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ORIGINAL

February 17, 1999

Mrs. Blanca S. Bayo
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

RE: Docket No. 981121-TP

Dear Mrs. Bayo:

Enclosed are an original and fifteen copies of BellSouth Telecommunications, Inc.'s Brief of the Evidence. Please file this in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served on the parties shown on the attached Certificate of Service.

Sincerely,

J. Phillip Carver

J. Phillip Carver

ACK
AFA
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Enclosures

cc: All Parties of Record
M. M. Criser, III
N. B. White
W. J. Ellenberg (w/o enclosures)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Request for arbitration Concerning complaint of MCIMetro Access Transmission Services LLC for enforcement of Interconnection agreement with BellSouth Telecommunications, Inc.	)))))))	Docket No. 981121-TP Filed: February 17, 1999

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STATEMENT OF THE CASE

On August 28, 1997, MCImetro Access Transmission Services, Inc. ("MCIm" or "MCI") filed a Petition to Set Non-Recurring Charges for Combinations of Network Elements. After the resulting docket was consolidated with other dockets for purposes of hearing, the case was heard on March 9, 1998. On June 12, 1998, the Commission issued its decision (Order No. PSC-98-0818-FOF-TP). In that Order, the Commission found "that the MCIm-BellSouth interconnection agreement specifies how prices will be determined for combinations of unbundled network elements that exist or do not exist at the time of MCI's Order and that do not recreate an existing BellSouth retail service". (Order, p. 25) (emphasis added). The Order went on to require that "MCIm and BellSouth shall negotiate the price for those network element combinations that recreate an existing BellSouth retail service, whether or not in existence at the time of MCIm's order". (Id.). The Order also provided that the Commission would "leave it to the parties to negotiate what precisely does constitute the recreation of a BellSouth retail service." (Id., p. 59).

Subsequent to the entry of the Order, BellSouth attempted on a number of occasions to meet with MCIm to discuss the implementation of the Order. (Tr. 161). On July 8, 1998, the parties did meet briefly to discuss implementation of the Commission's Order. MCIm, however, refused to discuss the issue of any unbundled network element combination ("UNE") that would constitute the recreation of a BellSouth service. Instead, MCIm insisted that it should "be allowed to purchase combinations of a DS1 loop and DS1 dedicated transport for a price that equals the sum of the network elements". (Tr. 161). BellSouth stated its position that this particular combination recreates the retail service known as MegaLink® service.

BellSouth made a number of other attempts to meet with MCIm to discuss this issue, but MCIm refused each time. Specifically, as BellSouth witness, Jerry Hendrix, testified, BellSouth sent a letter to MCIm suggesting that the parties jointly request an extension of time to implement the Commission's Order. MCI refused in a letter dated July 14, 1998, in which it also stated that it did not "believe that it makes a difference whether combined elements recreate an existing BellSouth service . . .," (Tr. 162). As Mr. Hendrix related, BellSouth made at least two additional attempts to arrange a meeting with MCI, but MCI continued to refuse to meet to discuss the UNE combination issue (Tr. 162-63).[1] On September 14, 1998, MCIm filed a complaint for enforcement of the Interconnection Agreement with BellSouth in which it alleged that it was entitled to receive a UNE combination consisting of 4-wire DS1 loop and dedicated transport at the sum of the price of these UNEs.

The hearing on this matter took place Wednesday, February 3, 1999. Both direct and rebuttal testimony was presented by BellSouth witnesses, Jerry Hendrix and Keith Milner. Ron Martinez and Joseph Gillan testified on behalf of MCIm. The hearing produced a transcript of 185 pages and 9 exhibits.

This Brief of the Evidence is submitted in accordance with the post-hearing procedures of Rule 25-22.056, Florida Administrative Code.

[1] During the hearing on this matter, MCIm witness, Ron Martinez, admitted that the chronology of events set forth herein (based upon the testimony of Mr. Hendrix) is accurate. (Tr. 61).

STATEMENT OF BASIC POSITION

In Order No. PSC-98-0810-FOF-TP, this Commission directed BellSouth and MCI to "determine through negotiation" what combination of unbundled network elements "constitute[s] the recreation of a BellSouth retail service." (Order, p. 50). MCI has refused to do so. MCI has instead attempted to order a combination of network elements that it admits technically recreates MegaLink® service. In fact, this combination of elements recreates MegaLink® service in every regard. There is no basis to distinguish between the combination of UNEs that MCI has attempted to order and MegaLink® Service, and MCI's attempts to do so are without merit.

