ORIGINAL

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October 4, 2000

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

Re: Docket No. 991755-TP (MCI)

Dear Ms. Bayó:

Enclosed please find an original and fifteen copies of BellSouth Telecommunications, Inc.'s Brief of the Evidence, which we ask that you file in the above-referenced matter.

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 to the parties shown on the attached Certificate of Service.

Sincerely,

E. Earl Edenfield (BW)

E. Earl Edenfield

APP
CAF
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COM 3
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RGO
SEC 1
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OTH

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey
Nancy White

CERTIFICATE OF SERVICE
Docket No. 991755-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this 4th day of October, 2000 to the following:

(#) Signed Protective Agreement

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ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. against BellSouth Telecommunications, Inc. for Breach of Approved Interconnection Agreement	)	Docket No. 991755-TP
	)	Filed: October 4, 2000

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STATEMENT OF THE CASE

This complaint involves an attempt by MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. (jointly "MCI") to reform the June 3, 1997 Interconnection Agreement ("Agreement") between MCI and BellSouth Telecommunications, Inc. ("BellSouth"). The basis for MCI's contention is that the United States Supreme Court's reinstatement of FCC Rule 51.711(a) renders Attachment IV, Section 2.4.2 of the Agreement (and by implication the Florida Public Service Commission's Order approving the Agreement) "unlawful." Thus, MCI concludes that Part A, Section 2.2 of the Agreement requires the Commission to reform the Agreement consistent with MCI's interpretation of FCC Rule 51.711(a).

BellSouth disagrees with MCI's analysis and contends that the Commission's Order approving the Agreement (as well as the language in the Agreement) was not rendered unlawful by the reinstatement of FCC Rule 51.711(a). In fact, the test adopted by the Commission to determine if a party is entitled to the reciprocal compensation at the tandem switching rate is completely consistent with FCC Rules and Orders.

A hearing in this matter was held on September 6, 2000. At the hearing, BellSouth submitted the direct and rebuttal testimony of Cynthia K. Cox. This Brief of the Evidence is submitted in accordance with the post-hearing procedures of Rule 25-22.056, Florida Administrative Code, and the Commission's Pre-Hearing Order. A summary of BellSouth's position on each issue to be resolved in this docket is set forth in the following pages and marked with a double asterisk.

STATEMENT OF BASIC POSITION

The Commission should conclude that the reinstatement of FCC Rule 51.711(a) did not render Section 2.4.2 of Attachment IV unlawful. The Commission's determination that MCI is entitled to the tandem switching elemental rate only in those circumstances where MCI actually performs the same tandem switching function, which has been applied consistently by the Commission in numerous disputes involving this issue, is consistent with all FCC Rules and Orders. In fact, the Commission has not receded from this long-standing position (requiring ALECs to actually perform tandem switching as a prerequisite to recovering the tandem switching elemental rate) in Commission decisions rendered after the reinstatement of FCC Rule 51.711(a). MCI has not, and cannot, cite to any decision ruling that it is unlawful for a state commission to require a functionality and geographic two-prong test in determining entitlement to reciprocal compensation for the tandem switching element. Thus, MCI has failed to meet its burden of proof and that the Commission should determine that the provisions of the Agreement, as well as the Commission's decision requiring that language in the Agreement, are lawful.

STATEMENT OF POSITION ON THE ISSUES

Issue 1: Under FCC Rule 51.711, would MCIm and MWC be entitled to be compensated at the sum of the tandem interconnection rate and the end office interconnection rate for calls terminated on their switches if those switches serve a geographic area comparable to the area served by BellSouth's tandem switches?

> **Position: No. Intermedia should only be compensated for those functions it provides. If Intermedia's switch does not actually perform tandem switching, then it is not appropriate to pay Intermedia reciprocal compensation for the tandem switching function.

It should be noted from the outset that Issues 1, 2 and 4 are relevant only in the circumstance that the Commission has determined that its prior decision requiring MCI to actually perform tandem switching as a prerequisite for entitlement to reciprocal compensation at

the tandem switching elemental rate is unlawful. Unless the Commission determines its prior decision to be unlawful, no basis exists (nor has one been plead by MCI) upon which the Commission should reform the Agreement previously approved by the Commission.

