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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 Response to BellSouth's Motion for Reconsideration.

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

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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: June 23, 1999
 Telecommunications, Inc.)
 _____)

MCIMETRO'S RESPONSE TO BELLSOUTH'S MOTION FOR RECONSIDERATION

MCImetro Access Transmission Services, LLC ("MCImetro") hereby files its response in opposition to the motion of BellSouth Telecommunications, Inc. ("BellSouth") for reconsideration of Order No. PSC-99-1089-FOF-TP ("UNE Combo Order").

STANDARD OF REVIEW

The purpose of a motion for reconsideration is to bring to the attention of the tribunal some point of fact or law that it overlooked or failed to consider when it rendered its decision. Diamond Cab Co. of Miami v. King, 146 So. 2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). As the court in State v. Green, 106 So. 2d 817, 818 (Fla. 1st DCA 1958) said with reference to petitions for rehearing:

The sole and only purpose of a petition for rehearing is to call to the attention of the court some fact, precedent, or rule of law which the court has overlooked in rendering its decision. . . .

It is not a compliment to the intelligence, the competence or the industry of the court for it to be told in each case which it decides that it has "overlooked and failed to consider" from three to twenty matters which, had they been given proper weight, would have necessitated a different decision.

When measured against these standards, BellSouth's Motion for Reconsideration ("Motion") must be denied. BellSouth has failed to show that there are any matters of record or points of law that the Commission overlooked or failed to consider in rendering the UNE Combo Order in this case. Instead, BellSouth rehashes a point that it made in its post-hearing brief, and indeed in its Motion quotes a lengthy portion of the argument from its brief, as if to suggest that perhaps the Commission neglected to read it the first time. As discussed below, the Commission plainly was correct in rejecting BellSouth's argument. BellSouth's Motion should be denied.

ARGUMENT AND CITATION OF AUTHORITY

I. Introduction

The sole basis for BellSouth's Motion is its contention that the Commission overlooked one of its arguments for the proposition that its MegaLink private line service could be used to connect a customer to the public switched network. In its pre-filed testimony and at the hearing, BellSouth argued that by its terms the MegaLink tariff was not limited to private line service. BellSouth's testimony in this regard was discredited

at the hearing and squarely rejected by the Commission in its UNE Combo Order. BellSouth bases its Motion on a fallback argument it raised for the first time in its post-hearing brief, that a reseller would not be limited by the tariff's terms and conditions and therefore could use MegaLink in conjunction with local switching. BellSouth's Motion ignores portions of the Commission's UNE Combo Order that refute that argument and misconstrues the Commission's arbitration order (Order No. PSC-96-1579-FOF-TP) ("Arbitration Order") and its order interpreting MCImetro's Interconnection Agreement (Order No. PSC-98-0810-FOF-TP) ("Contract Interpretation Order").

II. MCImetro's Use of Its Own Switching Is Dispositive of the Recreation Issue

Throughout this proceeding, MCImetro has argued that a DS1 loop-transport combination ("DS1 Combo") does not recreate BellSouth's MegaLink service because MCImetro would use the combination in conjunction with its own Class 5 switches. In its UNE Combo Order, the Commission agreed. As it stated: "We need to consider both the nature of the incumbent's tariffed retail service as well as the competitor's intended use of the requested UNE combination to determine whether the one recreates the other." (UNE Combo Order, p. 4.) The Commission continued:

In this case, one of the major differences between MCI's intended use of the DS1 combination and BellSouth's MegaLink service is that MCI will use it

with its own Class 5 local switch to provide a full range of local telecommunications to its customers.

(Id.) The Commission noted that BellSouth previously had contended that competitors should be permitted to combine BellSouth provided elements with their own elements to create their own services. The Commission cited with approval MCImetro testimony noting that MCImetro was using the DS1 loop-transport combination in exactly the way that BellSouth previously had stated was appropriate. (Id. at 4-5.) The Commission concluded:

It is the fact that MCI will connect BellSouth's DS1 loop and DS1 dedicated transport to its own facilities to provide telecommunications service. It cannot be said from the evidence in the record that MCI will provide telecommunications service to its customers entirely from a combination of BellSouth's network elements that recreate a retail service.

(Id. at 5.)

The Commission's analysis undercuts BellSouth assertion that the Commission's decision was "premised largely, if not entirely, upon the language of the tariff." (Motion, p. 1.) To the contrary, the Commission considered dispositive the fact that MCImetro is providing service in part using its own facilities. Simply put, even if BellSouth's tortured arguments concerning its MegaLink tariff were correct (which they are not, as discussed below), they would not affect the outcome of this case. BellSouth's Motion does not even address the Commission's independent ground for decision based on MCImetro's use of its own facilities. BellSouth's Motion should be rejected for that reason alone.

III. The Commission Correctly Decided the MegaLink Tariff Issue

A. Introduction

In its pre-trial testimony and at the hearing, BellSouth took the position that its MegaLink tariff permitted a competitor to connect a MegaLink extended loop to the public switched network. In the UNE Combo Order, the Commission rejected the testimony of BellSouth witness Milner to that effect. BellSouth argues in passing that the Commission should have accepted Mr. Milner's testimony because "[t]here was no other evidence on point."¹ (Motion, p. 4.) But in fact Mr. Milner's testimony concerning the MegaLink tariff was shattered during cross-examination. (See Transcript, pp 138-54.) The Commission's UNE Combo Order demonstrates that Mr. Milner's testimony cannot be squared with the tariff's plain language, and BellSouth does not request reconsideration based on that conclusion.

