



# Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA 32399-0850

## -M-E-M-O-R-A-N-D-U-M-

RECORDS AND REPORTING

99 AUG 30 PM 3:01

RECEIVED-PPSC

**DATE:** AUGUST 30, 1999

**TO:** DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAY)

**FROM:** DIVISION OF LEGAL SERVICES (BEDELL) *CB*  
DIVISION OF COMMUNICATIONS (FAVORS) *CRF* *MD*

**RE:** DOCKET NO. 981121-TP - REQUEST FOR ARBITRATION CONCERNING COMPLAINT OF MCImETRO ACCESS TRANSMISSION SERVICES LLC FOR ENFORCEMENT OF INTERCONNECTION AGREEMENT WITH BELL SOUTH TELECOMMUNICATIONS, INC.

**AGENDA:** SEPTEMBER 7, 1999 - POSTHEARING AGENDA - RECONSIDERATION - DISCUSSION LIMITED TO COMMISSIONERS AND STAFF

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\LEG\WP\981121.RCM

### CASE BACKGROUND

On September 14, 1998, MCIm Metro Access Transmission Services, LLC (MCIm) filed a complaint for enforcement of its Interconnection Agreement with BellSouth Telecommunications, Inc. (BellSouth). An evidentiary hearing on the complaint was conducted on February 3, 1999. On May 27, 1999, Order No. PSC-99-1089-FOF-TP was issued memorializing the Commission's decision that the combination of unbundled network elements (UNEs) consisting of a 4-wire DS-1 loop and DS-1 dedicated transport does not recreate BellSouth's Megalink service and requiring a refund.

On June 17, 1999, BellSouth filed a Motion for Reconsideration of Order No. PSC-99-1089-FOF-TP, and a Request for Oral Argument. MCIm filed its response on June 23, 1999. This recommendation addresses the Motion for Reconsideration.

DOCUMENT NUMBER-DATE

10330 AUG 30 99

PPSC-RECORDS/REPORTING

**DISCUSSION OF ISSUES**

**ISSUE 1:** Should BellSouth's Request for Oral Argument be granted?

**RECOMMENDATION:** No, oral argument is not necessary for the resolution of the issue raised on reconsideration. **(BEDELL)**

**STAFF ANALYSIS:** The points raised on reconsideration do not require oral argument in order to be fully addressed. Therefore, Staff recommends that the Request for Oral Argument be denied.

**ISSUE 2:** Should BellSouth's Motion for Reconsideration be granted?

**RECOMMENDATION:** No, BellSouth has failed to point out any point of law, fact or policy which the Commission has overlooked or misapprehended. The Order should be clarified to reflect that the Commission has not ruled inconsistently with any previous orders. **(BEDELL)**

**STAFF ANALYSIS:** On June 17, 1999, BellSouth filed a Motion for Reconsideration of Order No. PSC-99-1089-FOF-TP, issued May 27, 1999. As grounds for its motion, BellSouth alleges that the Commission has overlooked a prior decision, Order No. PSC-96-1579-FOF-TP, issued December 31, 1996. Specifically, BellSouth argues that the Commission erred by applying end-user tariff restrictions in this docket which were determined to be unreasonable in Order No. PSC-96-1579-FOF-TP. According to BellSouth, in the early arbitration dockets, 960835, 960846 and 980916, the Commission held that no restrictions on the resale of services are allowed except for grandfathered services, residential services and lifeline/link-up services. Thus, BellSouth argues that the Commission should not rely on the private-line restriction on its Megalink service to reject a finding that MCIm's combination of a DS1 loop and transport recreates a BellSouth service. Further, BellSouth argues that there was no record evidence of the tariff restriction.

