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ORIGINAL

Ms. Blanca S. Bayó
Director, Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Complaint of MCImetro for Enforcement of its
Interconnection Agreement with BellSouth -Docket No.
981121-TP

Dear Ms. Bayó:

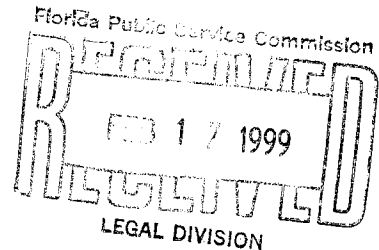
Enclosed for filing on behalf of MCImetro Access
Transmission Services, LLC are the original and fifteen copies of
its Post-Hearing Brief together with a diskette.

By copy of this letter, this document has been furnished to
the parties on the attached service list.

Very truly yours,

Richard D. Melson

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for arbitration)
concerning complaint of MCImetro)
Access Transmission Services, LLC) Docket No. 981121-TP
for enforcement of interconnection)
agreement with BellSouth) Filed: February 17, 1999
Telecommunications, Inc.)
_____)

MCIMETRO'S POST-HEARING BRIEF

MCImetro Access Transmission Services, LLC (MCImetro)
hereby files its post-hearing brief.

EXECUTIVE SUMMARY

This case involves a dispute between MCImetro and BellSouth regarding the price of a specific unbundled network element (UNE) combination that MCImetro has been attempting to purchase from BellSouth since November, 1997. That UNE combination consists of a DS1 local loop and DS1 dedicated transport (DS1 combo) terminated at an MCImetro local switch. The DS1 combo provides a high speed digital local loop between MCImetro's local switch and the premises of an MCImetro business customer. The DS1 combo is used in conjunction with MCImetro's local switch to provide full-featured competitive local exchange service.

The question the Commission must decide is whether MCImetro's use of a DS1 combo in this manner "recreates" an

existing BellSouth retail service within the meaning of Order PSC-98-0810-FOF-TP (the "Contract Interpretation Order").

In the Contract Interpretation Order, the Commission ruled that:

(1) BellSouth has a contractual obligation to provide UNEs to MCI metro on a combined basis.

(2) If a particular UNE combination does not "recreate" an existing BellSouth retail service, the Interconnection Agreement sets the price of the UNE combination equal to the sum of the prices for the individual UNEs, with no additional charges.¹

(MCI metro believes this is the rule that governs the DS1 combo at issue in this case.)

(3) If the UNE combination does "recreate" an existing BellSouth retail service, the Interconnection Agreement does not set the price of the UNE combination, which is subject to further negotiation between MCI metro and BellSouth.² (BellSouth asserts this is the rule that governs the DS1 combo at issue in this case.)

(4) A loop and port combination alone does not recreate BellSouth's existing local exchange service.

¹ There is a qualification to this general rule -- not applicable in this case -- that if the summation results in a duplication of charges for functions or activities that MCI metro does not need when the elements are combined, the parties should negotiate charges that eliminate the duplication. Order No. PSC-98-0810-FOF-TP at 26; Order No. PSC-97-0298-FOF-TP at 26-28, 29.

² MCI metro respectfully disagrees with the Commission's conclusion that the Interconnection Agreement makes a distinction between combinations which do or do not "recreate" a BellSouth service. For purposes of this docket, MCI metro is not challenging that ruling, although it reserves its right to do so at the appropriate time in an appropriate forum.

In determining whether a specific UNE combination "recreates" a BellSouth service within the meaning of the Contract Interpretation Order, the Commission must focus on the service provided by MCImetro to its end use customer. If that service is provided using a combination of BellSouth UNEs, and only BellSouth UNEs, then a question of possible recreation exists. However, if the service is provided using a combination of BellSouth UNEs, plus facilities provided by MCImetro, then no question of possible recreation ever arises.

In this case, MCImetro is seeking to provide a full-featured business local exchange service using a DS1 combo purchased from BellSouth (i.e. a high capacity loop) together with switching and switch-based features provided by MCImetro's local switch. Although the relative significance of the facilities provided by MCImetro should not be a factor in any recreation analysis, in this situation the switching facilities are a major component of the finished service provided to MCImetro's customer and any *de minimis* test that BellSouth might advocate would not apply.

