

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Metropolitan
Fiber Systems of Florida, Inc.
for arbitration with BellSouth
Telecommunications, Inc.
concerning interconnection
rates, terms, and conditions,
pursuant to the Federal
Telecommunications Act of 1996.

DOCKET NO. 960757-TP

In re: Petition by AT&T
Communications of the Southern
States, Inc. for arbitration of
certain terms and conditions of
a proposed agreement with
BellSouth Telecommunications,
Inc. concerning interconnection
and resale under the
Telecommunications Act of 1996.

DOCKET NO. 960833-TP

In re: Petition by MCI
Telecommunications Corporation
and MCI Metro Access
Transmission Services, Inc. for
arbitration of certain terms and
conditions of a proposed
agreement with BellSouth
Telecommunications, Inc.
concerning interconnection and
resale under the
Telecommunications Act of 1996.

DOCKET NO. 960846-TP

In re: Petition by MCI Metro
Access Transmission Services,
Inc. to set non-recurring
charges for combination of
network elements with BellSouth
Telecommunications, Inc.

DOCKET NO. 971140-TP
ORDER NO. PSC-98-0007-PCO-TP
ISSUED: January 2, 1998

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FPSC-RECORDS/REPORTING

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ORDER ON RECONSIDERATION OF ORDER NO. PSC-97-1399-PCO-TP

On December 31, 1996, the Commission issued Order No. PSC-96-1579-FOF-TP, in Docket Nos. 960833-TP and 960846-TP, its final order in the arbitration proceedings of AT&T Communications of the Southern States, Inc., (AT&T) and MCI Telecommunications Corporation and MCI Metro Access Transmission Services, Inc., (MCI) with BellSouth Telecommunications, Inc., (BellSouth) under the Telecommunications Act of 1996 (the Act). On December 16, 1996, in Docket No. 960757-TP, the Commission issued Order No. PSC-96-1531-FOF-TP, its final order in the arbitration proceeding of MFS Communications Company Inc., (MFS) with BellSouth under the Act. In this proceeding, the Commission will set permanent rates for a number of network elements for which it set only interim rates in those arbitration orders.

By Order No. PSC-97-1399-PCO-TP, issued November 6, 1997, American Communications Services, Inc., and American Communications Services of Jacksonville, Inc., (ACSI) was granted party status in this proceeding. Following the order granting ACSI party status, several other carriers filed petitions to intervene, arguing that they should be permitted party status as well.

Even though this Commission has limited participation in arbitration proceedings under the Act to the requesting carrier and the incumbent local exchange company, it appeared appropriate and expedient in this instance to permit ACSI's participation. ACSI had argued that a number of the network elements at issue in this proceeding were in its interconnection agreement with BellSouth with rates subject to true-up, rates it alleged to be therefore interim in nature. Upon reconsideration, however, it has become clear that the order granting ACSI party status was not based on a complete consideration of the facts or law. For the reasons set forth below, therefore, Order No. PSC 97-1399-PCO-TP granting intervention to ACSI is hereby reversed.

Section 252(b)(4)(A) of the Act provides that

The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues

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set forth in the petition and in the response,
if any, filed under paragraph (3).

Paragraph (1) permits a requesting carrier to petition a State commission to arbitrate any issues still open after 135 days of negotiations. Paragraph (3) permits the incumbent local exchange company 25 days in which to respond to the petition for arbitration. This language reflects a Congressional intent that interconnection agreements should be reached through negotiations between a requesting carrier and an incumbent local exchange company; or, failing that, through arbitration proceedings litigated before state commissions by the parties to the negotiations. The arbitration proceedings are limited to the issues raised by the immediate parties to the particular negotiations. The outcome of arbitration proceedings is an agreement between those parties that is binding only on them. The Act does not contemplate participation by other entities who are not parties to the negotiations and who will not be parties to the ultimate interconnection agreement that results. Entities not party to the negotiations are not proper parties in arbitration proceedings, even though they may, in some indirect way, be affected by a particular decision. This conclusion is consistent with the conclusion reached by the Prehearing Officer at page 2 in Order No. PSC-96-0933-PCO-TP, which established procedure in Docket No. 960833-TP:

Upon review of the Act, I find that intervention with full party status is not appropriate for purposes of the Commission conducting arbitration in this docket. Section 252 contemplates that only the party requesting interconnection and the incumbent local exchange company shall be parties to the arbitration proceeding. For example, Section 252(b)(1) of the Act states that the "carrier or any other party to the negotiation" may request arbitration. (emphasis added) Similarly Section 252(b)(3) says "a non-petitioning party to a negotiation may respond to the other party's petition" within 25 days. (emphasis added) Section 252(b)(4) requires this Commission to limit its consideration to

the issues raised by the petition and the response. None of these statutory provisions provides for intervenor participation.