MCIm responded to the Motion for Reconsideration on June 23, 1999. In its response, MCIm argues that BellSouth misconstrued Order No. PSC-96-1579-FOF-TP and Order No. PSC-98-0810-FOF-TP issued June 12, 1998. MCIm points out that in the Order for which

DOCKET NO. 981121-TP  
DATE: AUGUST 30, 1999

BellSouth now seeks reconsideration, the Commission found that it must look to both the nature of the tariffed retail service as well as the intended use of the UNE Combination to determine whether the one recreates the other. MCIm also notes that BellSouth's motion failed to address the Commission reliance on MCIm's intended use of the facilities.

The proper standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

Staff has examined the hearing and Agenda Conference transcripts and the Order. Staff believes that the Commission's ultimate conclusion in this docket that the intended use by MCIm of the DS1 loop and transport is inconsistent with BellSouth's Megalink service tariff and therefore, does not recreate an existing service, is not inconsistent with previous decisions. Further, staff believes that the order is supported by record evidence.

However, in reaching its conclusion on the intended use, the Commission states at page 7 of the order (Order No. PSC-99-1089-FOF-TP):

Therefore, the language of BellSouth's Private Line Service tariff would prohibit MCIm from providing the service it intends to provide.

Staff agrees with BellSouth that this sentence appears to be inconsistent with the Commission's earlier ruling in Order No. PSC-96-1579-FOF-TP which determined tariff restrictions to be presumptively unreasonable. Staff believes that it was not the Commission's intent in Order No. PSC-99-1089-FOF-TP to recede from or be inconsistent with its previous decision. However, BellSouth correctly notes that some of the discussion at Agenda, particularly

DOCKET NO. 981121-TP  
DATE: AUGUST 30, 1999

the discussion found on pages 14-17 of the May 4, 1999 Agenda Conference transcript is contradictory to the presumption that certain tariff restrictions may be unreasonable. Specifically, on page 14 of the transcript, staff states:

...MCIm metro is taking these UNEs and the question is how are they applying them. And is the application consistent with the conditions in the Megalink tariff. That is what it is turning on.

On page 16 in the exchange between Commissioner Deason and staff it is again stated that what MCIm wants to do is counter to the tariff.

Staff then states beginning at line 24 of page 16:

The end use service that MCIm offers is helpful in terms of understanding the intended application. And I would argue the intended application is counter to the tariff. I do think it is important, you know, there is no question all the parties agree that this combo is functionally equivalent to Megalink. The question is should there be more considerations beyond that, that is really the question.

At the conclusion of the Agenda discussion Commissioner Clark stated:

...you shouldn't just look at the functionality, you have to look and see if the intended use is consistent with the tariff. And in this case it was not. Functionality alone is not a determining factor.

Agenda Conference Transcript at page 25.

BellSouth also argues that there was no record support for the statement found on page 6 of the Order that MCIm pointed out the tariff restrictions at the hearing. This statement is incorrect. The record indicates that this evidence was elicited during Mr. Milner's cross-examination and may be found on pages 138 through 154 of the transcript.

DOCKET NO. 981121-TP  
DATE: AUGUST 30, 1999

In conclusion, it does appear from parts of the discussion and from the sentence on page 7 of the Order that the Commission may have been relying on an erroneous conclusion that the tariff prohibited use of BellSouth's Megalink Service for MCI's intended purpose. This conclusion would appear to be in conflict with Order No. PSC-96-1579-FOF-TP. Staff believes, however, that the ultimate conclusion reached by the Commission is that the intended use of DS1 loop and transport combination by MCI is inconsistent with BellSouth's Megalink Service tariff.

Therefore, staff recommends that the Commission reaffirm this conclusion and clarify the Order by striking the sentence on page 7 which states:

Therefore, the language of BellSouth's Private Line Service tariff would prohibit MCI from providing the service it intends to provide.

**ISSUE 3:** Should this docket be closed?

**RECOMMENDATION:** Yes, this docket should be closed.  
(BEDELL)

**STAFF ANALYSIS:** There is no further action required by the Commission in this docket. Therefore, the docket may be closed.