STATEMENT OF POSITIONS ON THE ISSUES

Issue 1: Does the combination of unbundled network elements consisting of 4-wire DS1 loops and DS1 dedicated transport recreate an existing BellSouth retail service known at MegaLink®? If not, what action, if any, should the Commission take?

**Position: Yes. The identified combination of elements does recreate MegaLink® service. Further, if this Commission finds to the contrary, no refund should be given to MCI because it ordered DS1 Services, despite having other alternatives, and has received those services.

The issue in this proceeding, as framed above, is specific, narrow, and essentially uncontested. The question is simply whether a DS1 channel plus DS1 transport equals BellSouth's MegaLink® service. If the answer is affirmative, then the logical conclusion follows that this combination of unbundled network elements "recreates" MegaLink® service.

BellSouth's witness, Keith Milner, set forth at length in his pre-filed direct testimony the facts that prompt this conclusion. First, he testified that MegaLink® service "is a service by which digital signals are transmitted over digital facilities at a rate of 1.544 million bits per second (Mbps) . . .The facilities over which these signals are sent are DS1 loops and DS-1 dedicated transport facilities (Tr. 119). [2] "MegaLink® allows digital signals to be transmitted simultaneously in a two-way communication at 1.544 Mbps. It can be provided on a link basis, which is a partial channel, or as an end-to-end service". (Tr. 120).

Mr. Milner also testified that MCI has requested that BellSouth provide it, on a combined basis, a 4-wire DS1 loop and DS1 dedicated transport. This serving arrangement requested by MCI – the combination of a DS1 loop and transport – is identical to the serving arrangement that constitutes BellSouth's MegaLink® service (Tr. 122). Further, Mr. Milner testified that the use that MCI intends to make of this arrangement does nothing to alter the fact that it recreates MegaLink® service.

At the same time, MCI's witnesses essentially admitted that, at least from a functional standpoint, there is no difference between the UNE combination MCI has requested and MegaLink® service[3]. In fact, the only attempt that MCI made to distinguish between the

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[2] "'DS' stands for digital service, and the number is a reference to the transmission speed." (Id.)

[3] Testimony of Mr. Martinez:

"Q . . . [W]ould you agree that from a functional standpoint a DS1 loop and transport are the same as MegaLink service?

A. The DS1 loop and the DS1 transport that we buy would be equivalent to the DS1 loop and DS1 transport under MegaLink."

(Tr. 58).

- - -

Testimony of Mr. Gillan:

"Q. Would you agree that from a functional standpoint there's no difference between, on the one hand, MegaLink, and on the other hand, DS1 channels and transport?

A. I think that's correct, yes."

(Tr. 109).

subject DS1 facilities and MegaLink® was based on the MegaLink® tariff itself. Specifically, in his pre-filed rebuttal testimony Mr. Martinez stated that MegaLink® is a private line service that is "subject to all the restrictions and limitations of BellSouth's Private Line Services Tariff" (Tr. 53). However, during his deposition, Mr. Martinez stated that this testimony was not meant to be a claim that the UNE combination in question cannot recreate MegaLink® service. (Exhibit 4, Telephonic Deposition of Ron Martinez, pp. 8-9.)

Nevertheless, during the hearing, counsel for MCI questioned BellSouth's witness, Keith Milner, regarding the tariff restrictions that relate to MegaLink® service. Specifically, he asked Mr. Milner to agree "that private line service is only available to provide point-to-point communications between a customer and another customer location, or a customer and a designated authorized user, which in this case, could be an affiliated company." (Tr. 148). Mr. Milner stated that this restriction does not apply because the language of the tariff "puts very specific restrictions around two kinds of carriers. And it doesn't say anything about a CLEC's use of MegaLink® because a CLEC is neither . . . [of these two kinds of carriers]." (Tr. 148-49). Mr. Milner further testified specifically that MegaLink® service could be connected to a local switch by an appropriate purchaser such as MCI. (Tr. 150-151). Mr. Milner clearly testified that the restrictions of the MegaLink® tariff would not prevent MCI from purchasing MegaLink® on a resale basis and using it in precisely the manner that they plan to use the functionally identical UNE combination. No witness testified to the contrary.