The particular provision of the Agreement that MCI contends was rendered unlawful by the reinstatement of FCC Rule 51.711(a) is Section 2.4.2 of Attachment IV, which provides, in part, that "BellSouth shall not compensate MCIm for transport and tandem switching unless MCIm actually performs each function." MCI admits that this language prohibits it "from recovering the tandem interconnection rate even when their switches cover a geographic area comparable to the area covered by BellSouth tandem switches." (TR, at 75) Clearly, MCI acknowledges that it can not satisfy the functionality test under the current network configuration MCI has in Florida. (TR, at 103)

Recognizing that it can only increase the amount of reciprocal compensation it recovers from BellSouth by having the Commission abandon its long-standing functionality test, MCI advocates an test whereby MCI can recover the tandem switching rate element in situations where MCI admittedly does not perform tandem switching functionality. The Commission should reject MCI's request that the Commission abandon the long-standing functionality requirement and, instead, confirm that MCI must demonstrate tandem switching functionality (combined with geographic coverage) before MCI is entitled to reciprocal compensation at the tandem switching rate.

Under Section 251(b)(5) of the 1996 Act, all local exchange carriers are required to establish reciprocal compensation arrangements for the transport and termination of telecommunications. 47 U.S.C. § 251(b)(5). The terms and conditions for reciprocal compensation must be "just and reasonable," which requires the recovery of a reasonable

approximation of the "additional cost" of terminating calls that originate on the network of another carrier. 47 U.S.C. § 252(d)(2)(A). According to the FCC, the "additional costs" of transporting terminating traffic vary depending on whether or not a tandem switch is involved. *See* First Report and Order, *In re: Implementation of Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, CC Docket No. 96-98, ¶ 1090 (Aug. 8, 1996) (hereinafter referred to as "*First Report and Order*"). As a result, the FCC determined that state commissions can establish transport and termination rates that vary depending on whether the traffic is routed through a tandem switch or directly to a carrier's end-office switch. *Id.*

The FCC directed state commissions to consider two factors in determining whether an ALEC should receive the same reciprocal compensation rate as would be the case if traffic were transported and terminated via the incumbent's tandem switch. First, the FCC directed state commissions to "consider whether new technologies (*e.g.*, fiber ring or wireless network) performed functions similar to those performed by an incumbent LEC's tandem switch and thus whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch." *First Report and Order* ¶ 1090. Second, in addition to the functionality comparison, the FCC instructed state commissions to consider whether the new entrant's switch serves a geographic area comparable to that served by the incumbent local exchange carrier's tandem switch, in which case the appropriate proxy for the new carrier's costs is the incumbent's tandem interconnection rate. *Id.*; *see also* 47 CFR § 51.711(a)(3). Therefore, in order to evaluate whether an ALEC should receive the same reciprocal compensation rate as would be the case if traffic were transported and terminated via the incumbent's tandem switch, *"it is appropriate to look at both the function and geographic scope of the switch at issue." See U.S. West Communications, Inc. v. Minnesota*

Public Utilities Commission, 55 F. Supp. 2d 968, 978 1999 U.S. Dist. LEXIS 16224 (D. Minn. 1999) (emphasis added).

The decision of the Minnesota Commission is not unique. In fact, several federal district court and state commission decisions plainly hold that the functions performed by another carrier's switch should be considered in determining whether that carrier is entitled to receive compensation for end-office, tandem, and transport elements in transporting terminating traffic. *See, e.g., U.S. West Communications, Inc. v. Minnesota Public Utilities Commission*, 55 F. Supp. 2d at 977; *U.S. West Communications, Inc. v. Public Service Commission of Utah*, 75 F. Supp. 2d 1284, 1999 U.S. Dist. LEXIS 18148, *13-*16 (D. Utah, Nov. 23, 1999) (affirming commission requirement that U.S. West compensate Western Wireless at the tandem switching rate after concluding that Western Wireless's "switches perform comparable functions and serve a larger geographic area") (copy attached as Exhibit D); *MCI Telecommunications Corp. v. Illinois Bell Telephone Company d/b/a Ameritech Illinois, Inc., 1999 U.S. Dist. LEXIS 11418 at *19* (in deciding whether MCI was entitled to the tandem interconnection rate, the commission correctly applied the FCC's test to determine whether MCI's switch "performed functions similar to, and served a geographical area comparable with, an Ameritech tandem switch").

