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BY HAND DELIVERY

Donna Canzano
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

Re: MCI/BellSouth Section 252 Arbitration
Docket No. 960846-TP
Letter Brief re Disputed Issues

Dear Donna:

In its Petition for Arbitration in this docket, MCI submitted a number of issues for arbitration. The major issues to be resolved were stated on Exhibit 5 of the Petition in language that MCI believed was suitable for inclusion in a procedural order.

At the subsequent issue identification meetings, BellSouth has taken the position that the nine issues listed below are not the proper subject of arbitration, and should be excluded from arbitration by the Prehearing Officer:

Issue 8. What are the appropriate trunking arrangements between MCI and BellSouth for local interconnection? [originally issue 9][1]

Issue 9. What should be the compensation mechanism for the exchange of local traffic between MCI and BellSouth? [originally issue 10]

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[1] These issues are numbered as they were discussed in the most recent issue identification conference. The original issue number in brackets reflects the number or letter designation given to the issue in Exhibit 5 to MCI's Petition for Arbitration. In some cases, the wording of the issues has changed slightly from their original presentation.

Issue 22. What are the appropriate general contractual terms and conditions that should govern the arbitration agreement (e.g. resolution of disputes, performance requirements, and treatment of confidential information)? [originally issue 24]

Issue 24. What are the appropriate arrangements to provide MCI nondiscriminatory access to white and yellow page directory listings. [originally issue 25]

Issue 25. What should be the cost recovery mechanism for remote call forwarding (RCF) used to provide interim local number portability, in light of the FCC's recent order? [originally issue A]

Issue 26. What intrastate access charges, if any, should be collected on a transitional basis from carriers who purchase BellSouth's unbundled local switching element? How long should any transitional period last? [originally issue B]

Issue 27. What terms and conditions should apply to the provision of local interconnection by BellSouth to MCI? [originally issue C]

Issue 29. What are the appropriate rates, terms and conditions for access to code assignments and other numbering resources? [originally issue E]

Issue 30. What are the appropriate rates, terms and conditions related to the implementation of dialing parity for local traffic? [originally issue F]

MCI understands BellSouth's position to be that:

(1) issues 8, 9, 22, 24, 25, 27 and 29 are already covered by the Interim Agreement between the MCI and BellSouth (a copy of which was attached as Exhibit 2 to MCI's Petition), and that the existence of the Interim Agreement precludes their arbitration, and/or

(2) issues 25, 26 and 30 are industry-wide issues that should be resolved in generic proceedings rather than in two-party arbitration proceedings.

As explained below, MCI believes that each of these issues is a proper issue to be arbitrated in this docket.

Arbitration Required by Act

Section 251(c) of the Telecommunications Act of 1996 (Act) places on BellSouth the duty:

> to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection.

The duties described in subsections (b)(1) through (b)(5) relate to resale, number portability, dialing parity, access to rights-of-way, and reciprocal compensation. The duties described in subsection (c) relate to interconnection, unbundled access, resale, notice of changes, and collocation.

To the extent that negotiations on any of these issues are not successful, Section 252(b) permits a negotiating party to petition the state commission to resolve the issues through arbitration. Subsection (2)(A) of 252(b) requires a petitioning party such as MCI to identify each unresolved issue submitted for arbitration, and subsection (4) requires the Commission to limit its consideration of any petition to the issues set forth in the petition and in any response thereto under subsection (3).

MCI submits that under these provisions the Commission has a federal statutory obligation to consider each of the issues submitted for arbitration by either party, so long as the issues relate to matters within the scope of Sections 251 and 252.

Each of the contested issues was identified by MCI in its Petition as an unresolved issue to be arbitrated. Each of the issues is within the scope of Sections 251 and 252 of the Act. Therefore each is an issue which must be arbitrated by the Commission.

Interim Agreement Does Not Preclude Arbitration

BellSouth takes the position that the Interim Agreement between MCImetro and BellSouth (a copy of which was included as Exhibit 2 to MCI's Petition for Arbitration) constitutes a negotiated resolution of issues 8, 9, 22, 24, 25, 27 and 29. Accordingly, BellSouth takes the position that these issues are "resolved" and are not proper subjects for arbitration.