Beyond the brief allusion in Mr. Martinez' pre-filed testimony to MegaLink® tariff restrictions, MCI has provided no testimony to support the notion that the tariff restrictions that apply to MegaLink® service are such that UNEs that do not have these restrictions cannot

recreate MegaLink®. Still, there is certainly the possibility that MCI will make a legal argument to this effect in its brief. If so, it is a strange position, indeed, considering the past positions that MCI has taken. As set forth above, the only testimony on this issue was that the MegaLink® tariff restrictions do not, on their face, prohibit MCI's intended usage. Moreover, MCI has argued in the past that even if tariff restrictions of this sort clearly do apply on their face, they should not be applied to an ALEC such as MCI that purchases them on a resale basis. In the main, the Commission has adopted this approach.

Specifically, in the Final Order on Arbitration issued December 31, 1996 (Order No. PSC-96-1579-FOF-TP) in Docket Nos. 960833-TP, 960846-TP and 960916-TP, this Commission began its analysis of restrictions upon the resale of BellSouth's services by noting that, under the applicable FCC rules, resale restrictions are presumptively unreasonable, and that the burden is upon an incumbent LEC to rebut this presumption of unreasonableness. (Arbitration Order, p. 57.) BellSouth attempted to do so by arguing that the use and user restrictions in the tariff are essentially class of service restrictions that are appropriate under the Act (Order, p.58). MCI responded by arguing, through its witness, that the only resale restrictions should be those that limit the resale of "grandfathered service, residential services and lifeline/link-up services of end-users who are eligible to purchase such service directly from BellSouth." (Order, p. 59.) MCI's witness further stated "that any other usage or user restriction, or other limitation, would impede MCI's ability to compete through service resale." (Id., p. 59.) The Commission accepted MCI's position in toto, and held that "no restrictions on the resale of services are allowed, except for . . . [the limited exceptions noted-above]." (Id., p. 60). Subsequently, this Commission has applied other BellSouth tariff restrictions to resale

upon a finding that the restrictions are reasonable and otherwise sustainable (See e.g. In Re: Petition for Arbitration of Dispute with BellSouth Telecommunications, Inc. Regarding Call Forwarding, by Telenet of South Florida, Inc., Docket No. 961346-TP, Order No. PSC-97-0462-FOF-TP, issued April 23, 1997). The fact remains, however, that these restrictions are presumed to be unreasonable unless BellSouth makes a showing to the contrary.

In our case, BellSouth, through its witness, Mr. Milner, has affirmatively stated that the tariff restrictions in question are facially inapplicable to MCI (functioning as an ALEC). If BellSouth took the contrary view, i.e., that the restrictions apply on their face, it would still have the burden of showing that they should apply under the standard created by the FCC. Since this has not occurred, there is not even the most remote possibility that these restrictions would apply to MCI in the instant context. Nevertheless, in a strange turnabout, MCI would appear to be laying the groundwork for an argument that the tariff restrictions would apply to it--its prior position and the Commission's Order notwithstanding--and that this application would somehow either (1) make MegaLink® service unavailable to it, or (2) make MegaLink® service distinguishable from the DS1 channel and transport that it has attempted to order as unbundled network elements. Its argument should be summarily rejected. Having argued for, and obtained, a near total prohibition by this Commission of the application of any resale restriction, MCI should not be allowed to prevail on a fallacious argument that simply assumes that these resale restrictions would apply to MCI in the current circumstances.

If the resolution of this case is based upon the answer to the single question that is actually before the Commission--whether a DS1 channel plus transport recreates MegaLink® service--then BellSouth must prevail. Perhaps in recognition of this, MCI has elected to build

its case largely upon a reconstitution of the determinative question. In other words, since MCI has no real basis to argue that a DS1 channel and transport are distinguishable from MegaLink®, MCI, instead argues that this question is irrelevant. Instead, MCI argues that what it buys from BellSouth is not the issue, but rather what it sells to its end-user customer. (Ex. 5, Telephonic Deposition of Joseph Gillan, p. 26). Based upon this, MCI contends that, because it adds switching to the DS1 channel and transport, the resulting service that it sells to its customer does not recreate BellSouth's MegaLink® service.