BellSouth, on the other hand, asks the Commission to wear blinders and to ignore the facilities provided by MCImetro and the service received by MCImetro's customer. BellSouth urges the Commission to look only to see if the DS1 combo, standing alone, could be purchased out of some BellSouth retail tariff -- in this case as MegaLink private line service.

MCImetro acknowledged that *if* it were using a DS1 combo to offer its customers a private line service, then comparison to a

BellSouth's MegaLink service using exactly the same BellSouth facilities would be required under the Contract Interpretation Order. However, MCImetro is not offering a private line service like MegaLink. By definition, a private line service connects two premises of the same customer, or of a customer and its affiliate. MCImetro is offering a switch-based local exchange service that can be used to call any telephone in the world. It is the antithesis of a private line service.

BellSouth's suggested reading of the Contract Interpretation Order is flawed. It ignores (1) the local exchange service pricing issue that the Commission's recreation decision was attempting to address; (2) the policy reasons underlying the recreation decision; and (3) the language and logic of that decision.

BellSouth's position that MCImetro must purchase resold MegaLink service to provide the high speed loop to its customer is wrong for another reason. Under the applicable tariffs governing MegaLink, it cannot lawfully be used as part of a carrier-provided switched service.

The conclusion that MCImetro's purchase of a DS1 combo for use in conjunction with its own switching facilities is properly classified and priced as a UNE combination, and not as a resold service, finds further support in the recent U.S. Supreme Court decision in AT&T Corp. v. Iowa Utilities Board, 1999 WL 24568 (U.S. Jan. 25, 1999).

Once the Commission determines that MCImetro's use of a DS1 combo in the provisioning of a competitive local exchange

service does not recreate any BellSouth service, the Commission must address the refund issue.³ MCImetro has been attempting to purchase these high speed digital loop facilities under its Interconnection Agreement with BellSouth since November, 1997 by submitting orders for such elements under the Access Service Request (ASR) ordering process provided in that agreement.⁴ BellSouth has refused to provide this combination at the "sum of the elements" price called for in the Interconnection Agreement, and instead has been charging MCImetro the access tariff price for a T-1 circuit which consists of exactly the same elements and provides exactly the same functionality, but at a higher price. The Commission should order BellSouth to refund the difference between the price it has charged for these facilities under the access tariff, and the price it should have been charging for these facilities under the Interconnection Agreement, retroactive to November, 1997.

SPECIFIC 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 as MegaLink? If not, what action, if any, should the Commission take?

³Although BellSouth contends that no refund would be due, it concedes that the Commission has the jurisdiction to make that determination.

⁴The Commission has specifically confirmed that the Interconnection Agreement allows MCImetro to use ASRs to place orders for unbundled network elements. Order No. PSC-98-1484-FOF-TP at 32-33.

MCImetro: No. This combination is used in conjunction with MCImetro's local switch to provide competitive local service and does not recreate any BellSouth retail service within the meaning of Order No. PSC-98-0810-FOF-TP. The Commission should require BellSouth to: (a) provide this UNE combination to MCImetro at a price equal to the sum of the prices for the individual network elements, and (b) refund all overcharges with respect to these types of facilities since November, 1997.

I. Background

Before addressing the substance of the recreation issue, MCImetro believes it is helpful to identify the type of facilities at issue and to summarize the history of the parties' dispute.

A. The Facilities At Issue

A DS1 loop is a four-wire loop facility and associated electronics that connects a customer's premises to the customer's serving wire center. A DS1 loop provides 1.544 megabits per second of digital bandwidth, which is the equivalent of 24 voice grade channels. (Martinez, Tr. 42; Milner, Tr. 121) DS1 dedicated transport is a four-wire interoffice facility and associated electronics that provide a 1.544 MBPS digital connection between the customer's serving wire center and a point of interconnection at MCImetro's local switch. (Martinez, Tr. 42; Milner, Tr. 121) Both the DS1 loop and the DS1 transport are available to MCImetro as unbundled

network elements (UNEs) under its Interconnection Agreement with BellSouth. (Martinez, Tr. 42; Exhibit 3, Sked. RM-1, Agreement §§ 2.7, 4.1.1, 10.1)

The DS1 loop/DS1 dedicated transport combination (DS1 combo) at issue in this case is simply a combination of these two elements to form a continuous 1.544 MBPS transmission path between a customer location and the point of interconnection at MCImetro's local switch.⁵ (Martinez, Tr. 43) In the words of BellSouth witness Milner, it is a high capacity digital pipeline. (Milner, Tr. 124)

The way it is used in this case, the DS1 combo is simply a high speed digital loop that MCImetro uses to connect its business customer to its local switch, so that MCImetro can provide the customer a full-featured competitive local exchange service. This service includes dial-tone and local calling provided by MCImetro's switch, vertical features provided by MCImetro's switch, and access provided by MCImetro's switch to DA, operator services, 911, and interexchange carriers.

