971140-TP

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

BellSouth Telecommunications, Inc.,

Plaintiff,

vs.

Civil Action No. 4:99cv448-WS

4:99CV448-WS

AT&T Communications of the Southern States, Inc., MCI Worldcom Network Services, Inc. f/n/a MCI Telecommunications Corporation, MCImetro Access Transmission Services, LLC, the Florida Public Service Commission, the Honorable Susan F. Clark, in her official capacity as a Commissioner of the Florida Public Service Commission, the Honorable J. Terry Deason, in his official capacity as a Commissioner of the Florida Public Service Commission, the Honorable Joe Garcia, in his official capacity as a Commissioner of the Florida Public Service Commission, the Honorable E. Leon Jacobs, in his official capacity as a Commissioner of the Florida Public Service Commission, and the Honorable Julia L. Johnson, in her official capacity as a Commissioner of the Florida Public Service Commission,

Defendants.

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COMPLAINT

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Nature of the Action

1. BellSouth Telecommunications, Inc. ("BellSouth") brings this action to seek review of decisions of the Florida Public Service Commission (the "PSC") under the federal Telecommunications Act of 1996 (the "1996 Act"). The PSC decisions at issue require BellSouth to provide defendants AT&T Communications of the Southern States, Inc. ("AT&T") and MCI Telecommunications Corporation and MCImetro Access Transmission Services, LLC (collectively "MCI"), access to combinations of local exchange network elements that are not currently combined in BellSouth's network, at the sum of the unbundled network element prices for those elements. That requirement is inconsistent with the 1996 Act, as authoritatively interpreted by a United States Court of Appeals, and BellSouth has not voluntarily consented to it. The PSC's decisions are also arbitrary and capricious and result from a failure to engage in reasoned decision-making. They should be declared unlawful and all parties to this case should be enjoined from enforcing them against BellSouth.

Parties, Jurisdiction, and Venue

2. Plaintiff BellSouth is a Georgia Corporation with its principal place of business in Georgia. BellSouth provides local telephone service throughout much of the State of Florida.

3. Defendant AT&T is an affiliate of AT&T Corporation. AT&T is a New York corporation with its principal place of business in Morristown, New Jersey. AT&T provides local telephone service in Florida.

4. MCI is an affiliate of MCI Worldcom, and since May 17, 1999 is known as MCI Worldcom Network Services, Inc. MCI is a Delaware corporation with its principal place of business in Washington, D.C. MCI provides local telephone service in Florida.

5. Defendant PSC is an agency of the State of Florida. The PSC is a "State commission" within the meaning of 47 U.S.C. §§ 153(41), 251 and 252.

6. Defendant Susan F. Clark is a Commissioner of the PSC. Commissioner Clark is sued in her official capacity for declaratory and injunctive relief only.

7. Defendant J. Terry Deason is a Commissioner of the PSC. Commissioner Deason is sued in his official capacity for declaratory and injunctive relief only.

8. Defendant Joe Garcia is a Commissioner of the PSC. Commissioner Garcia is sued in his official capacity for declaratory and injunctive relief only.

9. Defendant E. Leon Jacobs is a Commissioner of the PSC. Commissioner Jacobs is sued in his official capacity for declaratory and injunctive relief only.

10. Defendant Julia L. Johnson is a Commissioner of the PSC. Commissioner Johnson is sued in her official capacity for declaratory and injunctive relief only.

11. This Court has subject matter jurisdiction over the action pursuant to the judicial review provision of the 1996 Act, 47 U.S.C. § 252(e)(6), and 28 U.S.C. § 1331.

12. Venue is proper in this District pursuant to 28 U.S.C. § 1391. Venue is proper under Section 1391(b)(1) because the Commissioner Defendants reside in this District. Venue is also proper under Section 1391(b)(2) because a substantial part of the events giving rise to this action occurred in this District, in which the PSC sits.

The 1996 Act

13. Prior to this decade, local telephone service was generally provided in Florida and in other States by a single, heavily regulated company such as BellSouth that held an exclusive franchise to provide such service.

