

State of Florida



Public Service Commission

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

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RECORDS AND REPORTING

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DATE: MARCH 18, 1999

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF COMMUNICATIONS (FAVORS) *CRF*
DIVISION OF LEGAL SERVICES (BEDELL, BROWN) *CB MCB*

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

AGENDA: 03/30/99 - REGULAR AGENDA - POST-HEARING DECISION - PARTICIPATION IS 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, MCImetro Access Transmission Services, Inc. (MCIIm) filed a complaint for enforcement of its Interconnection Agreement with BellSouth Telecommunications, Inc. (BellSouth). This complaint concerns provisioning of a 4-wire DS1 loop and DS1 dedicated transport combination by BellSouth to MCIIm under the Interconnection Agreement. MCIIm requested an expedited hearing. On October 5, 1998, BellSouth filed its Answer and Response to MCI's Petition. The Commission conducted an administrative hearing regarding this matter on February 3, 1999.

The decision in this case should be based on an interpretation of this Commission's Order No. PSC-98-0810-FOF-TP issued in Docket No. 971140-TP, which was an unbundled network element (UNE) combinations case involving AT&T Communications of the Southern States, Inc., MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. and BellSouth Telecommunications, Inc. In this Order the Commission stated:

MCIIm and BellSouth shall negotiate the price for those network element combinations that recreate an existing BellSouth retail service, whether or not in existence at the time of MCIIm's order. (Order at p. 25)

When evaluating this portion of the Order, staff notes that reasonable people may interpret this section differently. The Primary Recommendation is based on an interpretation that a network element combination recreates a BellSouth retail service if the combination and the BellSouth retail service are functionally equivalent. The Alternative Recommendation is based on an interpretation that a network element combination recreates a BellSouth retail service if the combination and associated application is equivalent to a BellSouth tariffed retail offering. The Alternative Recommendation also includes a refund to MCIIm to reflect that the price for the UNE combination is lower than the price MCIIm has been paying.

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?

PRIMARY RECOMMENDATION: Yes. The combination of unbundled network elements consisting of 4-wire DS1 loops and DS1 dedicated transport recreates an existing BellSouth retail service known as Megalink. Staff recommends that the Commission order BellSouth and MCI to negotiate a price for this combination. **(FAVORS)**

ALTERNATIVE RECOMMENDATION: No. The combination of unbundled network elements consisting of 4-wire DS1 loops and DS1 dedicated transport does not recreate an existing BellSouth retail service known as Megalink, and MCI should be able to order these UNEs as a combination. Staff recommends that the Commission order BellSouth to refund the difference in price between this UNE combination and the T-1 Circuits that MCI has been ordering since November 1997. **(FAVORS, BEDELL, BROWN)**

POSITION OF THE PARTIES

MCI: No. The combination of DS1 loops and DS1 dedicated transport are used to connect business customers to MCI metro's local switch to enable MCI metro to provide a competitive local service. This combination does not recreate any existing BellSouth retail service within the meaning of Order No. PSC-98-0810-FOF-TP. BellSouth's claim that this combination recreates MegaLink is inconsistent with its prior position that a recreated service exists when an ALEC provides service to an end user using only facilities provided by BellSouth. The Commission should direct BellSouth to provide the requested UNE combination to MCI metro on a going-forward basis at a price equal to the sum of the prices for the individual network elements, and should order BellSouth to refund MCI metro all overcharges with respect to these types of facilities since November 1997.

BELLSOUTH: Yes. The identified combination of elements does recreate MegaLink service. Further, if this Commission finds to the contrary, no refund should be given to MCI

because it ordered T-1 Services, despite having other alternatives, and has received those services.

PRIMARY STAFF ANALYSIS:

In presenting this analysis staff would note that the interpretation of Commission Order No. PSC-98-0810-FOF-TP would be to examine the specific UNEs that MCI purchases from BellSouth, and not MCI's intended application.