(Martinez, Tr. 44) The DS1 combo is not offered as a stand-alone service; it is an integral part of the larger competitive local service. (Martinez, Tr. 54)

⁵A DS1 combo could also be used to connect other locations. However the issue in this proceeding relates only to DS1 combos that connect a local customer premises to an MCImetro local switch which is used to provide competitive local service.

The facilities comprising the DS1 combo are not unique. The record reflects at least four different ways that BellSouth can provide exactly the same facilities and functionality: (1) as separate DS1 loop facilities and DS1 local transport facilities under the Interconnection Agreement, delivered to an MCImetro collocation cage at which MCImetro could perform a cross-connection; (2) as an end-to-end T-1 facility under the access tariff; (3) as a MegaLink service under BellSouth's private line tariff;⁶ or (4) as a DS1 combo under the Interconnection Agreement, with BellSouth performing the combination. (Hendrix, Tr. 175-177)

Depending on the tariff or contract provision which applies in a given situation, the price for the same facilities varies dramatically. For example, a T-1 circuit under the access tariff costs approximately twice as much as the same facilities purchased as a DS1 combo under the Interconnection Agreement at cost-based UNE prices established under the Telecommunication Act of 1996. (Martinez, Tr. 45) If MCImetro chose to purchase the DS1 loop and DS1 transport separately and combine them itself, it would incur the additional cost of a collocation cage which is unnecessary if BellSouth provides the elements on a combined basis. (See Hendrix, Tr. 176, 177)

⁶As discussed later, although MegaLink provides the same facilities and functionality, tariff restrictions would preclude its use in the customer-to-carrier-switch application involved in this case.

The Commission has previously ruled in the Contract Interpretation Order (Order No. PSC-98-0810-FOF-TP) that BellSouth is contractually obligated to provide UNE combinations to MCImetro, whether or not the elements are already combined at the time of MCImetro's order. (Order at 24; Martinez, Tr. 46) BellSouth acknowledges this obligation. (Hendrix, Tr. 177) The only issue is price.

B. History of the Parties' Dispute

The Contract Interpretation Order held that the Interconnection Agreement establishes a price for UNE combinations which do not recreate a BellSouth retail service. That price is the sum of the prices for the individual UNES included in the combination, with no additional charge.⁷ (Order at 25) It also held that where a UNE combination does recreate an existing BellSouth retail service, the Interconnection Agreement does not specify a price and the parties are left to further negotiations.⁸ (Order at 25-26) Finally, the Order

⁷ As indicated in the Executive Summary, there is a qualification to this general rule -- not applicable in this case -- that if the summation results in a duplication of charges for functions or activities that MCImetro does not need when the elements are combined, the parties should negotiate charges that eliminate the duplication. Order No. PSC-98-0810-FOF-TP at 26; Order No. PSC-97-0298-FOF-TP at 26-28, 29.

⁸ As indicated in the Executive Summary, MCImetro respectfully disagrees with the Commission's conclusion that the Interconnection Agreement makes a distinction between combinations which do or do not "recreate" a BellSouth service. For purposes of this docket, MCImetro is not challenging that ruling, although it reserves its right to do so at the appropriate time in an appropriate forum.

stated that a loop/port combination alone does not recreate BellSouth's local exchange service, but left the parties to negotiate what does or does not constitute recreation in other instances. (Order at 59)

MCImetro has been attempting to purchase DS1 combos out of its Interconnection Agreement with BellSouth since November, 1997. BellSouth initially stated that it would accept orders for such combinations, but then quickly changed its position and said that because the DS1 combo "recreated" a BellSouth service, MCImetro would either have to buy the elements separately and combine them itself in an MCImetro collocation space, or buy and resell MegaLink service at a wholesale discount. (Martinez, Tr. 44-45, 56-57; see testimony of William Stacy in Docket No. 981121-TP, reproduced at Exhibit 3, Sked. RM-10) MCImetro disagreed with both parts of BellSouth's position and submitted orders for this DS1 combo using the Access Service Request method permitted under its Interconnection Agreement. First, MCImetro disagreed that BellSouth's contract obligation to provide UNE combinations depended on whether or not the combination "recreated" a BellSouth service. Second, MCI disagreed that the DS1 combo at issue would recreate a BellSouth service in any event.

