

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  
ORDER NO. PSC-99-0042-FOF-TP  
ISSUED: January 5, 1999

The following Commissioners participated in the disposition of  
this matter:

JULIA L. JOHNSON, Chairman  
J. TERRY DEASON  
SUSAN F. CLARK  
JOE GARCIA  
E. LEON JACOBS, JR.

ORDER GRANTING MOTION TO DISMISS  
PETITION TO ADDRESS GEOGRAPHICALLY  
DEAVERAGED RATES

BY THE COMMISSION:

On December 16, 1996, we issued Order No. PSC-96-1531-FOF-TP in Docket No. 960757-TP, an arbitration proceeding between Metropolitan Fiber Systems of Florida, Inc. (MFS/WorldCom) and BellSouth Telecommunications, Inc. (BellSouth). In that order, we directed BellSouth to file cost studies so that permanent rates could be established for specific unbundled network elements. On December 31, 1996, we issued Order No. PSC-96-1579-FOF-TP in Docket Nos. 960833-TP and 960846-TP, a consolidated arbitration proceeding between BellSouth, AT&T Communications of the Southern States, Inc. (AT&T) and MCI Telecommunications, Inc. and MCImetro Access Transmission Services, Inc. (MCI). In that Order, we again ordered BellSouth to file cost studies specifically addressing those elements for which we had established interim rates, so that permanent rates could be established. Subsequently, we consolidated Docket Nos. 960833-TP, 960846-TP, and 960757-TP for hearing.

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FPSC-RECORDS/REPORTING

On January 26 through January 28, 1998, we conducted an evidentiary hearing for these dockets. The objective of the proceeding was to establish recurring and non-recurring rates for certain unbundled network elements (UNEs). On April 29, 1998, we issued our Final Order on Arbitration, Order No. PSC-98-0604-FOF-TP. Therein, we set permanent recurring and non-recurring rates for specific UNEs. By Order No. PSC-98-0844-FOF-TP, issued June 25, 1998, we granted, in part, and denied, in part, a Motion for Reconsideration of Order No. PSC-98-0604-FOF-TP filed by BellSouth.

On September 18, 1998, MFS/WorldCom filed a petition asking that we require BellSouth to file cost studies on geographically deaveraged loops and that we conduct a proceeding to determine what the rates and terms should be for geographically deaveraged loops.

On October 13, 1998, BellSouth filed a Motion to Dismiss and Response in Opposition to MFS/WorldCom's petition. On October 21, 1998, MFS/WorldCom filed its Response in Opposition to BellSouth's Motion to Dismiss.

Our determination on BellSouth's Motion to Dismiss is set forth herein.

#### Standard of Review

We have reviewed BellSouth's Motion to Dismiss to determine whether the motion demonstrates that MFS/WorldCom's petition fails to state a cause of action upon which we may grant the requested relief. All allegations in the petition have been taken as though true, and considered by us in the light most favorable to MFS/WorldCom. See, e.g., Ralph v. City of Daytona Beach, 471 So.2d 1, 2 (Fla. 1983); Orlando Sports Stadium, Inc. v. State of Florida ex rel Powell, 262 So.2d 881, 883 (Fla. 1972); Kest v. Nathanson, 216 So.2d 233, 235 (Fla. 4th DCA, 1968); Ocala Loan Co. v. Smith, 155 So.2d 711, 715 (Fla. 1st DCA, 1963).

#### MFS/WorldCom's Petition

In its Petition, MFS/WorldCom states that we conducted an arbitration proceeding between BellSouth and MFS/WorldCom regarding three main issues. One of those issues pertained to the appropriate rate for unbundled loops. In presenting its case regarding this issue, MFS/WorldCom argued that the loop rates should be geographically deaveraged. By Order No. PSC-96-1531-FOF-TP, issued December 13, 1996, we determined that the cost

methodology submitted by MFS/WorldCom for deaveraged loop rates was inappropriate, and, therefore, deaveraged loop rates were not set. MFS/WorldCom asserts, however, that we did not reject geographic deaveraging. MFS/WorldCom argues that, instead, we simply determined that there was insufficient evidence in the record to set geographically deaveraged prices at that time.