The issue before the Commission is to determine whether the combination of unbundled network elements (UNEs) consisting of a DS1 loop and DS1 dedicated transport recreates BellSouth's Megalink retail service. MCI contends that this combination does not recreate BellSouth's Megalink service, and that it should be able to order these UNEs at the sum of the UNE prices. BellSouth contends that this combination does recreate its Megalink service, and that pursuant to this Commission's Order, the parties are required to negotiate a price.

The Commission Order that BellSouth refers to is Order No. PSC-98-0810-FOF-TP, issued in Docket No. 971140-TP, which was a UNE combinations case involving AT&T Communications of the Southern States, Inc., MCI Telecommunications Corporation and MCI metro Access Transmission Services, Inc. and BellSouth Telecommunications, Inc. In that Order the Commission made several decisions regarding UNE combinations, and stated:

Thus, we find upon consideration that BellSouth has undertaken a contractual obligation to provide network elements in combinations to MCI. BellSouth is required under the agreement to provide network elements as defined in C.F.R. §51.319 to MCI individually or combined, whether already combined at the time ordered or not. (Order at p. 24)

. . .

We find further that a qualification to pricing UNE combinations that do not recreate an existing BellSouth retail service as the straightforward summation of the individual element prices is set forth in Section 8 of Attachment I of the agreement. (Order at p. 26)

. . .

MCIm and BellSouth shall negotiate the price for those network element combinations that recreate an existing BellSouth retail service, whether or not in existence at the time of MCIm's order. (Order at p. 25)

As MCIm noted at hearing, the issue ultimately ends up being what is the price that MCIm should pay BellSouth for this UNE combination. (TR 9)

MCIm witness Martinez defined a DS1 loop as a four-wire facility and associated electronics that connect a customer's premises to the customer's serving wire center. He further states that a DS1 loop provides 1.5 million bits per second (MBPS) of bandwidth, which is equivalent to 24 voice grade channels. (TR 42) Witness Martinez defines DS1 dedicated transport as a four-wire interoffice facility and associated electronics that provide a 1.5 MBPS connection between the customer's serving wire center and a point of interconnection at MCIm's local switch location. (TR 42) BellSouth witness Milner's definition of these two UNEs is essentially the same. (TR 121)

MCIm witness Martinez states that MCIm uses the DS1 loop/DS1 transport combination to connect a business customer's premises to a MCIm Class 5 local switch. (TR 43) Witness Martinez further states that MCIm's switch is used to provide local service to the customer, including dial-tone, local calling, vertical features, access to operator services, access to 911 service, and switched access to the customer's preferred long distance carrier. (TR 44)

BellSouth witness Milner describes Megalink as a service by which digital signals are transmitted over digital facilities at a rate of 1.544 MBPS to transmit DS1 signals to and from a customer's premises. (TR 120) Witness Milner further states that BellSouth offers Megalink through its Private Line Services Tariff. (TR 120)

MCIm's witnesses agree that functionally the DS1 loop/DS1 dedicated transport combination is the same as Megalink. (Martinez TR 53, Gillan TR 109) However, MCIm witness Martinez strongly disagrees that a Megalink circuit provided to an end use customer by BellSouth and a DS1 loop/DS1 dedicated transport combination used by MCIm as part of an MCIm switch-based local service offering are in any way equivalent in the eyes of the customer. (TR 53)

Conclusion

Interpreting Commission Order No. PSC-98-0810-FOF-TP to mean that one must examine the UNEs that MCIm purchases from BellSouth and the functionality of those UNEs, staff concludes that the UNE combination consisting of a 4-wire DS1 loop and DS1 dedicated transport does recreate BellSouth's Megalink service. All parties agree that from a functional standpoint, this UNE combination is the same as Megalink.

Staff recommends that the Commission order BellSouth and MCIm to negotiate the price for this UNE combination. MCIm would not be due a refund since it is not entitled to purchase this UNE combination at the sum of the UNE prices.