In the Contract Interpretation Order subsequently issued on June 12, 1998, the Commission confirmed that BellSouth was

obligated to provide UNE combinations to MCImetro, whether or not the combinations recreated a BellSouth retail service.

(Order at 24) The only issue was price, and then only if a specific UNE combination "recreated" a BellSouth retail service within the meaning of the Order. (Order at 25)

In reliance on this Order, MCImetro renewed its request that BellSouth provide DS1 combos under the Interconnection Agreement at the price the Commission had determined was applicable to combinations that do not recreate a BellSouth service, namely the sum of the individual UNE prices. In a series of letters and a meeting, BellSouth maintained that the DS1 combo "recreated" a BellSouth service and the parties were therefore required to negotiate a price. MCImetro maintained that the DS1 combo did not recreate a BellSouth service and the Interconnection Agreement therefore fixed the price. (Martinez, Tr. 46-49; see correspondence at Exhibit 3, Skeds. RM-3 to RM-9 and Exhibit 9, Skeds. JDH-1 to JDH-7) By September 14, 1998, it became clear to MCImetro that an impasse had been reached on the recreation/pricing issue, and MCImetro filed its complaint in this docket.⁹ (Martinez, Tr. 49)

⁹ Part of the difficulty in explaining the history of the parties' dispute stems from the fact that BellSouth's position is continually evolving. For example, BellSouth first took the position that it was not obligated to combine UNEs that recreate a BellSouth service, and MCImetro must either do the combining itself or resell a comparable service purchased at a wholesale discount. (See Exhibit 3, Sked. RM-11). BellSouth subsequently conceded that it was obligated to provide requested UNE combinations, but contended that

**II. MCI Is Not Using the DS1 Combo
to Recreate Any BellSouth Service**

The use of a DS1 combo as a high speed digital loop to connect an MCImetro customer to an MCImetro local switch as part of the provision of full-featured, switch-based local exchange service does not recreate any BellSouth retail service within the meaning of the Contract Interpretation Order.

A. In Determining Whether MCImetro "Recreates" A BellSouth Service, The Commission Must Consider the Service Provided to the End-Use Customer

In determining whether a specific UNE combination "recreates" a BellSouth service within the meaning of the Contract Interpretation Order, the Commission must focus on the service being provided by MCImetro to its end-use customer. If that service is provided using a combination of BellSouth UNEs, and only BellSouth UNEs, then a question of possible recreation exists. (See Gillan, Tr. 106) However, if that service is provided using a combination of BellSouth UNEs plus facilities provided by MCImetro, then no question of possible recreation ever arises. As Mr. Gillan aptly stated:

In fact, the loop/transport combination does not even *qualify* as a candidate to be a "recreated service" because the combination does not satisfy the Commission's threshold criteria that the combination be sufficient, in and of itself, to provide the service

the Interconnection Agreement did not provide pricing for any combinations (See Order PSC-98-0810-FOF-TP at 20, 23), and it refused to provide the combinations until the pricing issue was resolved.

being "recreated." As shown by the Commission in the Combinations Order, even this threshold criteria can only be satisfied if the retail service is provided entirely using network elements purchased from BellSouth.