Once having reconstituted the question, MCI then contends that the answer to the question has already been provided by the Commission in a previous order. Throughout the testimony of Mr. Gillan, he cites to the language of various Orders in an attempt to argue, in effect, that the issue before the Commission has already been resolved. (See e.g. Tr. 91-3; 104-05)[4] There are two difficulties with this approach. First, as noted above, this Commission has left it to MCI and BellSouth to "negotiate what precisely does constitute the recreation of a BellSouth retail service." (Order No. PSC-98-0810-FOF-TP, p. 58). It makes little sense to assume that when the Commission told the parties to define recreated service, the Commission had, in reality, already crafted an implicit definition of this term that can be gleaned from reading between the lines of the Order. If this is what the Commission intended, then surely it would simply have given explicitly the definition of recreated service. BellSouth believes that the only logical conclusion that can be drawn from the clear instruction in the Commission's order is that the Commission meant exactly what it said, that the parties should negotiate this

[4] Mr. Gillan argues of one point that "the Commission has not determined all the criteria that must be satisfied before a combination of network elements would "recreate" a retail service, . . . [but it has established] . . . the minimum conditions that must be met. (Tr. 91).

definition. MCI has refused to do so, and now takes the illogical position that the Commission has, in effect, already defined this term.

Second, MCI's contention that the Commission has already defined what constitutes a recreated service ignores the fact that discussion in Order No. PSC-98-0810-FOF-TP focused upon a related, but very different matter, the recreation of basic local service. In the arbitration, this Commission found that MCI should be allowed to combine network elements it had purchased from BellSouth to recreate an existing BellSouth service. The question subsequently became one of the price to be charged for such a combination. The issues that the Commission ultimately directed the parties to negotiate involved the price for, and definition of, a UNE combination that "recreates a BellSouth retail service", i.e., any retail service. Throughout the discussion in the Order, however, it is clear that the Commission was referring, not to a generic standard that would apply to the recreation of any service, but to the more narrow issue of what constitutes the recreation of basic local service.

During his deposition, Mr. Gillan acknowledged that the Commission's Order addressed the recreation of local service. (Ex. 5, p. 21). However, in his pre-filed testimony, Mr. Gillan cited to a discussion in the Commission's Order of local service recreation as if it relates directly to the instant case. His citation to this discussion, however, vividly demonstrates the inapplicability of the Commission's prior decision to the current question of what recreates MegaLink® service. Mr. Gillan states in his testimony that the Commission has found that to recreate a service the purchased UNEs must be something more than a loop and a port. Therefore, he argues that "the loop without the local switching network element (i.e. the issue here) is even more deficient." (Tr. 92-3). During his deposition, however, Mr. Gillan conceded

that when the service in question (i.e., MegaLink®) does not include a port, then it is obviously not necessary to have a port (or any other form of switching functionality) to recreate that service. (Tr. 18-21). Thus, the Commission's discussion of what constitutes local service (upon which MCI relies so heavily) simply does not apply to the recreation of MegaLink® service.

Further, a review of the Commission's order makes it clear that the Commission and the parties were addressing a situation in which MCI would buy UNEs from BellSouth in circumstances in which there are only two possibilities. One scenario would be that MCI would buy from BellSouth UNEs that are simply piece-parts of the network, combine these with network elements that MCI would furnish, and sell to the MCI customer a finished product. The other scenario (and the one addressed in the earlier case) contemplated a situation in which MCI would buy from BellSouth all of the UNEs necessary to "recreate" a service and simply sell those to the customers. In other words, the prior Order addressed a situation is which MCI buys from BellSouth and sells to its end user the same thing. What is before this Commission now is a different issue, and frankly, a matter of first impression. The current issue relates to a situation in which MCI purchases a combination of UNEs from BellSouth that inarguably recreates one BellSouth service (MegaLink®), then adds additional functionality to construct a second service (local service), which it sells to its customer. The discussion in the previous Order gives little guidance because it focused upon a circumstance in which UNE combinations are either piece parts of a service, or a recreated service. Our situation is clearly different.

