FLORIDA PUBLIC SERVICE COMMISSION
Capital Circle Office Center • 2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

M E M O R A N D U M

July 2, 1996

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (CANZANO, EDMONDS, BILLMEIER)
DIVISION OF COMMUNICATIONS (CHASE, REITH, NORTON)

RE: DOCKET NO. 950984-TL - RESOLUTION OF PETITION(S) TO ESTABLISH NONDISCRIMINATORY RATES, TERMS, AND CONDITIONS FOR RESALE INVOLVING LOCAL EXCHANGE COMPANIES AND ALTERNATIVE LOCAL EXCHANGE COMPANIES PURSUANT TO SECTION 364.161, FLORIDA STATUTES

AGENDA: JULY 16, 1996 - REGULAR AGENDA - POST HEARING DECISION - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF UNLESS ORAL ARGUMENT IS GRANTED

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\950984D.RCM

CASE BACKGROUND

This matter came to hearing as a result of petitions filed by Metropolitan Fiber Systems of Florida, Inc. (MFS-FL) and MCI Metro Access Transmission Services, Inc. (MCImetro) for unbundling and resale of BellSouth Telecommunications, Inc. (BellSouth) network elements and services. Section 364.161, Florida Statutes, provides that upon request, each local exchange telecommunications company shall unbundle all of its network features, functions, and capabilities, and offer them to any other telecommunications provider requesting them for resale to the extent technically and economically feasible. If the parties to this proceeding are unable to successfully negotiate the terms, conditions, and prices of any feasible unbundling request, the Commission, pursuant to Section 364.162(3), Florida Statutes, is required to set nondiscriminatory rates, terms, and conditions for resale of services and facilities within 120 days of receiving a petition.

By Order No. PSC-96-0444-FOF-TP, issued March 29, 1996, the Commission decided various issues regarding rates, terms, and conditions for unbundling and resale of BellSouth facilities to MFS-FL and MCImetro. On April 12, 1996, BellSouth filed a motion

for reconsideration of portions of the Order and a request for oral argument on the motion. On April 24, 1996, MFS-FL, MCImetro, and AT&T Communications of the Southern States, Inc. (AT&T) filed responses to BellSouth's request. On May 31, 1996, BellSouth filed a Partial Withdrawal of Motion for Reconsideration.

Standard of Review

The appropriate standard for review for a motion for reconsideration is that which is set forth in Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962). The purpose of a motion for reconsideration is to bring to the attention of the Commission some material and relevant point of fact or law which was overlooked, or which it failed to consider when it rendered the order in the first instance. See Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So. 2d 161 (Fla 1st DCA 1981). It is not an appropriate venue for rearguing matters which were already considered, or for raising immaterial matters which even if adopted would not materially change the outcome of the case.

BellSouth's Motion

BellSouth makes essentially three arguments in its Motion for Reconsideration. First, it argues that the Commission-established price of $2.00 per 2-wire analog port violates Section 364.161(1), Florida Statutes because it does not include a usage rate on the port in addition to the port rate.[1] Second, it argues that the requirement that BellSouth allow ALECs to locate loop concentration equipment in its central offices violates the Telecommunications Act of 1996. Finally, it argues that the Order involves an unlawful impairment of contract obligations and violates the United States and Florida Constitutions. Each argument will be considered in turn.

In Issue 1, staff recommends the Commission deny BellSouth's request for oral argument. In Issue 2, staff recommends the Commission deny BellSouth's motion for reconsideration on the issue of whether setting a usage rate is appropriate. In Issue 3, staff recommends the Commission deny BellSouth's motion for

[1] BellSouth originally argued that the Commission-established prices of the unbundled 2-wire voice grade loop and the 2-wire analog port violated Section 364.161(1) as well. On May 31, 1996, BellSouth withdrew that portion of its motion. BellSouth's only remaining argument on this issue is that the Commission should impose a usage rate in addition to the $2.00 per month port rate. The withdrawn portion of BellSouth's motion is not discussed in this recommendation.

reconsideration on the issue of whether physical collocation of loop concentrators violates the Telecommunications Act of 1996. In Issue 4, staff recommends the Commission deny BellSouth's motion for reconsideration on the issue of whether the requirement to file operational requirements violates the contracts clauses of the state and federal constitutions. In Issue 5, staff recommends this docket remain open to address issues left unresolved by Order No. PSC-96-0444-FOF-TP.