(Tr. 89; emphasis in original)

In this case, MCImetro is seeking to provide a competitive local exchange service to business customers using the DS1 combo to provide a high capacity local loop to connect the customer to MCImetro's switch, from which the whole array of local services and features are provided. (Martinez, Tr. 43-44) Because MCImetro is using the functionality provided by its local switch as a major component of the finished service provided to the customer, there is no basis to claim that the local service provided by MCImetro "recreates" BellSouth's local service. From the customer's point of view, it is buying local service -- it is not buying one piece part consisting of the local loop and another piece part consisting of switching and switch-based features and functions. (Martinez, Tr. 54)

It is also important to recall that in the Contract Interpretation Order, the Commission held that a loop plus switching is not sufficient to recreate BellSouth's local exchange service. Here, where MCImetro is purchasing the equivalent of a loop, but is providing its own switching, the recreation claim is even more deficient. (Gillan, Tr. 91-92) In

addition, the use of a BellSouth UNE combination in conjunction with elements provided by MCImetro (in this case switching) is precisely the type of arrangement that BellSouth previously said was required in order to avoid recreating a BellSouth service. (Gillan, Tr. 90, 97-101)

Recognizing that it cannot claim that MCImetro is using a solely a UNE combination to recreate BellSouth's local exchange service, BellSouth has attempted to redefine the question to be addressed. BellSouth now says the Commission should ignore the service being provided by MCImetro and purchased by the customer. Instead, it should focus only on the UNEs purchased from BellSouth and determine whether those UNEs, standing alone, recreate some BellSouth service. In this case, BellSouth contends, they recreate MegaLink.

But what is MegaLink? It is a private line service designed to carry traffic between two fixed locations of a single customer. It has nothing in common with the full-featured local service that the customer is purchasing from MCImetro. (Martinez, Tr. 53)

As Mr. Martinez readily acknowledged, if MCImetro were purchasing a DS1 combo for the purpose of providing a private line service between two locations of the same customer, then there would be a question under the Contract Interpretation Order as to whether BellSouth's MegaLink service was being

recreated. (Martinez, Tr. 54, 79-83) However, MCImetro is not providing a private line service between two customer locations, it is providing local exchange service. Thus the question of recreation never arises.

BellSouth appears to claim that unless the Commission ignores the service provided by MCImetro, BellSouth and the Commission will always have to depend on information from MCImetro as to the finished service MCImetro is providing in order to determine whether or not a specific UNE combination recreates a BellSouth service. BellSouth misses the point. The question is whether MCImetro is recreating a BellSouth service. By definition, one *must* know what MCImetro is providing in order to answer that question. (Gillan, Tr. 108)

Moreover, any time that a UNE combination is connected to an MCImetro switch, MCImetro is adding switching functionality, and no recreation issue can arise. Because MCImetro's order for a DS1 combo always specifies the two end points of the transport link (the so-called "A" and "Z" locations), BellSouth will always know from the face of the order whether or not one end is connected to an MCImetro switch. (Martinez, Tr. 63-64, 68-70) If so, no recreation can exist.

One significant danger with BellSouth's position that the Commission should look only to the UNEs provided by BellSouth and determine if they also comprise a retail service is that

BellSouth could evade its obligation to provide network element combinations simply by offering "retail" services functionally equivalent to any requested combination. (Gillan, Tr. 102-103) This concern was recognized by Commissioner Clark, and her concern echoed that previously expressed by both the FCC and the 8th Circuit Court of Appeal. (See Gillan, Tr. 102-104, 108-109) There simply is no basis in the Commission's prior orders, or in logic, to adopt the test for recreation suggested by BellSouth in this case.

B. Even Under BellSouth's Method of Analysis, MCImetro Is Not Recreating MegaLink Service

Assuming for the sake of argument that the Commission accepts BellSouth's invitation to wear blinders, and looks only at the UNEs provided by BellSouth, a DS1 combo connecting a customer premises to MCImetro's switch still would not recreate any BellSouth retail service. Why? Because BellSouth does not offer a retail service that permits a point-to-point connection between a customer premises and the switch of another carrier.

MegaLink is a private line service and as such is subject to all of the terms and conditions in BellSouth's private line tariff. (Milner, Tr. 144; Exhibit 6, Sked. WKM-1, Tariff Section B7.1.1.E) Although Mr. Milner's prefiled testimony states that the tariffs allow the transport functionality of MegaLink to be used in conjunction with either local or toll switches (Milner,

Tr. 129), Mr. Milner acknowledged that the terms "local switch" and "toll switch" do not appear in the MegaLink tariff. (Milner, Tr. 143) Mr. Milner bases his claim regarding the permissible uses of MegaLink on two provisions of the MegaLink tariff, neither of which supports his testimony. To the contrary, the tariffs *preclude* a customer or carrier using MegaLink service as part of a larger switch-based service.