14. Congress enacted the 1996 Act in order to replace this exclusive franchise system with competition for local service. *See* 47 U.S.C. §§ 251-253. As Congress explained, the 1996 Act creates a "pro-competitive, de-regulatory" framework for the provision of telecommunications services. S. Conf. Rep. 104-230, 104th Cong., 2d Sess. 113 (1996). To achieve that goal, Congress not only preempted all State and local exclusive franchise arrangements, see 47 U.S.C. § 253, but also placed certain affirmative duties on incumbent local exchange carriers such as BellSouth to assist new entrants in the local market.

15. Among those duties is BellSouth's obligation to allow new entrants to lease BellSouth's unbundled "network elements" at cost-based rates. *See* 47 U.S.C. §§ 251(c)(3) and 252(d)(1). The 1996 Act defines "network element" to include "a facility or equipment used in the provision of a telecommunications service." 47 U.S.C. § 153(29).

16. The terms under which BellSouth must provide access to unbundled network elements are determined in the first instance through negotiation between BellSouth and potential local entrants such as MCI and AT&T. *See* 47 U.S.C. § 252(a).

17. In the event that BellSouth cannot reach agreement with an entrant on the terms at which BellSouth will provide access to aspects of its business, either party may petition the appropriate State commission to arbitrate that issue in accordance with the terms of the 1996 Act. *See id.* § 252(b)(1). Additionally, after the parties have reached a full agreement -- as a result of either negotiation or arbitration -- the State commission must approve or reject that entire agreement based on whether it meets the criteria set out in sections 251 and 252. *Id.* § 252(e).

18. Any party aggrieved by a State commission determination has a statutory right to bring suit in a federal district court. *Id.* § 252(e)(6); *see GTE Florida Inc. v. Johnson*, 964 F. Supp. 333, 335 (N.D. Fla. 1997). A state commission decision arbitrating an agreement term becomes

reviewable upon the issuance of a subsequent decision approving or rejecting the relevant agreement or agreement amendment. *See GTE Florida, Inc.*, 964 F. Supp. at 335.

Prior Proceedings and the PSC Decisions at Issue Here

19. Under the terms of an interconnection agreement between BellSouth and MCI, BellSouth has agreed to grant MCI access to unbundled network elements.

20. Under the terms of an interconnection agreement between BellSouth and AT&T, BellSouth has agreed to grant AT&T access to unbundled network elements.

21. On June 12, 1998, in a consolidated proceeding, the PSC issued an order purporting to interpret the interconnection agreements between BellSouth and MCI and between BellSouth and AT&T. *See Motions of AT&T Communications of the Southern States, Inc. and MCI Telecomms. Corp. and MCImetro Access Transmission Services, Inc., to compel BellSouth Telecomms., Inc., to Comply with Order No. PSC -96-1579-FOF-TP and to Set Non-Recurring Charges for Combinations of Network Elements with BellSouth Telecomms., Inc., Pursuant to Their Agreement*, No. PSC-98-0810-FOF-TP (Fla. PSC June 12, 1998) ("June 12, 1998, Order") (attached as Exh. A). That order purported to impose upon BellSouth the obligation to provide both MCI and AT&T with access to combinations of network elements, even where those combinations are not currently combined in BellSouth's network. The PSC directed BellSouth and the other parties to "submit [to the PSC] written agreements memorializing and implementing [its] decisions . . . within thirty days of the issuance of [the] Order." *Id.* at 69.

22. On June 29, 1998, BellSouth filed a motion for reconsideration of the June 12, 1998, Order. In that motion, BellSouth also sought an extension of time in which to file amendments to the interconnection agreements, as well as clarification of the June 12, 1998, Order. On September 25, 1998, the PSC issued an order denying BellSouth's motion for reconsideration, granting the

motion for an extension of time, and clarifying the June 12, 1998, Order. *See Motions of AT&T Communications of the Southern States, Inc., and MCI Telecomms. Corp. and MCI Metro Access Transmission Services, Inc., to Compel BellSouth Telecomms., Inc., to Comply with Order PSC-96-1579-FOF-TP and to Set Non-Recurring Charges for Combinations of Network Elements with BellSouth Telecomms., Inc., Pursuant to Their Agreement*, No. PSC-98-1271-FOF-TP (Fla. PSC Sept. 25, 1998) ("September 25, 1998, Order") (attached as Exh. B).

