an interconnection agreement between BellSouth and MCI, BellSouth has agreed to grant MCI access to individual unbundled network elements at the cost-based rates set by the PSC.

17. In June 1998, the PSC determined that, under the interconnection agreement, BellSouth was required to provide MCI access not just to individual network elements, but also to combinations of network elements. *See Motions of AT&T Communications of the Southern States, Inc., and MCI Telecomms. Corp. and MCImetro Access Transmission Services, Inc., to Compel BellSouth Telecomms., Inc. to Comply with Order No. PSC-96-1579-FOF-TP and to Set Non-Recurring Charges for Combinations of Network Elements with BellSouth Telecomms., Inc., Pursuant to their Agreement*, Docket No. 971140-TP, Order No. PSC-98-0810-FOF-TP (Fla. PSC

June 12, 1998) ("June 12, 1998, Order"). The PSC directed the parties to implement that conclusion by negotiating an amendment to their agreement; when the parties could not agree on that amendment, the PSC ordered the parties to insert certain language in their agreement and approved the agreement as amended to contain that language. *See Motions of AT&T Communications of the Southern States, Inc., and MCI Telecomms. Corp. and MCI Metro Access Transmission Services, Inc., to Compel BellSouth Telecomms., Inc. to Comply with Order PSC-96-1579-FOF-TP and to Set Non-Recurring Charges for Combinations of Network Elements with BellSouth Telecomms., Inc., Pursuant to their Agreement*, Docket No. 971140-TP, Order No. PSC-99-1989-FOF-TP (Fla. PSC Oct. 11, 1999). BellSouth has recently filed a complaint in this Court challenging some aspects of those determinations. *See BellSouth Telecomms., Inc. v. AT&T Communications of the Southern States, et al.*, Docket No. _____ (filed Nov. 10, 1999).

18. In its June 12, 1998, Order, however, the PSC did not conclude that all combinations were to be priced at the cost-based rates applicable to Section 251(c)(3)'s unbundling requirement. Instead, the Commission drew a distinction between those combinations that recreated an existing BellSouth retail service, and those combinations that did not. The price for combinations that did not recreate a retail service would be equal to the sum of the component elements, while the price for those that did recreate a retail service would be negotiated by the parties. *See June 12, 1998, Order*, at 25.

19. In November, 1997, MCI requested access to a combination of BellSouth network elements consisting of a 4-wire DS1 loop and DS1 dedicated transport. This combination would provide transmission, at a rate of 1.5 million bits per second, between a customer's premises and the serving wire center, and between the serving wire center and a point of interconnection at MCI's local switch.

20. An existing BellSouth retail service known as MegaLink also provides access, at a rate of 1.544 million bits per second, between a customer's premises and the serving wire center, and between that wire center and a local switch location. Because of this nearly identical functionality, BellSouth believed that the requested combination would, in the PSC's words, "recreate an existing BellSouth retail service." See June 12, 1998, Order at 25. Thus, in accordance with the terms of the interconnection agreement, BellSouth sought to negotiate a price for the combination requested by MCI.

21. MCI refused to negotiate with BellSouth and instead, on September 14, 1998, sought relief from the PSC.

22. In an order dated May 27, 1999, the PSC ruled that the combination requested by MCI did not recreate MegaLink. See *Request for Arbitration Concerning Complaint of MCI Metro Access Transmission Services, LLC for Enforcement of Interconnection Agreement with BellSouth Telecomms., Inc.*, Docket No. 981121-TP, Order No. PSC-99-1089-FOF-TP (Fla. PSC May 27, 1999) ("May 27, 1999, Order") (attached as Exh. A). The Commission reasoned that, although the requested combination "is functionally the same as MegaLink," MCI intended to connect the combination to its own local switch in order "to provide a full range of local telecommunications to its customers." *Id.* at 3-4. By contrast, according to the PSC, MCI could use MegaLink only to provide "private line services," since the tariff under which BellSouth offered MegaLink contained such a restriction. *Id.* at 5.

23. In light of its conclusion that the combination did not recreate MegaLink, the PSC ordered BellSouth to provide the combination to MCI "pursuant to the terms of its interconnection agreement at the sum of the unbundled network element prices." *Id.* at 8. It also directed BellSouth to pay to MCI the difference between the price of the component elements of the combination and

the price of another service that MCI had purchased under tariff since November 1997 to provide the desired functionality to its customers. *See id.* at 8.