MFS/WorldCom further explains that we did not require BellSouth to file cost studies regarding geographically deaveraged rates, although we did require BellSouth to submit additional cost studies on another issue addressed in that proceeding, collocation. We then conducted further consolidated proceedings on the outstanding arbitration issues from this docket, and Dockets Nos. 960833-TP and 960846-TP, for which BellSouth had been ordered to file the additional cost studies. MFS/WorldCom asserts that it asked that geographically deaveraged loops be included in that proceeding, but we rejected its request, stating that the additional proceedings were limited to the issues for which BellSouth had been ordered to file cost studies.

MFS/WorldCom now argues that the issue of geographically deaveraged rates is still before us. MFS/WorldCom asserts that we did not reject geographic deaveraging, and it is now time for us to address the issue. MFS/WorldCom notes that we do not need to address whether geographic deaveraging is appropriate, because we have already indicated that it is appropriate by approving agreements containing provisions on geographic deaveraging. MFS/WorldCom asserts that the issue that we must now address is limited to the appropriate rates and terms for geographically deaveraged loops.

In addition, MFS/WorldCom emphasizes that the Department of Justice (DOJ) has filed comments with the FCC supporting geographically deaveraged rates. MFS/WorldCom states that the DOJ indicated that obtaining loops at deaveraged prices appears crucial to allowing facilities-based ALECs to offer their services to more than just large business customers.

For these reasons, MFS/WorldCom asks that we require BellSouth to file cost studies on geographically deaveraged loops within 60 days. MFS/WorldCom also asks that we set this matter for hearing.

BellSouth's Motion to Dismiss and Response in Opposition

In its Motion and Response, BellSouth argues that we have already addressed and decided the issue of geographically deaveraged loops. BellSouth states that we must, therefore, dismiss MFS/WorldCom's Petition. BellSouth also claims that MFS/WorldCom's Petition fails to state a cause of action upon which relief can be granted, is untimely, and is barred because we have already addressed the issue.

MFS/WorldCom's Response to the Motion to Dismiss

MFS/WorldCom responds that BellSouth's motion does no more than state that MFS/WorldCom's petition fails to state a cause of action. MFS/WorldCom states that BellSouth has provided no support for this assertion. MFS/WorldCom argues that BellSouth's motion should, therefore, be denied.<sup>1</sup>

MFS/WorldCom also argues that BellSouth has not accurately set forth the status of the issue of geographically deaveraged rates. MFS/WorldCom states that our Orders clearly indicate that we have not rejected geographically deaveraged loops. MFS/WorldCom asserts that we only determined that there was not sufficient evidence in the record to set proper deaveraged loop rates. MFS/WorldCom stresses that our determination that there was not enough evidence to set rates does not mean we rejected geographically deaveraged loop rates as a policy matter. MFS/WorldCom adds that we simply determined in the prior proceedings that MFS/WorldCom's cost methodology was not appropriate.

Furthermore, MFS/WorldCom argues that BellSouth misinterprets Order No. PSC-97-1303-PCO-TP, wherein we denied MFS/WorldCom's request to include geographically deaveraged rates in the cost proceeding. MFS/WorldCom asserts that the reason that the issue was not included was that we had not required BellSouth to submit cost studies on geographically deaveraged loops, not because the issue had already been decided. Thus, MFS/WorldCom argues that BellSouth's Motion to Dismiss should be denied, and we should address the merits of MFS/WorldCom's Petition.

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<sup>1</sup>Citing Nicholas v. Harry P. Leu Machinery Corp., 200 So. 2d 232 (Fla. 3rd DCA 1967).