Moreover, despite its protestations to the contrary, while MCI's switch may be capable of performing tandem switching functions when connected to an end-office switch, capability is not the issue. Thus, the issue is whether MCI's switches actually perform those functions for local calls. (TR, at 156)

The relevance of the functions the switch is actually performing is that reciprocal compensation is not paid for loop costs, but rather only for the cost of transporting and terminating local calls. (Tr. at pp. 48-49; *First Report and Order*, ¶ 1057.) Specifically, the

FCC held that the "costs of local loops and line ports associated with local switches do not vary in proportion to the number of calls terminated over these facilities. We conclude that such non-traffic sensitive costs should not be considered 'additional costs' when a LEC terminates a call that originated on the network of a competing carrier." (*First Report and Order*, ¶ 1057.) By inappropriately claiming its end office switches are tandem switches, MCI is seeking unwarranted compensation from BellSouth for loop facilities between MCI's end office and its end users. (TR, at 107; 170-171)

This Commission has previously reached the same conclusion recommended by BellSouth here in the Commission's Metropolitan Fiber Systems of Florida, Inc. ("MFS") and Sprint arbitration orders. The Commission determined that "MFS should not charge Sprint for transport because MFS does not actually perform this function." (Order No. PSC-96-1532-FOF-TP, issued December 16, 1996.). The Commission reaffirmed this conclusion when it issued its Order in the MCI/Sprint arbitration case in Docket No. 961230-TP. (Order No. PSC-97-0294-FOF-TP, issued April 14, 1997.) It is interesting to note that the two companies involved in the Commission's initial consideration of this matter (MFS and MCI) are now one company, MCI. (TR, at 105) MCI could not provide any evidence as to whether the geographic scope of the switches it has, plus those acquired from MFS, changed since the Commission's initial consideration in this matter. (TR, at 104) Thus, from a network perspective, the circumstances surrounding this conflict have not changed since the Commission's original consideration. Further, the evidence in this record does not support MCI's position that its switch actually provides the transport element; and the Act does not contemplate that the compensation for transporting and terminating local traffic should be identical when one party does not actually provide the network facility for which it seeks compensation.

More recently, by Order dated January 14, 2000, this Commission re-affirmed its above-stated position in BellSouth's arbitration with ICG and found in favor of BellSouth on this issue. In doing so, the Commission expressly considered the functions performed and the geographic area served by ICG's switch. The Commission thus approved its Staff's Recommendation, denying the request of ICG as follows:

> Because ICG currently does not have a network in place in Florida, we cannot determine if ICG's network will, in fact, serve a geographic area comparable to one that is served by a BellSouth tandem switch ... Similarly, the evidence of record in this arbitration does not show that ICG will deploy both a tandem and end office switch in its network. In addition, since tandem switching is described by both parties as performing the function of transferring telecommunications between two trunks as an intermediate switch or connection, we do not believe this function will or can be performed by ICG's single switch. As a result, we cannot at this time require that ICG be compensated for the tandem element of termination.[1]

The California Public Utilities Commission also reached a conclusion similar to this Commission on this issue. In an arbitration proceeding before MFS/WorldCom and Pacific Bell, the CPUC held that "a party is entitled to tandem and common transport compensation only when the party actually provides a tandem or common transport function." *See* Decision 99-09-069, *In re: Petition of Pacific Bell for Arbitration of an Interconnection Agreement with MFS/WorldCom*, Application 99-03-047, 1999 Cal. PUC LEXIS 652 at *23. (The CPUC further found unpersuasive MFS/WorldCom's argument that its network served a geographic area comparable in size to that served by Pacific Bell's tandem switch. Id. at *24.)