First, Mr. Milner cites to Section B7.1.1.A which says that MegaLink service is furnished "for private line intraLATA communication by the company." (See Ex. 6, Sked. WKM-1) Mr. Milner then construes "intraLATA" to refer to both switched local traffic and switched intraLATA traffic and concludes that MegaLink can therefore be connected a local or toll switch. In doing so, however, Mr. Milner completely ignores the "private line" limitation in this provision. Yes, MegaLink is available for both local and intraLATA communications -- but only "private line" intraLATA communications, not switched intraLATA communications. Under the myriad of provisions in Section B.2 of the Private Line Tariff, it is clear that "private line" communications are point-to-point communications between two locations of the same customer, or between the location of a customer and its affiliate. (See Milner, Tr. 142-148; Exhibit 7, Sections B2.1.1.A, B2.2.3.B, B2.5) Thus private line service is

the antithesis of the switched service which Mr. Milner claims that MegaLink can be used to provide.

Second, Mr. Milner asserts that MCImetro's local switch is a "customer provided communications system" to which MegaLink can be connected pursuant to Section B7.1.2.D of the MegaLink tariff. (Milner, Tr. 143-144) That contention is also incorrect. The applicable definition of "communications systems" in Section B2.5 of the private line tariff states:

The term 'Communications Systems' when used in connection with communications systems provided by an Other Carrier (OC), denotes channels and other facilities furnished by the OC **for private line services** as such OC is authorized by the Federal Communications Commission or Public Service Commission to provide.

(Emphasis added.)

Under these provisions, MegaLink can be connected to a "private line" network provided by MCImetro, but cannot be connected to a local switch used to provide non-private line services. (See Tr. 152-154)

C. A Finding of "No Recreation" Is Consistent With the Policy Concerns the Commission Was Addressing In The Contract Interpretation Order

A determination that no BellSouth service is recreated when MCImetro uses a DS1 combo as a local loop is consistent with the policy concerns the Commission was addressing in the Contract Interpretation Order. That order stated:

The parties differ in their view of which network elements, when combined, recreate a BellSouth retail service. ***We believe that BellSouth's concern is over the recreation of its basic local service.***

(Order, page 50)

It was in this context that the Commission expressed three concerns with allowing MCImetro to purchase from BellSouth on a combined basis all the UNEs necessary to provide local exchange service (an entry strategy which has been referred to by proponents as "UNE platform" and by opponents as "sham unbundling"):

(a) such combination would allow MCImetro to obtain a cost-based UNE price, rather than an avoided cost resale price, when it was not using any of its own facilities in the provision of service to the end-use customer (Order at 25-26);

(b) such combination would allow the MCImetro to avoid the joint marketing restriction which applied under Section 271(e)(1) of the Act to services provided via resale, but not to services provided using unbundled network elements (Order at 26); and

(c) such combination would allow the MCImetro to obtain access charge revenues to which it would not be entitled if it were reselling under Section 251(c)(4) of the Act (Order at 26).

None of these three concerns is involved when MCImetro purchases a DS1 combo to use as the local loop portion of an MCImetro switch-based service. (Gillan, Tr. 101-102)

Pricing. The UNE vs. resale pricing concern arises only in a situation where the service received by the end-use customer is provided using only network elements obtained from BellSouth. In this case, where the retail service involves the use of MCImetro's local switch, there is no doubt that MCImetro is entitled to a cost-based UNE price under the Act for the elements purchased from BellSouth.

Access Charges. The concern regarding entitlement to access charges is likewise inapplicable where MCImetro is providing switching and switch-based features using its own local switch. In this situation, it is MCImetro that is providing the switch intelligence necessary to route outgoing long distance calls to the customer's carrier of choice and to route incoming long distance calls to the customer. The fact that MCImetro is in effect leasing the local loop from BellSouth does not affect MCImetro's entitlement to access charges in this situation.

Joint Marketing Restriction. The purpose of the joint marketing restriction (which expired on February 8, 1999) was to prevent a carrier from bundling resold local service with long distance service. Again, where the local service is provided

using a carrier's own switching equipment, this now-defunct restriction simply has no applicability.