Determination

As explained by BellSouth, we have addressed this issue several times already in this Docket. In Order No. PSC-96-1531-FOF-TP, issued December 16, 1996, on MFS/WorldCom's original petition for arbitration, we stated that MFS/WorldCom's proposed deaveraging methodology was not acceptable, although geographic deaveraging would be appropriate if defined appropriately with the cost differences accurately reflected. Order at p. 11. On reconsideration of Order No. PSC-96-1531-FOF-TP, we emphasized that we had heard a significant amount of evidence on the geographic deaveraging of unbundled loop rates in the arbitration hearing, upon which we had based our decision. We also rejected MFS/WorldCom's assertion that it could have presented more evidence on the issue. Thus, we denied MFS/WorldCom's Motion for Reconsideration. Order No. PSC-97-0235-FOF-TP at p. 5.

Subsequently, by Order No. PSC-97-1303-PCO-TP, Dockets Nos. 960757-TP, 960833-TP, 960846-TP, and 971140-TP were consolidated for purposes of addressing the additional cost studies that we had required BellSouth to file. In that Order, the prehearing officer addressed MFS/WorldCom's request to include geographically deaveraged loops in the proceeding. The prehearing officer denied MFS/WorldCom's request. The prehearing officer stated that MFS/WorldCom should not be allowed to raise this issue in the proceeding, because it had already had the opportunity to present evidence on geographically deaveraged loops in the arbitration, and we had rejected MFS/WorldCom's methodology.

On April 29, 1998, we entered our Final Order on Arbitration, Order No. PSC-98-0604-FOF-TP, for Dockets Nos. 960757-TP, 960833-TP, and 960846-TP. Therein, we addressed the cost studies filed by BellSouth and set permanent rates for those elements for which we had previously set interim rates. We ordered the parties to file agreements memorializing our decision within 30 days of the issuance of the Order, and stated that the Dockets would remain open until the final agreements between the parties had been approved. In that Order, we made no provision for any further proceedings in these Dockets, other than the approval of the final agreements between the parties.

We have considered the substantive evidence on geographic deaveraging presented by MFS/WorldCom in this Docket and found it to be insufficient for us to require BellSouth to geographically deaverage its loop rates. We have consistently denied

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MFS/WorldCom's requests to further address this issue in this Docket. We have rendered our final arbitration decision in this Docket and have required the parties to file an agreement reflecting that decision. We clearly contemplated no further proceedings. For purposes of this Docket, geographic deaveraging has been addressed and decided. Thus, even viewed in the light most favorable to MFS/WorldCom, we cannot grant the relief requested by MFS/WorldCom. For all these reasons, BellSouth's Motion to Dismiss is granted. Upon approval of the amended interconnection agreement between the parties reflecting our decisions in Order No. PSC-98-0604-FOF-TP, this Docket shall be closed.

In addition, we emphasize again that we have not rejected geographic deaveraging as a policy matter. We have simply determined that insufficient evidence was presented in this Docket to warrant requiring BellSouth to implement geographically deaveraged loop rates. Order No. PSC-96-1531-FOF-TP at p. 11. Upon termination of the agreement established in this Docket between MFS/WorldCom and BellSouth, the parties may seek to negotiate this issue. If the parties are unable to reach an agreement, MFS/WorldCom is not precluded from seeking arbitration of this issue then.

Based on the foregoing, it is therefore

ORDERED by the Florida Public Service Commission that BellSouth Telecommunications, Inc.'s Motion to Dismiss is granted, as set forth in the body of this Order. It is further

ORDERED that this Docket shall remain open pending our approval of the parties' amended arbitration agreement memorializing our decision in Order No. PSC-98-0604-FOF-TP. It is further

ORDERED that upon our approval of the parties' amended arbitration agreements, this Docket shall be closed.

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By ORDER of the Florida Public Service Commission this 5th  
day of January, 1999.

BLANCA S. BAYÓ, Director  
Division of Records and Reporting

By: Kay Flynn  
Kay Flynn, Chief  
Bureau of Records

( S E A L )

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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 the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) 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 and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.