In light of the above, the Commission cannot merely rely upon previous decisions that deal with a different issue, but rather must view the current issue as a new and different matter, and judge the position of each party on its respective merits. MCI's position is, in effect, that it

may recreate any BellSouth service with UNEs—as long as it is not local service—and still avoid the obligation to negotiate the price for the UNE combination. BellSouth's position is that the parties must negotiate the price of any UNE combination that recreates any BellSouth service.

In a curious approach to the issue, MCI has proposed a standard for this Commission to apply to the recreation issue, while going to great lengths to argue that it has not proposed a general standard of any sort. During cross-examination of Mr. Martinez by BellSouth, counsel for MCI objected to a question and stated that "MCI is not trying to establish a general test." (Tr. 71). Likewise, Mr. Gillan stated during the hearing that he was not proposing any sort of affirmative test as to what would constitute a recreation of service. (Tr. 110-11). This contention, however, ignores the fact that, even though MCI has not clearly articulated a test, it is applying one in the context of MegaLink®. Further, if MCI prevails, and this test becomes a precedent to be applied to other future recombinations, then it will virtually ensure that service recreation is never found to exist in any possible future combination of UNEs.

MCI argues that the Commission should decide the issue based on whether it is selling MegaLink® service to its customers, not whether it is buying MegaLink® service from BellSouth. It is possible to consider what MCI sells to its customer because MCI initiated this case by stating this information in its Petition. In the normal course of business, however, BellSouth would have no way to know what MCI is selling to its customers. During his deposition, Mr. Gillan agreed that "if the test were dependent upon what MCI sells to its end user, then in order to know how to price something that MCI purchases, BellSouth would have to know what MCI is going to do . . ." with the UNE combination it purchases (Ex. 5, p. 26).

Mr. Gillan also acknowledged that to apply this test MCI would have to provide BellSouth with additional information (Tr. 27-32). However, as Martinez acknowledged, under the terms of the Interconnection Agreement, MCI has no duty to tell BellSouth what services it will construct from the UNEs that it purchases from BellSouth. (Tr. 74). Further, after lengthy cross-examination, Mr. Martinez reluctantly acknowledged that BellSouth would have no way to know what MCI is selling to its customer. As he testified, "in a market world, you wouldn't know. Because I am not going to share with you all the secrets that I'm going to sell to the customer nor the pricing plans that I'm going to use nor a lot of other things." (Tr. 73). Therefore, as a practical matter, MCI's approach to the issue would insure that recreated service would never be appropriately priced because BellSouth would never know what MCI is selling to its customers, and, therefore, would never know when a BellSouth service had been recreated with UNEs.

The second difficulty with the standard that has at least implicitly been proposed by MCI is that it would give MCI the ability to make minor adjustments to its service offering to ensure that a BellSouth service is never recreated. During his deposition, Mr. Gillan was asked to identify a combination of UNEs that he believes could be purchased and combined to recreate a BellSouth service. He responded that his "position would be that would never happen . . .". (Ex. 5, p. 13). Mr. Gillan went on to make clear that, in MCI's view, virtually any difference between BellSouth's service and MCI's would be sufficient to argue that a recreation has not occurred. Specially, Mr. Gillan stated that if the price of the MCI service were different, then there would be no service recreation. (Ex. 5, p. 36). Likewise, he testified that if the terms and conditions of the service were changed, then there would be no service recreation. (Ex. 5, p. 37). Finally, and perhaps most tellingly, he testified that if the MCI service duplicated the BellSouth

service, but was bundled with some other service that BellSouth did not offer, then this would not be a recreation of a BellSouth service. (Ex. 5, Tr. 37). Specifically, during Mr. Gillan's deposition, this question and answer occurred:

> Q. Let's assume that you have used the BellSouth UNEs to recreate an MCI service that is – let's say it is the local platform and it is exactly the same as the BellSouth local platform, priced the same, terms and conditions the same, everything the same except those areas we have agreed to disagree about. Then you also take that local service and bundle it together with long distance service. Now, is that service, that bundled service that you are providing to your customer, is that different than the BellSouth service?
>
> A. Yes, I think so.

(Id.).

Thus, under MCI's analysis, as expressed by Mr. Gillan, MCI would be free to effectively recreate BellSouth's local service, but to avoid a finding of recreation by packaging it with long distance service that BellSouth cannot currently offer. The inequity of this situation is obvious.