III. Impact of the Recent Supreme Court Decision

The United States Supreme Court's recent decision in AT&T Corp. v. Iowa Utilities Board, 1999 WL 24568 (U.S. Jan. 25, 1999) lends further weight to MCImetro's position. The Supreme Court upheld the FCC's "all elements rule," which permits ALECs to lease UNEs regardless of whether the ALEC's service is provided in part over its own facilities. Id., 1999 WL 24568 at *10. Thus, even when an ALEC provides service *exclusively* over UNEs leased from an ILEC, the ALEC is not deemed to be providing a resale service.

The Supreme Court also upheld FCC Rule 315(b), which provides that "an incumbent LEC shall not separate requested network elements that the incumbent LEC currently provides." The Court noted that the collective effect of this rule, the rules requiring TELRIC pricing, and the "all elements rule" is that "a competitor can lease a complete, preassembled network at (allegedly very low) cost-based rates." Iowa Util. Board, 1999 WL 24568 at *10. The Court concluded that Rule 315(b) reasonably interpreted the Act. The Court explained: "It is true that Rule 315(b) could allow entrants access to an entire preassembled network. In the absence of Rule 315(b), however,

incumbents could impose wasteful costs on even those carriers who requested less than the whole network." Id., 1999 WL 24568 at *11.

The UNEs to which ILECs must provide access will be determined by the FCC on remand. The Supreme Court vacated FCC Rule 319, which provided a list of seven network elements that ILECs must unbundle and offer to competitors. The Court ordered the FCC to re-examine Rule 319 consistent with the "necessary and impair" factors in Section 251(d)(2) of the Act. Iowa Util. Board, 1999 WL 24568 at *8-10. The Court did not suggest that applying a somewhat stricter standard would mean that any elements included in Rule 319 should not be unbundled. In any event, BellSouth plainly must provide MCImetro access to the loop and transport elements at issue here. Because those elements are in the Section 271 checklist, and BellSouth seeks to meet the checklist, nondiscriminatory access will be required. Further, BellSouth has a contractual obligation to provide access to the loop and transport elements. Interconnection Agreement, Attachment III, §§ 2.1, 2.7.

Iowa Utilities Board clearly affirms that ALECs are entitled to lease combinations of any available UNEs at cost-based rates. The argument that combinations that supposedly recreate existing BellSouth services should be accorded different treatment has been put to rest once and for all.

Although the Supreme Court's decision undermines the "recreation" exception to cost-based pricing in the Contract Interpretation Order, the Commission need not address that issue in this case. Here, it will suffice for the Commission to conclude that BellSouth is attempting to "impose wasteful costs" on MCImetro, which not only has "requested less than the whole network," but also has used part of its own network to serve its customers.

IV. Issues the Commission Need Not Consider

MCI expects that BellSouth will attempt to cloud the primary issue in this case by arguing matters that the Commission does not need to decide at this juncture.

MCImetro and BellSouth have an on-going disagreement about the scope of the requirement in the Contract Interpretation Order which directed the parties to negotiate the recreation issue. In this regard, the Order states:

...we also conclude that it is appropriate for us to leave it to the parties to negotiate what precisely does constitute the recreation of a BellSouth retail service. . . .We choose, however, to impose no restrictions on these negotiations apart from our conclusion that something more than a loop and local switching element is necessary.

* * *

ORDERED that the parties to this proceeding shall be required to negotiate on their own initiative

what competitive local telecommunications services provisioned by means of unbundled access, if any, constitute the recreation of the incumbent local exchange carrier's retail service.

(Order at 59, 69; emphasis added.)

BellSouth interprets these provisions to require the parties to negotiate a global standard for addressing the recreation issue. Mr. Hendrix suggests that MCImetro has violated this requirement by refusing to negotiate the issue on global basis. (Hendrix, Tr. 159-163, 175)

MCImetro interprets the Order to require only case-by-case negotiations, whenever it wants to provide a "competitive local telecommunications service" solely "by means of unbundled network elements." Since this situation has never arisen, MCImetro has no current duty to negotiate on a global basis. This is particularly true where (1) the competitive local telecommunications service MCImetro is providing does not rely solely on BellSouth's unbundled network elements, and (2) attempting to negotiate a global resolution would unnecessarily delay MCImetro obtaining the one UNE combination which it requires to do business. (Martinez, Tr. 48, 62)

There is no issue before the Commission in this docket regarding the scope of this negotiation obligation. The issue is before the Commission in Docket No. 981121-TP, where the parties were unable to agree on contract language to implement the

decisions in the Contract Interpretation Order. The parties therefore submitted competing agreements reflecting their respective understanding of the order, and the Commission will have to determine which of the competing agreements accurately reflects its rulings. Given the existence of that issue in Docket 981121-TP, it is neither necessary or appropriate for the Commission to address it here.

