



Public Service Commission

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

DATE: MAY 4, 2000

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

FROM: DIVISION OF COMMUNICATIONS (FAVORS) *CRF*
DIVISION OF LEGAL SERVICES (CALDWELL) *Doc #14*

RE: DOCKET NO. '980281-TP - COMPLAINT OF MCI METRO ACCESS TRANSMISSION SERVICES, INC. AGAINST BELLSOUTH TELECOMMUNICATIONS, INC. FOR BREACH OF APPROVED INTERCONNECTION AGREEMENT.

AGENDA: MAY 16, 2000 - REGULAR AGENDA - MOTION TO ENFORCE COMMISSION ORDERS - PARTIES MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\CMU\WP\980281.RCM

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CASE BACKGROUND

On February 23, 1998, MCI metro Access Transmission Services, Inc. (MCI) filed a complaint against BellSouth Telecommunications, Inc. (BellSouth) for alleged violations of the Telecommunications Act of 1996 (the Act), and for alleged breaches of the parties' Interconnection Agreement (Agreement) approved by this Commission on June 19, 1997. On March 16, 1998, BellSouth filed its answer and response to MCI's complaint.

On August 5, 1998, this Commission held a hearing in which it received testimony concerning MCI's claims that BellSouth failed to perform under the terms of the agreement and the Act. Thereafter, by Order No. PSC-98-1484-FOF-TP, issued November 5, 1998, the Commission made its determination on the terms of the agreement and required BellSouth to provide MCI with data and services pursuant to the agreement no later than December 5, 1998. On November 20, 1998, BellSouth filed a timely Motion for Reconsideration, for Clarification and for Extension of Time. MCI

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timely filed its response on November 30, 1998. By Order No. PSC-99-0081-FOF-TP, issued January 11, 1999, the Commission denied in part and granted in part, BellSouth's Motion and ordered the docket to remain open pending BellSouth's Compliance with the requirements of Order No. PSC-98-1484-FOF-TP.

Between January 1999 and March 2000, staff sent letters to and met with the parties asking if compliance with the Orders had occurred in order to close the docket. On March 10, 2000, MCIIm filed its Motion to Enforce Commission Orders. On March 17, 2000, BellSouth filed its Response in Opposition to the Motion. This recommendation addresses the Motion and Response.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant MCIImetro Access Transmission Services, LLC's Motion to Enforce Commission Orders?

RECOMMENDATION: Yes. Staff recommends that the Commission grant MCIIm's Motion to Enforce Commission Orders by prohibiting BellSouth from requiring MCIIm to execute a license agreement prior to the release of the Regional Street Address Guide (RSAG) download data base. However, staff recommends that restricting MCIIm's use of the RSAG download to address validation for local telecommunications service to be consistent with the record in this case. In addition, staff recommends that MCIIm should not attempt to sell the data on the open market. Finally, staff recommends that the RSAG download data provided to MCIIm should not be transferred to any entity, including affiliates. **(Caldwell)**

STAFF ANALYSIS:

MCIImetro Access Transmission Services, LLC's Position

In its Motion, MCIIm requests that the Commission enforce Orders Nos. PSC-98-1484-FOF-TP (Order) and PSC-99-0081-FOF-TP (Reconsideration Order) in this Docket and direct BellSouth to provide a download of the agreed upon portion of the Regional Street Address Guide (RSAG) without requiring a license agreement.

MCIm states that the Order required BellSouth to provide the RSAG download and directed the parties to negotiate in good faith an appropriate subset of the database to be provided. MCIm states that in addressing the Motion for Reconsideration the Commission clarified that BellSouth was permitted to provide RSAG updates within the same time frames and in the same manner that BellSouth provided updates to itself. In the Reconsideration Order, the Commission further noted that the Agreement required BellSouth to provide updates to the RSAG download, not a daily download of the entire database, and finally, that the data would be provided at no cost.

MCIm states that it has specified the subset of the RSAG that it wants BellSouth to download, and that BellSouth has confirmed that it is operationally ready to download the data. MCIm states that BellSouth now refuses to provide the download until MCIm signs a license agreement restricting MCIm's usage of the data. MCIm states that BellSouth did not raise the need for a license agreement at the hearing or in its Motion for Reconsideration, and the Commission in its Orders did not require MCIm to sign such an agreement. MCIm argues that "it would have made little sense for the Commission to have done so because the Orders limited the RSAG download and updates to nonproprietary portions of the database."

MCIm states that while it regarded BellSouth's request for a license agreement as improper and unauthorized, it attempted to negotiate such an agreement with BellSouth in an effort to resolve the RSAG issue without further Commission involvement. Upon reaching an impasse, the parties met with staff, but were unable to reach a resolution.

MCIm states that the license agreement BellSouth has demanded is onerous and unreasonable. The agreement, among other things, provides that: (a) BellSouth will retain title to any works MCIm derives from RSAG data; (b) MCIm may not transfer RSAG data to any affiliate; (c) RSAG data only may be used for purposes of local telecommunications; and (d) MCIm must return RSAG data upon termination of the Agreement. MCIm argues that none of these conditions is contemplated by the provisions of the Interconnection Agreement making the RSAG available to MCIm, and none of these conditions was imposed by the Commission. MCIm states that it is still a new entrant in the Florida local market and cannot now identify all business uses to which the RSAG might be put. However, MCIm stated it has no intention of attempting to sell the data on the open market and would agree to such a restriction. MCIm asserts it should not be bound by additional restrictions that

were not ordered by the Commission and that BellSouth did not raise during litigation.