Clearly, if the recreation standard that is being applied by MCI in this case becomes a broader standard, then MCI will be given a method to ensure that no combination of UNEs that it purchases from BellSouth and sells to its customers in the future will be deemed a recreated BellSouth service and priced accordingly. In other words, MCI will be able to evade completely the instruction of this Commission to the parties to negotiate a separate price for UNE combinations in this situation.

There are two ways to avoid this result. One, even if the Commission were inclined to accept MCI's argument and determine that it is not attempting to recreate MegaLink® service in this instance, this finding should have no precedental weight for the reasons set forth above. In other words, even if this Commission believes that the switching element that MCI adds to this

service before selling to its customer renders it distinguishable from MegaLink®, the Commission must not allow MCI to use this decision as a future justification to apply any of the miniscule distinctions that it believes can be used as the basis to defeat a finding of service recreation. Likewise, this case should not serve as a precedent for the general approach that service recreation is to be determined from what MCI sells its customers. As stated above, this approach would thwart the ability of BellSouth to ever determine whether its services are being recreated by MCI.

Two, the better way to ensure that these unfortunate consequences do not occur in the future is to simply reject the approach of MCI in this case as well as in any future situation. The test proposed by BellSouth--that one should look at what MCI purchases from BellSouth--is clearer, fairer, and it can be better applied from a practical standpoint.

MCI raises a number of arguments, in support of its contention that BellSouth's approach should be rejected. A close analysis of these arguments, however, reveal them to be nothing more than a series of "red-herrings".

For example, MCI contends that if service recreation is determined by comparing the UNEs MCI purchases from BellSouth to the pertinent BellSouth service, then BellSouth will simply tariff every UNE or UNE-combination as a way to vitiate the availability of UNEs. (Tr. 103-04). First, it is noteworthy that MCI has insisted (as described above) that the subject case should be limited only to an inquiry as to the recreation of MegaLink® service, and that broader issues concerning the precedental result of the decision in this case should not be considered. Yet MCI takes precisely the opposite tact here and argues that if BellSouth wins, the resulting standard can be misused in the future.

This point aside, it is difficult to see how MCI's far-fetched contention could ever come about in the real world. First of all, there are thousands of potential network elements that can be purchased. The possibility that BellSouth would undertake to tariff every single one (or identify and tariff every potential combination) seems remote on its face. Such a strategy would put BellSouth's revenues from its retail services at great risk from BellSouth's own customers, who could seek ALEC certification merely to arbitrage the UNE rate. Moreover, the unlikeliness of this scenario is increased even more when one considers that BellSouth tariff offerings are still subject to review by this Commission. A grand scale effort by BellSouth to tariff every network element or element combination would, to put it mildly, be fairly easy to detect. It is inconceivable, even if BellSouth attempted to do such a thing, that this commission would allow it.

On the other hand, the much greater danger, as discussed above, is the likelihood that, if MCI's approach is accepted and given prospective effect, MCI will tailor its service offerings in the future to avoid their being defined as a recreated BellSouth service. Thus, MCI has identified a legitimate concern, that a carrier will tailor its offering to achieve a result that it desires in the context of future determinations of service recreation. However, the party that is most likely to take undue advantage of a decision in its favor in this case (and that will have the greatest ability to do so in the future) is MCI, not BellSouth.

In a related contention, Mr. Gillan argued that the FCC and the Eighth Circuit have opined that capabilities that can constitute services can also be UNEs. (Tr. 103). Even if Mr. Gillan is correct, his point proves nothing. The issue is not whether this occurrence is possible. The issue, instead, involves the instruction of this Commission to negotiate the price of UNE combinations that recreate existing BellSouth service. Thus, the issue is not a broad question

concerning the availability of UNEs that may also be services, but rather a specific question of the price for combinations of UNEs that, when combined, recreate an existing service.

Finally, perhaps the biggest red-herring of all is the notion that the United States' Supreme Court's recent decision in AT&T Corp. v. Iowa Utilities Board (1999 W.L. 24568) somehow affects the issues that the Commission must consider in this case. During his deposition, Mr. Gillan expressed the opinion that the Supreme Court decision likely would have no bearing on this case because the case involves "the question of what does the contract require and what does the Commission mean by recreate service and that framework doesn't necessarily change right now." (Ex. 5, p. 5). Nevertheless during the hearing, counsel for MCI made reference to MCI's intention to argue in its brief that the Supreme Court Order "may have some impact on this case in terms of reinforcing MCI's position." (Tr. 7-8). Although BellSouth obviously cannot anticipate the legal argument that MCI will make, any argument that the Supreme Court opinion supports MCI's position (or any given position) should be rejected for two reasons.