ISSUE 1: Should BellSouth's Request for Oral Argument be granted?

RECOMMENDATION: No.

STAFF ANALYSIS: On April 12, 1996, BellSouth filed a Request for Oral Argument in support of its Motion for Reconsideration. On April 24, 1996, MFS-FL filed a response in opposition to BellSouth's request. As explained below, staff recommends the Commission deny BellSouth's Request for Oral Argument.

Rule 25-22.060(1)(f), Florida Administrative Code, states that oral argument on any motion for reconsideration shall be granted "solely at the discretion of the Commission." Rule 25-22.058, Florida Administrative Code, sets standards for granting oral argument in Section 120.57 hearings and states, in pertinent part, "The request shall state with particularity why oral argument would aid the Commission in comprehending and evaluating the issues before it."

To support its request for oral argument, BellSouth stated only that the issues raised in its motion are extremely important to the company and that the Order failed to address many of the concerns expressed by BellSouth. BellSouth maintains that the Commission should allow the parties to participate in the agenda conference so that the subject matter can be accurately and fully presented to the Commission.

MFS-FL opposes BellSouth's oral argument request. MFS-FL states that BellSouth's motion failed to make a "threshold showing that the Commission either ignored, misinterpreted or misapplied the law applicable to the evidence in this proceeding" and that the request should be denied.

Staff does not believe oral argument will aid the Commission's understanding of BellSouth's motion. BellSouth filed a lengthy motion for reconsideration and three parties filed responses. BellSouth did not explain why its written motion is inadequate and why oral argument is necessary. Staff believes the pleadings are sufficient for the Commission to rule on BellSouth's motion. Accordingly, staff recommends the Commission deny BellSouth's request pursuant to Rule 25-22.060(1)(f), Florida Administrative Code.

ISSUE 2: Should the Commission grant BellSouth Telecommunications, Inc. Motion for Reconsideration of Order No. PSC-96-0444-FOF-TP regarding a usage rate, in addition to the flat-rated port charge?

RECOMMENDATION: No. BellSouth Telecommunications, Inc.'s Motion regarding a usage rate does not show material and relevant facts or points of law the Commission failed to consider when it issued Order No. PSC-96-0444-FOF-TP. Therefore, staff recommends the Motion be denied on this point.

STAFF ANALYSIS: BellSouth argues that a usage rate should be charged above the interim $2.00 rate charged for a port. BellSouth does not cite any evidence in the record that shows that a usage rate is appropriate. Conversely, none of the respondents argued that one is not appropriate. MCImetro specifically declined to address the issue.

Staff does not believe that it is appropriate to rule on a usage rate for ports at this time. The Commission was asked to determine rates for unbundled components requested by MFS-FL and MCImetro. These carriers requested loops and ports, but did not request local switching in this proceeding which is what the usage rate would cover. ALECs can obtain that from the LEC if they so desire. The parties can negotiate a price or bring it to the Commission for resolution.

BellSouth also raised a point heretofore unheard in this proceeding:

> It should be noted that to the extent the Commission's decision was an attempt to minimize the cost of unbundling loops, that purpose has not been achieved. An end user charge and a flat-rated carrier common line charge will be assessed to the competitive carrier that obtains the unbundled common line. (Motion, p. 5)

The Company explained at length how it plans to assess these charges. MCImetro and MFS-FL responded that such charges would be contrary to the Commission's order, and proposed that the $17 2-wire loop charge approved in Florida should be offset by any amounts that BellSouth collects from federal charges.

This is the first time that an end user charge or a carrier common line charge, flat-rated or otherwise, has been mentioned in this proceeding. It is not appropriate, on reconsideration, to raise new arguments not mentioned earlier. The Commission should make no ruling unless and until such issues are properly brought

before it. In this case, that would logically be part of the determination of permanent loop and port rates.