This proceeding remains an arbitration proceeding for the purpose of making permanent a number of interim rates established in the initial arbitrations on the basis of cost studies subsequently filed by BellSouth in these consolidated dockets. The decisions to be made here will become part of the ultimate interconnection agreements between the parties to the initial negotiations and will be binding only upon them. The presence, therefore, of ACSI and those who subsequently petitioned to intervene in this proceeding, who were not parties to the negotiations, and will not be parties to the ultimate agreements, is at odds with the Act. The only proper parties are AT&T, MCI, MFS (now WorldCom, Inc.) and BellSouth.¹

In addition, ACSI's argument that the rates in its separate interconnection agreement with BellSouth for loops, loop cross-connections and loop channelization are rates subject to being "trued-up" and, therefore, are interim rates "similar to the 'interim' rates" now under review in this proceeding, appears to be flawed. The amendment to ACSI's interconnection agreement with BellSouth, which the Commission approved by Order No. PSC-96-1509-FOF-TP in a separate proceeding, provides in paragraph 2 that:

The parties agree that the prices reflected herein shall be "trued-up" (up or down) based on final prices either determined by further agreement or by a final order ... of the relevant public service commission ... which final order meets the criteria contained in paragraph 4 hereof. The "true-up" will consist of comparing actual volumes and demand for each item, together with the price associated with such item by this Amendment, with the final prices determined for each item. Each party shall keep its own records

¹ACSI withdrew from the initial proceeding before the Commission issued its arbitration order.

upon which a "true-up" can be based and any final payment from one party to the other shall be in an amount agreed upon by the Parties based on such records

Thus, by the terms of ACSI's agreement itself, interim rates and true-up rates are not the same thing. Interim rates, in the context of the arbitration proceedings between AT&T, MCI, MFS and BellSouth, are rates that the Commission set by various means in the absence of forward-looking cost data in the evidentiary records, with the intention to make them permanent by eventually considering appropriate cost studies, which it ordered BellSouth to file. The provision in ACSI's interconnection agreement for true-up rates, however, is an additional mechanism that allows adjustment of final or permanent rates (or prices) determined by further agreement or an appropriate final order of the Commission upon consideration of actual volumes and demands.

Since ACSI and BellSouth have not established final prices based on further agreement, the question is whether the rates to be set in this proceeding are to be final prices as defined in ACSI's interconnection agreement with BellSouth. Paragraph 4 of the agreement provides that:

Any final order that forms the basis of a "true-up" under this Amendment shall meet the following criteria:

(a) It shall be a proceeding to which ACSI and BellSouth are entitled to be full parties to the proceeding.

(b) It shall apply the provisions of the Telecommunications Act of 1996, including, but not limited to, Section 252(d)(1) and all effective implementing rules and regulations; provided that such Act and such regulations are in effect at the time of the final order.

(c) It shall include as an issue the geographic deaveraging of unbundled element rates, which deaveraged rates, if any are

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required by said final order, shall form the basis of any "true-up."

For the reasons stated above, ACSI is not entitled under the Act to be a full party to this proceeding. Moreover, the present proceeding is not one in which geographic deaveraging of unbundled element rates is an issue.² Final prices subject to true-up under the parties' agreement must be contained in a final order that satisfies each of the three criteria. Therefore, the final order that the Commission is to issue in this proceeding establishing permanent rates for agreements between parties not including ACSI is not the kind that will meet the applicable criteria. It will not establish final prices subject to being trued-up on consideration of actual volumes and demands.

Accordingly, Order No. PSC-97-1399-PCO-TP is reconsidered and ACSI is denied further intervention in this proceeding.

Based on the foregoing, it is, therefore,

ORDERED by Susan F. Clark, as Prehearing Officer, that Order No. PSC-97-1399-PCO-TP is hereby reversed.

By ORDER of Commissioner Susan F. Clark, as Prehearing Officer, this 2nd day of January, 1998.



SUSAN F. CLARK, Commissioner and
Prehearing Officer

(S E A L)

²In Order No. PSC-97-1303-PCO-TP, issued October 21, 1997, WorldCom, Inc.'s request to include an issue in this proceeding on geographic deaveraging was denied. See pages 6-7.

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.