Most recently, the Commission considered this issue in the context of the arbitration proceeding between BellSouth and Intermedia. (*See* In re: Petition of BellSouth

Telecommunications, Inc. for Section 252(b) arbitration interconnection agreement with Intermedia Communications, Inc., Docket No. 991854-TP, Order No. PSC-00-1519-FOF-TP, issued August 22, 2000.) In its Order, the Commission again confirmed that demonstrating functionality was a prerequisite to recovering the tandem switching rate element:

> We find the evidence of record insufficient to determine *if the second, geographic criterion is met.* We are unable to reasonably determine if Intermedia is actually serving the areas they have designated as local calling areas. As such, we are unable to determine that Intermedia should be compensated at the tandem rate based on geographic coverage.
>
> As mentioned above, neither do we find sufficient evidence in the record indicating that Intermedia's switch is performing similar functions to that of a tandem switch. Therefore, we are unable to find that Intermedia should be compensated at the tandem rate based on similar functionality as well. *This is consistent with past decisions of this Commission.* (Emphasis added)

For the foregoing reasons, this Commission should deny MCI's request that the Commission vacate its long-standing requirement that ALECs demonstrate the provision of tandem functionality as a prerequisite for recovering the tandem switching elemental rate. Rather, the Commission should confirm the use of the two-prong functionality/geographic coverage test. Even if the Commission determines that its prior decision was unlawful and that an ALEC is entitled to the tandem switching element based solely on geographic coverage, MCI still fails to demonstrate that it satisfies this prong of the test.

Issue 2: Do MCIm's and MWC's switches serve geographic areas comparable to those served by BST tandem switches?

> **Position: No. MCI fails to establish that it's switched are *actually serving customers* in a geographic area comparable to the geographic area served by BellSouth's tandem switches.

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[1] Order, *In re Petition of ICG Telecom Group, Inc. for arbitration of unresolved issues in interconnection negotiations with BellSouth Telecommunications, Inc.*, Docket No. 990691-TP, Order No. PSC-00-0128-FOF-TP, at 10-11 (Fla. Pub. Serv. Comm. 1/14/00).

Considering geographic comparability, the evidence in this record (or lack thereof) on the question of whether MCI's switches serve a comparable geographic area is similar to the record evidence confronted by the federal district court in *MCI Telecommunications Corp. v. Illinois Bell Telephone Company d/b/a Ameritech Illinois, Inc.*, 1999 U.S. Dist. LEXIS 11418, *19 (N.D. Ill, June 22, 1999). In that case, (just as in this one) MCI argued that it should be compensated at the tandem rate for its switch in Bensonville, Illinois. The Illinois Commerce Commission ("ICC") rejected MCI's argument, finding that MCI had failed to provide sufficient evidence to support a conclusion that it was entitled to the tandem interconnection rate.[2]

In affirming the ICC on the tandem switching issue, the federal district court found that MCI's "intentions for its switch" were "irrelevant." According to the court, MCI was required to identify the location of its customers and the geographical area "actually serviced by MCI's switch," which MCI had utterly failed to do. *Id.* at *22-23 n.10. The district court reasoned that:

> The "Chicago area" is large, yet MCI offered no evidence as to the location of its customers within the Chicago area. Indeed, an MCI witness said that he "doubted" whether MCI had customers in every "wire center territory" within the Chicago service area. MCI's customers might have been concentrated in an area smaller than that served by an Ameritech tandem switch or MCI's customers might have been widely scattered over a large area, which raises the question whether provision of service to two different customers constitutes service to the entire geographical area between the customers. These are questions that MCI could have addressed, but did not. . . . In short, *MCI offered nothing but bare, unsupported conclusions that its switch currently served an area comparable to Ameritech tandem switch or was capable of serving such an area in the future.* The ICC's determination that

[2] Although the ICC did not make express findings regarding the comparable functions of MCI's switch and Ameritech's tandem switches or the comparative geographical areas served by the various switches, the ICC did discuss the evidence offered by each party on these issues. *Id.* at *20. According to the district court, "[t]he issue of comparable functionality apparently was not in serious dispute" as MCI presented evidence that its switch performed similar functions as Ameritech's tandem switches -- evidence that Ameritech did not dispute. *Id.* Indeed, Ameritech did not even raise the comparable functionality issue on appeal, which led the district court to conclude that "only at issue is the geographical areas served by the respective switches." *Id.*

> "MCI has not provided sufficient evidence to support a conclusion that it is entitled to the tandem interconnection rate" was not arbitrary and capricious.