Upon review, staff recommends that BellSouth Telecommunications, Inc.'s Motion regarding a usage rate be denied because it does not show material and relevant facts or points of law the Commission failed to consider when it issued Order No. PSC-96-0444-FOF-TP.

ISSUE 3: Should the Commission grant BellSouth Telecommunications, Inc. Motion for Reconsideration on the portion of Order No. PSC-96-0444-FOF-TP on collocating loop concentration equipment?

RECOMMENDATION: No. BellSouth Telecommunications, Inc.'s Motion does not show material and relevant facts or points of law the Commission failed to consider when it issued Order No. PSC-96-0444-FOF-TP. Therefore, staff recommends the Motion be denied on this point.

STAFF ANALYSIS: BellSouth states that after the record in this case had been closed, the Telecommunications Act of 1996 (Act) was approved. BellSouth asserts that Section 251(c)(6) of the Act requires it to provide physical collocation unless it is not practical for technical reasons or because of space limitations. For clarification, Section 251(c)(6) of the Act deals with collocation and states:

> The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

BellSouth adds that Section 251(c)(1) of the Act requires telecommunications carriers to negotiate with other parties in order to fulfill certain duties such as collocation.

BellSouth maintains that because the law has changed, it should be allowed to negotiate collocation arrangements. BellSouth believes that the Commission's order does not provide an opportunity to negotiate with regard to collocation of loop concentration equipment. BellSouth requests reconsideration of the Commission's order on this issue and asks the Commission to hold any order on this issue in abeyance, thereby giving the parties the opportunity to negotiate.

MFS-FL and MCImetro respond to BellSouth's motion by stating that MFS-FL attempted to negotiate the collocation of loop concentration equipment under state law prior to filing its petition with the Commission. MFS-FL points out that negotiations with BellSouth first began in July, 1995, and that BellSouth had ample time to negotiate under Chapter 364, Florida Statutes. In

addition, MFS-FL cites to Section 261(b) of the Act which addresses existing state regulations. Section 261(b) states:

> Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996, or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulation are not inconsistent with the provisions of this part.

Staff believes BellSouth already had ample opportunity to negotiate collocation of loop concentration equipment. In fact, Section 364.161(1), Florida Statutes, gives the companies 60 days to reach an agreement before they petition the Commission for resolution. Florida Statutes provide the companies an opportunity to negotiate this dispute. Staff believes that this statutory process is consistent with the Act. In addition, staff points out that in the Commission's expanded interconnection proceedings the Commission ordered BellSouth to tariff virtual collocation and allowed BellSouth to negotiate physical collocation. See Order No. PSC-95-0034-FOF-TP, issued January 9, 1995, in Docket No. 921074-TP. Therefore, BellSouth was able to provide physical collocation before the MFS-FL negotiations began. Staff does not believe the Act provides BellSouth with any new capabilities as far as collocation is concerned.

Staff recommends that BellSouth's request for reconsideration of the Commission's order on collocating loop concentration equipment be denied. BellSouth Telecommunications, Inc.'s Motion does not show material and relevant facts or points of law the Commission failed to consider when it issued Order No. PSC-96-0444-FOF-TP. BellSouth makes no showing that the Commission made a mistake of law that justifies reconsideration.

ISSUE 4: Should the Commission grant BellSouth Telecommunications, Inc. Motion for Reconsideration on the portion of Order No. PSC-96-0444-FOF-TP that requires BellSouth to file certain operational requirements?

RECOMMENDATION: No. BellSouth Telecommunications, Inc.'s Motion does not show material and relevant facts or points of law the Commission failed to consider when it issued Order No. PSC-96-0444-FOF-TP. Therefore, staff recommends the Motion be denied on this point.