Moreover, it is not necessary for the Commission to attempt in this docket to fashion any global rule for determining recreation issues. The sole question before the Commission in this docket relates to a single combination -- DS1 loop and DS1 transport --used in a single application -- to provide a local loop connection to an MCI metro switch-based service. The Commission should decline any invitation by BellSouth to expand the scope of this docket.

**V. The Commission Should Order A Refund of
Overcharges Since November, 1997**

If the Commission determines that MCI's use of a DS1 combo as a component of local exchange service does not recreate a BellSouth service, BellSouth should be ordered:

(1) to provide the DS1 combo on a going-forward basis at the "sum of the UNE prices" contained in the Interconnection Agreement; and

(2) to refund the difference between the access tariff prices for T-1 circuits that BellSouth has been charging MCImetro since November, 1997 and the Interconnection Agreement prices it should have been charging for the functionally equivalent DS1 combo that BellSouth has refused to provide.

Under the Act, the Commission has jurisdiction to enforce arbitrated interconnection agreements. In the Contract Interpretation Order, the Commission ordered that provisions of the agreement relating to the pricing of combinations of unbundled network elements "are to be construed" as set forth in the order. (Order at 68) The Interconnection Agreement has had the same pricing rule since its execution, and the Commission's construction of that provision relates back to the date of execution. If the Commission now confirms that BellSouth has misapplied that pricing rule, it has jurisdiction to order refunds back to the date of contract inception -- or in this case the later date in November 1997 when MCImetro first attempted to order the DS1 combo at issue. BellSouth's counsel agreed that the Commission has the legal authority to order refunds. (Tr. 182)

Mr. Hendrix' opposition to a refund appears to be based on his understanding that MCImetro did not initially attempt to order DS1 combos out of the Interconnection Agreement, but knowingly and voluntarily ordered T-1 circuits out of the access

tariff. (See Hendrix, Tr. 177-180) That understanding is incorrect. As Mr. Martinez testified, MCImetro attempted to order these circuits as DS1 combos and BellSouth refused.

(Martinez, Tr. 44-45) Mr. Martinez' version of the events is supported by the testimony of Mr. Stacy in Docket No. 981121-TP:

Q. (By Mr. Melson) While we're on that topic with the offnet T-1s, would you agree with me that MCI, beginning in November of 1997, sought to purchase a DS-1 loop and DS-1 local transport from BellSouth to provide the same functionality that is provided by a T-1?

A. Subject to check on the date, I know there was such a request late 1997 from MCImetro.

Q. And is it also your understanding that it was MCI's position that under the Interconnection Agreement, BellSouth was obligated to do the combination of that DS-1 loop and DS-1 local transport?

A. I understand -- yes, that that was MCImetro's position, yes.

Q. And it was BellSouth's position, was it not, that if they were provided on a combined basis, that that DS-1 loop and DS-1 local transport, in BellSouth's view, recreated a Megalink service and therefore was available only on a resale basis and not as a UNE combination?

A. Yes, that's -- in general, that's BellSouth's view.

Q. And is it as a result of BellSouth's refusal to provide that combination at the UNE price that MCI was led to order the functionality as a T-1?

A. No. It's a result of MCI's refusal to obtain collocation space in the offices and combine the two unbundled network elements.

Exhibit 3 at RM-10. Based on the testimony of Mr. Martinez and Mr. Stacy, it is clear that MCImetro did attempt to order these facilities as DS1 combos from the Interconnection Agreement, and it was only BellSouth's refusal to provide the requested combination that has led to them being provisioned, in the interim, as T-1 circuits under the access tariff. In these circumstances, it is fully appropriate to order a refund of the difference between the amount which has been paid, and the amount which would have been paid if BellSouth had provisioned the elements as requested and as required by the Interconnection Agreement.

RESPECTFULLY SUBMITTED this 17th day of February, 1999.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to the following parties by hand delivery(*) or U.S. Mail this 17th day of February, 1999.

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