24. On June 11, 1999, BellSouth filed a motion for reconsideration, challenging, *inter alia*, the Commission's contention that MCI would be restricted in the resale of MegaLink by BellSouth's tariff. BellSouth stressed that in a prior ruling, the Commission had determined that it was presumptively unreasonable to apply tariff restrictions to a carrier's attempt to resell an incumbent's services. *See AT&T Communications of the Southern States*, Docket No. 960833-TP, et al., 1996 WL 765150, at *36 (Fla. PSC Dec. 31, 1996); *see also First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15966, ¶ 939 (1996) ("resale restrictions," including "conditions and limitations contained the [incumbent's] underlying tariff," are "presumptively unreasonable"), modified on recon., 11 FCC Rcd 13042 (1996), vacated in part, *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). Accordingly, if BellSouth had provided its MegaLink service to MCI at a resale discount, MCI presumptively would not be required to adhere to the private line service restriction that the PSC had relied upon in its May 27, 1999 Order.

25. In an order issued October 13, 1999, the PSC denied reconsideration and clarified its prior order. *See Request for Arbitration Concerning Complaint of MCImetro Access Transmission Services, LLC for Enforcement of Interconnection Agreement with BellSouth Telecomms., Inc.*, Docket No. 981121-TP, Order No. PSC-99-2000-FOF-TP (Fla. PSC Oct. 13, 1999) ("October 13, 1999, Order") (attached as Exh. B). The Commission stated "that [its] ultimate conclusion ... is that the intended use of [the combination] by [MCI] is inconsistent with BellSouth's Megalink [sic] tariff." *Id.* at 3. At the same time, however, the PSC struck from its prior order the

statement that “the language of BellSouth’s Private Line Service tariff would prohibit [MCI] from [using MegaLink to] provid[e] the service it intends to provide.” *Id.* The PSC made no attempt to reconcile these facially contradictory statements.

26. The PSC’s conclusion that the set of elements sought by MCI does not replicate MegaLink is without a legal basis. As the PSC recognized, the functionality provided by each is identical for all practical purposes. And, contrary to the PSC’s view, under its own orders and those of the FCC, MCI can use both to offer, in the PSC’s words, “a full range of local telecommunications to its customers.” May 27, 1999, Order at 3-4. That is because, as noted, both the PSC and the FCC have concluded that the application of such tariff restrictions to resellers is presumptively unreasonable.

27. At no point in the PSC’s decisions under review here did the PSC rely upon the Supreme Court’s January 1999 determination that the 1996 Act requires incumbents to provide access to currently combined sets of network elements, even where those combinations replicate existing retail services. *See AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999). Accordingly, that decision cannot provide a basis upon which to affirm the PSC’s judgment. *See SEC v. Chenery Corp.*, 318 U.S. 80 87-88 (1943). In addition, the Supreme Court’s decision does not alter the basic 1996 Act principle that parties’ obligations are defined by voluntary negotiation and state commission arbitration, not by self-executing provisions of federal law. *See GTE Florida, Inc. v. Johnson*, 964 F. Supp. 333, 335 (N.D. Fla. 1997). Thus, if the agreement at issue here adopted a different rule (as the PSC has concluded it did), the Supreme Court’s decision has no effect here.

28. For all these reasons, the PSC’s decision to require BellSouth to pay a refund cannot stand. BellSouth has not violated the 1996 Act, the PSC’s orders implementing that statute, or its agreement with MCI. Accordingly, no refund is warranted. Moreover, even if the Supreme Court’s

decision provided a basis for granting prospective relief against BellSouth (and the PSC had relied upon that decision), there is no basis for requiring BellSouth to refund sums properly billed before the relevant FCC rules were reinstated as a result of the Court's ruling.

Claim for Relief

29. Paragraphs 1 through 28 are incorporated by reference as if set forth fully herein.

30. The PSC's decision to require BellSouth to provide MCI with access to the DS1 loop and DS1 dedicated transport at unbundled network element prices is not consistent with the 1996 Act, the agreement between MCI and BellSouth, or the PSC's own prior decisions implementing the 1996 Act.

31. The PSC's decision to require BellSouth to pay MCI an amount equal to the difference between the unbundled element prices of the DS1 loop and DS1 dedicated transport and that of the service used since November 1997 is contrary to the 1996 Act, the agreement between MCI and BellSouth, and the PSC's own prior decisions implementing the 1996 Act.

32. The PSC's determinations are also arbitrary and capricious, result from a failure to engage in reasoned decision-making, and are not supported by the record developed in the PSC proceedings.

RELIEF REQUESTED

WHEREFORE, as relief for the harms alleged herein, BellSouth as an aggrieved party requests that this Court:

a. declare that the PSC's and Commissioner Defendants' orders are invalid for the reasons discussed above;

b. grant BellSouth declaratory and injunctive relief to prevent all defendants and anyone acting in concert with them from enforcing or attempting to enforce the PSC's orders to the extent

that they require BellSouth to provide MCI with access to the DS1 loop and DS1 dedicated transport at unbundled network element prices and to provide payment to MCI for BellSouth's unwillingness to make such provision in the past;

c. grant such other relief as may be sought by BellSouth in further pleadings and as may be appropriate in this case.

Signed on this the 11 day of November, 1999.

ADORNO & ZEDER, P.A.



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