ALTERNATIVE STAFF ANALYSIS:

The Alternative Recommendation is based on interpreting Commission Order No. PSC-98-0810-FOF-TP to include consideration of MCIm's intended use of the combination, and whether that intended use is consistent with BellSouth's Private Line Services Tariff restrictions applicable to the Megalink service. This interpretation is also consistent with the definition of "service" in Section 364.02(11), Florida Statutes, which states that "[s]ervice is to be construed in its broadest and most inclusive sense."

BellSouth witness Milner states that the proposed combination of UNEs and Megalink service provide identical functionality regardless of whether MCIm connects either to MCIm's switch. (TR 129) Witness Milner states that the Megalink tariff clearly contemplates that the transport functionality may be used in conjunction with switches. (TR 137) However, the evidence of record does not support this statement. Witness Milner admits that the terms "local switch" or "toll switch" do not appear in any provisions of the Megalink tariff. (TR 143) Witness Milner states that Section B7.1.2.D of the tariff, regarding the connections that may be made to the Megalink service, uses the term "Customer-Provided Communications Systems" which he believes includes switches. (TR 143) However, the tariff defines "Communications Systems" as:

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

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is authorized by Federal Communications
Commission or Public Service Commission to
provide. (TR 152)

Witness Milner agrees that MCI would be defined as an Other Carrier. (TR 151) Staff notes that this definition is straightforward in that it would require an "Other Carrier" such as MCI to connect Megalink to facilities used to provide private line services. MCI argues in its brief that it "is offering a switched-based local exchange service that can be used to call any telephone in the world. It is the antithesis of a private line service." (BR 4)

BellSouth witness Milner further states that Megalink can be used to connect an end user customer to a BellSouth central office, or to another end user customer, or to connect two of BellSouth's central offices. (TR 139) However, the evidence of record does not support this statement. MCI pointed out at hearing that Section B2.1.1 of BellSouth's Private Line Services Tariff states:

Private line service is the provision of
Company facilities for communication between
specified locations of customers or
authorized users. (TR 145)

The tariff further defines "authorized users" as:

... a person, firm or corporation (other than
the customer) who may communicate over a
private line or channel according to the
terms of the tariff and (1) on whose premises
a station of the private line service is
located or (2) who receives from or sends to
the customer such private line or channel
communications relating solely to the
business of the customer. An authorized user
must be specified in the service contract.
(EXH 7, p. 35)

Staff believes that the evidence of record indicates that BellSouth's private line service is intended to connect locations of the same customer, or a customer and an affiliated authorized user. However, MCI intends to connect its business customers to the public switched network.

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BellSouth argues in its brief that the Commission should look at what MCI purchases from BellSouth to determine if a service has been recreated. (BR 14) However, MCI witness Gillan testifies:

To determine whether MCI "recreates" a BellSouth service requires a comparison that considers the service MCI offers. The service offered by MCI uses network elements in exactly the way BellSouth has (until now) argued that it should -- in combination with MCI's own facilities-- and BellSouth's instant claim that even this arrangement "recreates" a BellSouth service should be rejected. (TR 96)

Witness Gillan further states that BellSouth has continuously objected to a particular network configuration, the so-called network element "platform," wherein the entrant provides its service entirely using network elements obtained from BellSouth. (TR 96) Witness Gillan further points to the direct testimony of BellSouth witness Robert Scheye in the AT&T/MCI Arbitration proceeding, which stated:

ALECs should be able to combine BellSouth provided elements with their own capabilities to create a unique service. However, they should not be able to use only BellSouth's unbundled elements to create the same functionality as a BellSouth existing service. (TR 96-97)

Witness Gillan further notes that if the Commission adopts BellSouth's view, then BellSouth, in its own discretion, has the ability to avoid its unbundling and network element combining obligations simply by always having services that equal the network elements. (TR 108) While staff does not believe that BellSouth will attempt to avoid its obligations in this fashion, staff does agree that as the number of BellSouth's service offerings increases, the potential for this type of conflict could increase.