Id. at *22-23 (emphasis added).

The district court's reasoning applies equally here. As noted by MCI witness Argenbright, MCI has "not provided geographic location of customers within the rate centers." (TR, at 131). While MCI did provide maps in an attempt to demonstrate geographic coverage of the MCI switches, MCI readily admitted that a person "wouldn't be able to tell where you [MCI] are serving as opposed to where you are capable of serving." (TR, at 132) Clearly, MCI failed to produce the location of its customers in Florida, a fact which would be essential for the Commission to determine the geographic area MCI's Florida switches actually serve and whether that area is comparable to the area served by BellSouth's tandem switch. Lack of evidence on this key point alone should doom MCI's request that the Commission grant it the tandem switching rate.

The evidence presented (or not presented, as the case may be) is almost identical to that presented by Intermedia in the Intermedia/BellSouth arbitration, wherein the Commission determined that Intermedia was not entitled to the tandem switching rate element. As noted by the Commission in its Order:

> These maps indicate that Intermedia has established local calling areas that are comparable to those of BellSouth. We have difficulty, however, assessing from these maps whether Intermedia's switch actually serves these areas. We find BellSouth's argument more compelling, as witness Varner contends:
>
> > Intermedia claims that its switches are capable of serving areas comparable to BellSouth's tandems. However, that finding is insufficient. Any modern switch is capable of doing this. The issue is does it actually serve customers in an area that is comparable. And I submit that Intermedia's switches do not.

> We find the evidence of record insufficient to determine if the second, geographic criterion is met. We are unable to reasonably determine if Intermedia is actually serving the areas they have designated as local calling areas. As such, we are unable to determine that Intermedia should be compensated at the tandem rate based on geographic coverage.

To illustrate the importance of providing the customer locations, assume MCI's Florida customers are all located in a single office complex located next door to an MCI switch in Miami. Under no set of circumstances could MCI seriously argue that in such a case its switch serves a comparable geographic area to BellSouth's switch. *See* Decision 99-09-069, *In re: Petition of Pacific Bell for Arbitration of an Interconnection Agreement with MFS/WorldCom*, Application 99-03-047, 1999 Cal. PUC LEXIS 652, *21-*24 (Sept. 16, 1999) (finding "unpersuasive" MFS's showing that its switch served a comparable geographic area when many of MFS's ISP customers were actually collocated with MFS's switch). Absent such evidence, which MCI admitted it did not produce, MCI has clearly failed to satisfy its burden of proof on this issue. Thus, the Commission should conclude that MCI has failed to satisfy its burden of proof that the MCI switches actually serve a comparable geographic area to that area served by BellSouth's tandem switches.

Issue 3: Should BellSouth be required, pursuant to Part A Section 2.2 or 2.4 of the interconnection agreement, to execute amendments to its interconnection agreements with MCIm and MWC requiring BellSouth to compensate MCIm and MWC at the sum of the tandem interconnection rate and the end office interconnection rate for calls terminated on their switches that serve a geographic area comparable to the area served by BellSouth's tandem switches?

> **Position: No. MCI concedes that it did not provide timely notice under Section 2.2 of the Agreement. Further, Section 2.4 requires an amendment when a provision in the Agreement has been rendered unlawful, which MCI has failed to prove.