BellSouth now insists that a fallback argument, which it raised for the first time in its post-hearing brief, was ignored by the Commission. The argument essentially is that a DS1 Combo recreates BellSouth's MegaLink service because MCImetro could obtain MegaLink on a resale basis and use the loop and transport elements to provide a completely different service than would be

¹ BellSouth's contention is incorrect in this regard. MCImetro witness Martinez addressed MegaLink tariff issues. (Transcript, pp. 53, 57, 76-83.)

authorized under the MegaLink tariff. Thus, the argument goes, even if the MegaLink tariff was designed for private line service, MCImetro could use it (along with its own switching) to provide public switched service. This argument is fundamentally flawed because it misconstrues the Arbitration Order and the Contract Interpretation Order.

B. BellSouth Misconstrues the Arbitration Order

During the arbitration between BellSouth and MCI and AT&T, the Commission considered the issue of whether resale terms must be identical to the terms and conditions in BellSouth's retail tariffs. In its Arbitration Order, the Commission relied upon FCC Rule 51.613, which describes the restrictions that an incumbent may impose on resale services. That rule permits a state commission to allow restrictions on cross-class selling and short term promotions. Otherwise, the incumbent is permitted to impose a restriction on its resale services "only if it proves to the state commission that the restriction is reasonable and nondiscriminatory."

BellSouth contended during the arbitration that any "use or user" restrictions in its tariffs should be deemed cross-class selling restrictions and thus apply to carriers seeking to resell those services. In other words, BellSouth sought to bind resellers to all the terms and conditions of its tariffs. MCI and AT&T opposed such a blanket requirement, arguing that the

ability to offer BellSouth's resale services that were not identical to BellSouth's service packages would promote innovation and competition. The Commission agreed with MCI and AT&T. Nothing in the Commission's Arbitration Order, however, permits resellers to require BellSouth to provide resale services that are fundamentally different than what BellSouth provides to its own customers.

MegaLink private line service is fundamentally different than the public switched service that MCImetro provides. The differences between a point-to-point service and a public switched service cannot be characterized as differences in restrictions, reasonable and nondiscriminatory or otherwise. The very definition of private line service is distorted beyond recognition if it is changed to permit local exchange service. The Arbitration Order did not contemplate that BellSouth's retail services would be so malleable as to be rendered meaningless. BellSouth's approach (which it surely would oppose under any other circumstances) provides no basis for the Commission to reconsider its UNE Combo Order.

C. BellSouth Misconstrues the Contract Interpretation Order

MCImetro demonstrated in its Post-Hearing Brief that finding that MCImetro does not recreate a BellSouth service when it uses a DS1 Combo as a local loop is consistent with the concerns expressed by the Commission in the Contract

Interpretation Order.² BellSouth, on the other hand, turns the Commission's recreation test on its head. BellSouth asks the Commission to determine whether an existing BellSouth retail service can be boiled down to its elements and thus made to recreate the UNE combination that BellSouth does not wish to provide. Put another way, BellSouth's machinations are designed to take an existing BellSouth retail service and transform it into a completely different service that is neither a BellSouth service nor a retail service.

MegaLink provides a case in point. BellSouth attempts (unsuccessfully) to show that MegaLink could be transformed by a reseller from a private line service to a public switched service. Such a public switched service would be completely different than what BellSouth provides its customers through MegaLink, so the "recreated service" would bear no resemblance to the actual BellSouth service. Moreover, the "reseller" would have to combine Megalink with its own switching capacity to provide local exchange service, so that MegaLink would become a wholesale, not a retail, product, and thus no retail service would be recreated. In short, BellSouth cannot show that the DS1 Combo recreates an existing *BellSouth retail* service in accordance with the Contract Interpretation Order.

BellSouth's ridiculous approach cannot be squared with the sensible view expressed by the Commission in its UNE Combo Order, where it rejected BellSouth's attempt to equate retail

² MCImetro noted, however, that it respectfully disagreed with the adoption of the recreation test in the Contract Interpretation Order (although it is not challenging that ruling for purposes of this docket).

services with the elements used to provide them. The Commission stated:

We cannot accept the position that identical functionality alone determines whether a competing carrier's use of an unbundled network element combination "recreates" an incumbent carrier's retail service. If that were so, almost any element combination could be said to "recreate" some retail service. Such a standard would severely restrict competitive carriers' use of UNEs to enter local telephone markets, contrary to the intent of the Telecommunications Act of 1996 and the FCC's rules implementing that Act. We believe we must evaluate a claim that a UNE combination recreates a retail service much more comprehensively. Section 364.02(11), Florida Statutes, states that "[s]ervice is to be construed in its broadest and most inclusive sense," **and we need to consider other aspects of the services in question beyond just the functionality of the facilities involved.**

(UNE Combo Order, p. 4, emphasis added, footnote omitted.)

BellSouth gives the Commission no basis on which to change this or any other part of its UNE Combo Order.

WHEREFORE, for the foregoing reasons, MCImetro respectfully submits that BellSouth's Motion should be denied.

RESPECTFULLY SUBMITTED this 23rd day of June, 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 23rd day of June, 1999.

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