First, as set forth above, this is a case involving what is permissible under a particular contract between two parties. There is a clause in the Interconnection Agreement between MCI and BellSouth that allows the parties to renegotiate the contract in keeping with final court decisions. However, no party has invoked this clause, and in fact, it would be premature to do so. Prior to any such renegotiation, there is simply no way—legally, practically, or otherwise--that the Supreme Court opinion could go into effect to automatically change the terms of the Interconnection Agreement.

Second, and more to the point, the Supreme Court decision is not final, and even when it becomes final, more work remains to be done before it can be applied to a situation like the

instant one. The Supreme Court decision does appear to create increased opportunities for ALECs to combine UNEs. At the same time, the Court remanded for further consideration by the FCC the question of which UNEs must be made available. Thus, there is a possibility that the Supreme Court decision will be applied upon remand in a way that not only broadly renders moot recombination issues, but also does away with the specific question of what constitutes the recreation of MegaLink® service. For example, if the FCC determines that transport need not be offered as a UNE, MCI's ability to recreate MegaLink® service would likely no longer exist. Given this uncertainty as to how the Supreme Court decision will be dealt with on remand, neither party can plausibly argue that its position is reinforced by this decision.

For the reasons set forth above, this Commission should find that the subject DS1 channel and transport constitutes MegaLink® service. Upon making this finding this commission should instruct the parties to negotiate a price for this service.[5] Even if, however, this commission rules in favor of MCI, it should not order the refund that MCI has requested.

There is no question but that MCI has ordered a service and has received that service. MCI has no complaints about the way the service has functioned. Thus, applying the general standards under which this commission would consider whether a refund is appropriate, there is no basis for a refund in this case. Nevertheless, MCI has argued a new and rather unique basis for a refund, that the service it ordered, and which worked perfectly well, should have been made available to it at a cheaper price, i.e., that BellSouth should have allowed it to engage in

[5] Of course, the parties should also meet, as BellSouth has repeatedly requested MCI to do, to negotiate a general standard for determining service recreation.

pricing arbitrage in order to gain the exact same functionality at the much lower price that results from aggregating the individual UNE prices.

At the same time, MCI has steadfastly refused for almost nine months to implement the Commission's prior Order by attempting to negotiate what constitutes a recreated service. Had MCI agreed to this negotiation, there is at least a possibility that an accommodation between the parties could have been reached. Instead, MCI has insisted upon taking a hard line and refused to follow the Commission's Order. Now MCI requests that this dispute not only be resolved in its favor, but that BellSouth be forced to pay to it an amount that exceeds three million dollars because BellSouth did not acquiesce to MCI's original demand.

Clearly, this case is not a situation in which a refund is appropriate under the normal criteria (i.e., because the customer did not receive service, was not charged for the service at the tariffed rate, or had some legitimate complaint regarding the quality of service). Beyond this, MCI's conduct, specifically its recalcitrant rejection of BellSouth's attempt to work matters out, is such that equity simply does not militate in favor of granting MCI's unique demand for a refund.

CONCLUSION

Addressing the identified issue in this case--whether a DS1 channel and transport recreates MegaLink® service--can only leads to a conclusion in the affirmative. MCI attempts to avoid this conclusion by reconstituting the pertinent question, and arguing that it does not matter what UNEs it buys from BellSouth, but rather what it sells to its end-user customer. This approach, however, if applied in this case and given precedental value in the future, will give

MCI the mechanism to ensure that it will be able to use any combination of UNEs it wishes without ever having been deemed to recreate a BellSouth service. This result flies directly in the face of the Commission's prior Order and is contrary to the Federal Act. It should be rejected. Instead, this commission should determine that the DS1 channel and transport at issue recreate BellSouth's MegaLink® service and direct the parties to negotiate the price for this UNE combination.

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CERTIFICATE OF SERVICE

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I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail this 17th day of February, 1999 to the following:

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