STAFF ANALYSIS: BellSouth is requesting reconsideration of the Commission's order dealing with MFS-FL's request that BellSouth permit any customer to convert its bundled service to an unbundled service and assign such service to MFS-FL, with no penalties, rollover, termination, or conversion charges to MFS-FL or the customer. BellSouth believes this portion of the Order allows abrogation of contracts that BellSouth has entered into with large ESSX customers. BellSouth maintains that these contracts contain termination charges that are payable if the contract is discontinued before its stated term. BellSouth believes the Commission's order violates state and federal constitutions. In support, BellSouth cites Arkansas Natural Gas Co. v. Arkansas Railroad Commission, 261 U.S. 379 (1923) and United Telephone Company of Florida v. Public Service Commission, 496 So.2d 116 (Fla. 1986) for the proposition that a regulatory agency cannot modify or abrogate private contracts unless such action is necessary to protect the public interest. BellSouth argues the Commission follow Pomponio v. Claridge of Pompano Condominium, Inc., 378 So.2d. 774 (Fla. 1979) and perform a balancing test to determine whether "the nature and extent of the impairment is constitutionally tolerable in light of the importance of the state's objective, or whether it unreasonably intrudes into the parties bargain to a degree greater than is necessary to achieve that objective." Pomponio, 378 So.2d. at 780.

AT&T, MCImetro, and MFS-FL argue the Commission properly exercised its regulatory authority and that the Commission's decision does not violate any constitutional provisions regarding impairment of contracts. AT&T states that, under Pomponio, any impairment of a pre-existing contract is justified in order to allow the development of competition. MCImetro cites H. Miller & Sons, Inc. v. Hawkins, 373 So.2d. 913 (Fla. 1979) for the proposition that contracts with public utilities are subject to the reserved police power of the state and can be modified by the Commission if it is in the public interest to do so.

Staff believes that the Order does not require BellSouth to permit any customer to convert its bundled service to an unbundled service and assign such service to MFS-FL, with no penalties, rollover, termination, or conversion charges to MFS-FL or the customer.

Section V of the Order regards operational arrangements between BellSouth and MFS-FL and MCImetro. Essentially, BellSouth argued that it was premature for the Commission to address operational issues at the time and that the Florida Statutes envisioned that operational issues would be negotiated by the parties. MFS-FL proposed a list of arrangements addressing operational issues beginning on page 16 of the Order. One such element was that

> BellSouth should permit any customer to convert its bundled service to an unbundled service and assign such service to MFS-FL, with no penalties, rollover, termination, or conversion charges to MFS-FL or the customer.

On page 17 of the Order, the Commission recognized that MFS-FL was the only party to provide testimony spelling out a suggested operational process for ordering unbundled elements. The Order specifically recognizes that MFS-FL was the only party that attempted to describe the operational process behind repair and maintenance intervals, verification of orders for unbundled elements, and how customer requested changes in service were to be handled.

The Commission decided that these operational requirements are essential to implement unbundling. In fact, on page 17 the Order states that

> . . . BellSouth shall file with the Commission specific operational arrangements that address each of MFS-FL's operational requests. This filing shall also provide an analysis of each of MFS-FL's operational arrangement requests. BellSouth shall file its operational arrangements, procedures, and analyses within 60 days of the issuance of this order. If MFS-FL, MCImetro, and BellSouth reach an agreement regarding operational arrangements and a feasibility determination for unbundling within 60 days of the issuance of this order, BellSouth will not be required to file operational arrangements with the Commission.

Staff believes that the order did not approve all of the items in MFS-FL's proposed list of operational arrangements. Rather, the Order provides the parties 60 days to negotiate the items on the list and if that fails, then BellSouth is required to file its arrangements addressing and analyzing the list of arrangements proposed by MFS-FL, and then to file BellSouth's proposed list with the Commission. Specifically, if the parties do not agree to the procedures for customer requested service changes, then BellSouth would then be required to file a specific operational arrangement addressing this concern, including an analysis of MFS-FL's proposal.

Accordingly, BellSouth's motion for reconsideration should be denied. The motion does not raise a material and relevant point of fact or law which was overlooked or which the Commission failed to consider when it rendered the Order in the first instance.

ISSUE 5: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open to address the additional cost and operational information as required by Order No. PSC-96-0444-FOF-TP.