BellSouth's contention is inconsistent with the clear language of the Interim Agreement. Section II.B of the Interim

Agreement expressly provides that:

> B. Upon the execution of this Agreement by both parties, MCIm agrees that during the period that this Agreement is in effect MCIm shall not argue for different treatment of interconnection and local number portability (and if necessary will modify existing positions) before the state commissions in the states covered by this Agreement; provided, that **MCIm shall not be precluded from maintaining any positions in Florida** and Tennessee nor from maintaining in any forum that the appropriate pricing standard for transport, collocation and other network elements that may be included in this Agreement shall be according to the standards set out in Section 252 of the Telecommunications Act of 1996. **Subject to the foregoing, the parties agree that nothing in this Agreement shall have the effect of preventing MCIm from actively participating in any regulatory proceeding.**

The Agreement could not be more clear. It does not preclude MCIm from maintaining any positions in Florida, whether or not those positions are consistent with the provisions of the Interim Agreement.

This was a hotly contested provision in the agreement. In earlier drafts, BellSouth sought to limit MCIm's right to take differing positions by referring to specific on-going dockets, such as the Florida Commission's interim LNP, interconnection, and resale dockets. MCIm would not accept that limitation, and the parties ultimately agreed to the language set forth above. Under this provision, MCIm is clearly permitted to take positions in any proceeding -- including state arbitration proceedings conducted under the auspices of Section 252 of the Act -- on any of the items covered by the Interim Agreement.

BellSouth's position appears to be that the Interim Agreement represents the result of phase one of a two-phase negotiation under the Act. As Mr. Scheye states in his direct testimony in this docket:

> . . .the only basis of negotiations was the requirements of the Act. The Act defined the issues and established the timeframes. Entering into negotiations on any other basis would have been somewhat useless.

* * *

> Once the partial agreement [] was completed, MCI initiated additional discussions, i.e., phase two. BellSouth entered these discussions to negotiate issues not included in phase one, e.g. resale and unbundling. Revisiting the issues that were resolved in phase one would have been highly inefficient.

Mr. Scheye is wrong on both counts. The negotiations for the Interim Agreement were commenced under state statutes in July or August, 1995, over six months before the Act even existed. The negotiations were not undertaken by MCIm to ensure compliance with the Act -- they were undertaken to provide MCIm with an interim framework to begin offering local services in Florida and other states where switches were planned for 1996. Further, the "additional negotiations" that took place after the Interim Agreement was signed included discussion of <u>all</u> of the items contained in MCI's Term Sheet (see Exhibit 3 to MCI's Petition for Arbitration) -- including subject matters that were touched on in the Interim Agreement as well as subject matters that were specifically excluded from the Interim Agreement.

MCI has the right under the Act to seek arbitration on any issues where it has not reached a comprehensive negotiated agreement. The quoted language in the Interim Agreement was carefully crafted to ensure that nothing in the agreement would detract from MCI's right to take -- with respect to Florida and Tennessee -- any position on any issue and, if necessary, to seek arbitration regarding those issues.

Commission Jurisdiction to Interpret Agreement

The parties were specifically asked to address the question of whether the Commission has the authority to construe the Interim Agreement in making a decision on the inclusion or exclusion of the contested issues. MCI believes that the parties intended the Commission to have such jurisdiction, and points out that Section XI of the Agreement expressly provides that, on a non-exclusive basis, any dispute regarding the interpretation of any provision of the agreement may be brought before the appropriate state commission for resolution. As a practical matter, no other forum could consider this particular matter of interpretation in sufficient time for the Commission to comply with the 9-month deadline for concluding the arbitration proceeding.

In the event the Commission decides that it does not have jurisdiction to construe the agreement, then the decision on the inclusion or exclusion of the issues must be based solely on an analysis of the provisions of the Act. As noted above, all of these issues are proper matters for arbitration under the Act.

Generic Nature of Issues Does Not Preclude Arbitration

With respect to issues 25, 26, and 30, BellSouth takes the position that:

(a) these issues stem from requirements of FCC Orders that post-dated the negotiations, that subject matter of these issues was not negotiated by the parties, and, therefore, that the issues are not appropriate for arbitration; and/or

(b) the issues are generic in nature and should be resolved in generic proceedings in which parties other than MCI and BellSouth would be bound.

MCI will discuss each of the three contested issues in turn.