This issue is the threshold issue that must be decided by the Commission prior to considering Issue 1, 2 and 4. Essentially, if the Commission determines that the reinstatement of

FCC Rule 51.711 (a) did not render the Section 2.4.2 of Attachment IV "unlawful", then the Commission need not reach the other issues presented because no basis would exist upon which the Commission could reform the Agreement. Section 2.2 of Part A of the Agreement provides in relevant part:

> In the event the FCC or the State regulatory body promulgates rules or regulations, or issues orders, or a court with appropriate jurisdiction issues orders, *which make unlawful any provision of this Agreement*, the parties shall negotiate promptly and in good faith to amend the Agreement... (Emphasis added)

While MCI cites Section 2.4 of Part A of the Agreement a possible alternative provision under which the Commission could grant relief, MCI admits in its own direct testimony that, under MCI's theory of the case, MCI did not timely provide notice to BellSouth under this section. (TR, at 76) Thus, we are left with the question of whether the Commission requiring MCI to demonstrate actual tandem functionality as a prerequisite for recovering the tandem switching rate element is now unlawful.

At the time the Commission rendered its decision in the MCI/BellSouth arbitration, FCC Rule 51.711 had been stayed by the Eighth Circuit Court of Appeals. While acknowledging the stay, the Commission nevertheless relied upon Section 252(d)(2)(A)(i) of the Act and ¶1090 of the *First Report and Order* as the basis for its decision (TR, at 108-109). MCI acknowledges that nothing in the reinstatement of FCC Rule 51.711 overruled or superceded either Section 252(d)(2)(A)(i) or ¶1090. (TR, at 111) Thus, the legal foundation for the Commission's decision was left undisturbed.

The FCC provided additional insight into the functionality portion of the two-prong test in the recent *Third Report and Order*, CC Docket No. 96-98, Appendix C, p. 5, (Nov. 5, 1999), when it defined "local tandem switching capability" as:

(A) Trunk-connect facilities, which include, but are not limited to, the connection between trunk termination at a cross connect panel and switch trunk card;

(B) The basic switch trunk function of connecting trunks to trunks; and

(C) The functions that are centralized in tandem switches (as distinguished from separate end office switches), including but not limited, to call recording, the routing of calls to operator services, and signaling conversion features.

Clearly, the FCC considers functionality to be a component in defining local tandem switching. While MCI admits that its trunks do not perform the trunk-to-trunk connections required to satisfy this test (TR, at 106-107) it is implausible to argue that such a test does not exist, or that the Commission's reliance on this test was unlawful.

Even though MCI claims that the Commission's decision is unlawful, MCI admits that a number of state commissions have ruled exactly as this Commission did and that there are a "variety of approaches." (TR, at 114) Without citing the litany of cases that have considered this exact issue, MCI cannot cite a single federal appellate decision that determined that it was unlawful for a Commission to consider functionality as a prerequisite for recovering the tandem switching rate element. A number of the federal court decisions (most of which are mentioned above) specifically upheld a Commission requiring a two-prong functionality and geographic scope test. The Ninth Circuit Court of Appeals, reviewing the Washington Commission's adoption of a two-prong test, concluded that under the arbitrary and capricious standard the Washington Commission's adoption of the two-prong test was not reversible.

Not only has MCI failed to demonstrate that Section 2.4.2 of Attachment IV is unlawful, the exact test adopted by the Commission has been specifically affirmed by a United States Court

of Appeals (9th Circuit). Thus, MCI fails to establish a basis upon which the Commission can reform the Agreement.

Issue 4: Are MCIm and MWC entitled to a credit from BellSouth equal to the additional per minute amount of the tandem interconnection rate from January 25, 1999 to the earlier of (i) the date such amendments are approved by the Commission, or (ii) the date the interconnection agreements are terminated?

**Position: MCI conceded to BellSouth's position on this issue.

CONCLUSION

MCI has failed to demonstrate that Section 2.4.2 of Attachment IV is unlawful and, therefore, failed to establish a basis upon which the Commission can reform the Agreement. Even if the provision is deemed to be unlawful (which it is not) MCI still fails to establish that it either provides tandem functionality or actually serves a comparable geographic area to BellSouth's tandem switch. For the foregoing reasons, BellSouth requests that the Commission rule that MCI is not entitled to the tandem switching elemental rate under the terms of the Agreement.

Respectfully submitted this 4th day of October 2000.

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