23. The private parties were unable to agree on language implementing the June 12, 1998, and September 25, 1998, Orders, and, in October, 1998, each party submitted proposed amendments to the agreements for the PSC's consideration.

24. On October 11, 1999, the PSC issued an Order approving amendments to the interconnection agreements. *See Motions of AT&T Communications of the Southern States, Inc., and MCI Telecomms. Corp. and MCI Metro Access Transmission Services, Inc., to Compel BellSouth Telecomms., Inc. To Comply with Order PSC-96-1579-FOF-TP and to Set Nonrecurring Charges for Combinations of Network Elements with BellSouth Telecomms., Inc., Pursuant to Their Agreement*, No. PSC-99-1989-FOF-TP (Fla. PSC October 11, 1999) ("October 11, 1999, Order") (attached as Exh. C). In approving that language, the PSC again concluded that BellSouth must provide AT&T and MCI with access to combinations of network elements "whether or not [those combinations] are in existence," and it ordered BellSouth to do so at cost-based network element rates. *Id.* at 5 (emphasis added).

25. As authoritatively interpreted by the United States Court of Appeals for the Eighth Circuit, the 1996 Act does not require BellSouth to provide access to combinations of network elements that are not currently combined in its network, much less to do so at cost-based rates. *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 812 (8th Cir. 1999). The Eighth Circuit expressly struck

down as contrary to the 1996 Act the FCC rules (47 C.F.R. § 51.315(c)-(f)) that imposed such an obligation to create new combinations for the benefit of entrants. Although the Supreme Court reversed the Eighth Circuit's decision invalidating the FCC rule requiring incumbents to provide existing combinations of network elements *(see AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 737 (1999)), it was not asked to, and did not, reverse the Eighth Circuit's decision as to new combinations. That decision, accordingly, remains the law.[1]

26. Although the PSC's decision to impose these requirements purports to rest on its understanding of federal law and, in particular, of the Supreme Court's decision in *Iowa Utilities Board*, the PSC's decision to impose these agreement terms cannot be squared with the governing law that incumbents like BellSouth cannot be required to provide access to new network element combinations, much less to do so at the rates imposed by the PSC here. Moreover, BellSouth has never voluntarily agreed to such an obligation.

Claim for Relief

27. Paragraphs 1 through 26 are incorporated by reference as if set forth fully herein.

28. The PSC's orders requiring BellSouth to provide access to combinations of network elements that are not currently combined in BellSouth's network, and to do so at the sum of the prices of the component elements, are inconsistent with the 1996 Act, and with binding judicial precedent. Moreover, to the extent those decisions are based on any purported agreement by BellSouth, that determination is also contrary to federal law.

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[1] Despite the failure to raise the issue before the Supreme Court, and the evident differences between these two circumstances, some parties, including AT&T and MCI, have argued before the Eighth Circuit on remand that that court should revisit its prior decision as to new combinations. That issue is currently pending before the Eighth Circuit.

29. The PSC's determinations are also arbitrary and capricious, result from a failure to engage in reasoned decision-making, and are not supported by the record developed in the PSC proceedings.

RELIEF REQUESTED

WHEREFORE, as relief for the harms alleged herein, BellSouth as an aggrieved party requests that this Court:

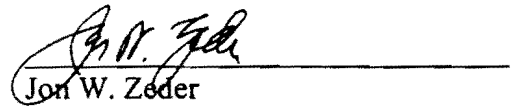
a. declare that the PSC's and Commissioner Defendants' orders are invalid for the reasons discussed above;

b. grant BellSouth declaratory and injunctive relief to prevent all defendants and anyone acting in concert with them from enforcing or attempting to enforce the PSC's orders (or the resulting agreements) to the extent that they require BellSouth to provide MCI and AT&T with access to combinations of network elements that are not currently combined in BellSouth's network and to do so at the sum of the prices of the component elements;

c. grant such other relief as may be sought by BellSouth in further pleadings and as may be appropriate in this case.

Signed on this the 9th day of November, 1999.

ADORNO & ZEDER, P.A.



Jon W. Zeder
Fla. Bar No. 98432
2601 South Bayshore Drive
Suite 1600
Miami, Florida 33133
Tel. (305) 858-5555
Fax. (305) 858-4777

Attorneys for BellSouth