Cost Recovery Mechanism for Interim LNP. BellSouth's position that interim local number portability is not an "arbitration" issue under the Act does violence to the clear language of Sections 251 and 252. Section 251(b) imposes an obligation on BellSouth to provide local number portability in accordance with the requirements prescribed by the FCC. Those requirements, including a cost recovery mechanism, have now been prescribed by FCC Rules. Section 251(c)(1) imposes an obligation on BellSouth to negotiate terms and conditions of agreements to fulfill the duty to provide local number portability. And Section 252 permits a party to seek arbitration with respect to any Section 251 issue on which agreement has not been reached. As shown in Part XXI.2.1 of MCI's Term Sheet (Exhibit 3), the issue of cost recovery was negotiated by the parties. Thus the cost recovery mechanism for interim number portability is clearly a proper subject for arbitration under the Act.

MCI agrees that cost recovery is a generic issue, but that does not detract from the Act's requirement that BellSouth negotiate the issue and, failing agreement, that the Commission arbitrate the issue within the 9-month time frame established for the negotiation/arbitration process. The Commission's current timetable for the generic interim local number portability docket simply will not produce a result in time for incorporation into an arbitrated agreement pursuant to Section 252(d) of the Act.

BellSouth's concern that other parties will be prejudiced if

the issue is resolved between MCI and BellSouth is misplaced. Under Section 252(i), any provisions for interim local number portability included in the arbitrated agreement will be available immediately to any other interested party. To the extent that another party seeks a cost recovery mechanism different than that established in the MCI/BellSouth arbitration, they have the right to participate in the slower-moving generic docket. In either event, the decision in this docket will not "prejudice" third parties in any way.

Access Charges on Unbundled Local Switching. BellSouth argues that this is not a proper arbitration issue because it relates to the price of exchange access, which is not covered by the Act, and because it first arose out of the FCC Local Interconnection Order which post-dated the MCI/BST negotiations. BellSouth's position relies on a mischaracterization of the issue.

When MCI provides local service using unbundled network elements, including unbundled switching, access charges will be billed to interexchange carriers by or on behalf of MCI. The FCC Order permits BellSouth to collect, as part of the price of unbundled local switching, the CCL and a portion of the RIC that BellSouth would have billed if it had retained the end user customer. The issue is not what access charges will be paid by the IXC, the issue is what is the price of unbundled local switching provided to MCI. Under the FCC Rules, the price for unbundled local switching may, but is not required, to include a per-minute charge equal to the intrastate CCL and a portion of the intrastate RIC for intrastate access minutes that transit the unbundled switching element.

The pricing of unbundled switching is an issue that the parties sought to negotiate, and it is clearly within the proper scope of an arbitration proceeding. The fact that the price for unbundled switching may incorporate a rate element equal to an existing access charge rate element does not convert this pricing issue into an access charge issue.

Rates, Terms and Conditions for Local Dialing Parity. MCI understands that BellSouth's objection to this issue is that it is a generic issue that should be resolved in an industrywide proceeding. Like the issue of cost recovery for interim LNP, however, section 251(b)(3) of the Act clearly establishes dialing parity as a BellSouth duty which must be negotiated under section 251(c)(1). As shown by Part XII of the Term Sheet, this was a negotiated issue.

As in the case of local number portability, any provisions on dialing parity which are included in the arbitrated agreement which results from this proceeding will be available to all parties, and nothing will preclude other parties from bringing their own arbitration proceedings, nor from participating in any subsequent generic proceeding on the issue.

Conclusion

Each of the issues contested by BellSouth should be retained as an issue in this proceeding. The Act contemplates that the petition and the response will define the issues to be arbitrated; each of these issues has been so identified; nothing in the Interim Agreement precludes MCI from seeking arbitration of these issues, nor from taking arbitration positions that are inconsistent with the terms of the Interim Agreement; and the fact that some of the duties imposed by the Act are "generic" in nature does not remove them from the ambit of permissible arbitration.

As MCI noted at the last informal issue identification conference, it requests that the Prehearing Officer's ruling on the inclusion or exclusion of these issues be set forth in a written order, so that the basis for the ruling will be clear on the record.

Sincerely,

HOPPING GREEN SAMS & SMITH, P.A.

By: _____
Richard D. Melson
Attorneys for MCI

cc: Nancy White (by fax)
Tracy Hatch (by hand)
Charles Rehwinkle (by hand)
Blanca Bayó (for docket file)