Conclusion

Based on the interpretation of Commission Order No. PSC-98-0810-FOF-TP which includes consideration of MCI's intended use of the UNE combination and Megalink's tariff restrictions, staff recommends that the Commission find that the combination of UNEs consisting of a 4-wire DS1 loop and DS1 dedicated transport does not recreate BellSouth's Megalink service. Staff believes they are functionally the same in that they both transmit digital signals at a bandwidth of 1.544 MBPS. However, as MCI pointed out at hearing, there are four possible ways to obtain this functionality: (1) by purchasing a DS1 loop UNE and DS1 transport UNE out of the Interconnection Agreement, and MCI combining these themselves in a collocation space; (2) by purchasing BellSouth's Megalink service; (3) by purchasing T-1 circuits from BellSouth's access tariff; and (4) by purchasing the combination of a DS1 loop and DS1 dedicated transport. (TR 176-177) With the exception of the pricing on option (4), BellSouth witness Hendrix agreed with the four options. (TR 176-177) The evidence of record indicates that BellSouth has the capability of providing this functionality in four different ways. Therefore, staff does not believe that functionality alone should be the determining factor in deciding that this UNE combination recreates Megalink. Moreover, under Section 251(c)(3) of the Telecommunications Act of 1996, which states that "[a]n incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service," staff believes that BellSouth is required to provide this UNE combination.

Further, staff believes that the evidence of record shows that the language in BellSouth's Private Line Services tariff would prohibit MCI from using the Megalink service in the fashion it intends. Specifically, MCI intends to connect the DS1 transport piece to its Class 5 switch to provide basic local service, not to provide private line service. Also, MCI intends to connect two premises that are not of the same customer or authorized user of the customer. Thus, staff does not believe that the requested combination would recreate Megalink.

Refund

MCI also requests the Commission order BellSouth to refund the difference between the access tariff prices for the T-1 circuits that MCI has been ordering and the price for the UNE combination of a DS1 loop and DS1 transport. (TR 49) MCI witness Martinez stated that as of the date direct testimony was filed,

the accumulated difference in price was worth over \$3 million, and was continuing to increase at a rate of over \$300,000 per month. (TR 50) BellSouth witness Hendrix states that MCI ordered T-1 circuits from the access tariff and has used them accordingly. (TR 173) He further states that MCI's argument that it ordered these circuits via the access tariff because it could not purchase UNEs is simply not true. He states that MCI could have purchased UNEs and combined them in their collocation space, or they could have purchased Megalink service at the tariffed rate less the applicable resale discount. (TR 174) Staff does not agree. As stated before, the Commission determined that BellSouth is contractually obligated to combine UNEs for MCI, whether already combined or not. Further, Megalink is the subject of this proceeding.

BellSouth argues in its brief:

Clearly, this case is not a situation in which a refund is appropriate under the normal criteria (i.e., because the customer did not receive service, was not charged for service at the tariffed rate, or had some legitimate complaint regarding the quality of service). (BR 18)

However, BellSouth does acknowledge that, from a legal standpoint, this Commission has the authority to order a refund. (TR 182)

Staff believes that MCI should be granted a refund. The evidence of record does, in fact, show BellSouth's acknowledgment that MCI attempted to order the DS1 loop/DS1 dedicated transport combination in late 1997. (EXH 3) Therefore, if the Commission accepts staff's recommendation that the UNE combination consisting of a DS1 loop/DS1 transport does not recreate BellSouth's Megalink service, staff recommends that MCI be granted a refund for the difference between the price of the DS1 loop/DS1 transport combination and the access tariff price of a T-1 circuit that MCI has purchased since November 1997.

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ISSUE 2: Should this docket be closed?

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

STAFF ANALYSIS: No further action is required in this docket, therefore, it should be closed upon issuance of the Order.