Finally, MCIIm states that BellSouth is justifying its demand for a license agreement on the theory that the RSAG data has intrinsic value. MCIIm argues that the only unique value the data has is that it is correctly formatted for validating addresses in the BellSouth system. MCIIm further argues that there are other sources just as good as the RSAG for applications such as marketing. MCIIm concludes by arguing that BellSouth's arguments are without merit as it raises the issue too late, and that it would have been more appropriate to raise the issue during the litigation. MCIIm requests that the Commission order BellSouth to immediately download the designated portion of the RSAG to MCIIm, and to provide updates, without MCIIm being required to sign the license agreement BellSouth demands.

BellSouth Telecommunications, Inc's Response

BellSouth timely filed its response to MCIIm's Motion. First, BellSouth notes that MCIIm's Motion is misnamed since compliance with the Commission's Orders are not at issue. Instead, BellSouth claims the issue is that BellSouth has requested MCIIm to execute a license agreement to ensure that MCIIm will, in fact, use the database only for address validation. BellSouth states that MCIIm has represented that it needs a download of the RSAG to perform address validation. BellSouth states that MCIIm is arguing that it should be allowed to use the database in any way that it wishes and is, therefore, objecting to restrictions that are designed to prevent it from using the database in the provision of long distance service, for marketing purposes, or to create derivative works for profit. BellSouth argues that none of these intended (or even potential) uses for the database were identified by MCIIm during the hearing and that the Commission's Order cannot fairly be read to require BellSouth to provide the database to MCIIm for any of these purposes. BellSouth asserts that it is appropriate for MCIIm to be restricted in some fashion to using the RSAG database only to validate street addresses, that MCIIm's contention to the contrary should be rejected, and its Motion should be denied.

In support of its argument, BellSouth asserts that the execution of an Interconnection Agreement was to provide MCIIm with the tools to enter the local market. BellSouth argues that there is nothing in the Telecommunications Act of 1996 (the Act) to suggest that it is proper for an ALEC to obtain a service, functionality, or database under the terms of an Interconnection Agreement for the purpose of using it for anything other than the

provision of local service. BellSouth emphasizes that the appropriate use of the RSAG database is to perform address validations in the context of rendering local service.

BellSouth argues that the testimony MCI_m filed in this proceeding repeatedly stated that its intended use of this data is address validation. BellSouth notes that the Commission specifically instructed the parties to "negotiate in good faith the appropriate subset of the database to be provided" and that "this subset should exclude any BellSouth proprietary information, but include at a minimum all the Florida address validation and facility availability data."

BellSouth asserts that MCI_m did not object to initial negotiations to enter into a license agreement that would ensure MCI_m would utilize the database only for address validation after the Order was issued. BellSouth states that sporadic negotiations took place over the course of the next year, apparently without success, and notes that now MCI_m claims that BellSouth has no right to request a license agreement. BellSouth notes the objections MCI_m raises in its Motion and states that none of the restrictions would present an impediment to MCI_m's utilization of the database for address validation, and further, that MCI_m does not contend otherwise.

BellSouth then addresses MCI_m's arguments that BellSouth's right to require a license agreement is waived because the issue of the license agreement only arose during the post-Order negotiation period prescribed by the Commission and not when the Interconnection Agreement was originally negotiated. BellSouth states that two crucial facts were ignored by MCI_m. First, BellSouth argues that its interpretation of the agreement only required it to provide MCI_m access to the database, not the download. Had its position prevailed, BellSouth argues, the issue would have not arisen and thus, no need for a license agreement. Second, BellSouth argues that MCI_m ignores the fact that the restrictions it wishes to place on MCI_m's use of the information are consistent with MCI_m's testimony as to how it intended to use the database. BellSouth argues its assumption was reasonable that the Commission intended for the database provided to MCI_m be used for address validation only because the Commission made note of the testimony relating to that fact in the Final Order. BellSouth asserts that the Commission's decision requiring the download of the RSAG data may have been different had MCI_m testified that it intended to utilize the database to develop a derivative work, to sell (or give) it to other parties, or to provide it to its long distance affiliate to market long distance service. BellSouth

argues that the restrictions it seeks would do nothing more than to hold MCI to its word.

BellSouth argues statements in MCI's Motion supports its position that a license agreement is a reasonable requirement. For instance, "MCI states that it 'is still a new entrant in the Florida local market and cannot now identify all business uses to which the RSAG might be put.'" BellSouth argues MCI's "newness" to the local market did not, of course, prevent it from identifying the need for address validation three years ago during negotiations or two years ago during the hearing. Now, however, while MCI does not know what it wishes to do with the information, it does not want to be subject to any restrictions. BellSouth argues that MCI should not be able to argue both sides but should be limited to using the database as it said it would during the proceeding.

BellSouth counters MCI's assertion that the information is of so little worth that it does not deserve protection, by asking why MCI wants the information without restriction. BellSouth argues that MCI's claim that the database has little intrinsic value is based upon a fundamental misreading of the Final Order. BellSouth believes the download information of all of the Florida address validation and facility availability data allows anyone having access to the database to know precisely what facilities are available at any given address listed in the database. BellSouth argues that there is no other database from which MCI could obtain this information for BellSouth's service territory, and no other means for MCI to obtain this information except from BellSouth. BellSouth argues that to the extent that MCI implies that this information is publicly available, this assertion is not true.

BellSouth asserts that MCI takes issues with only four aspects of the proposed license agreement but requests that it obtain the database without signing an agreement that contains any restrictions. BellSouth, believing each of the restrictions well-founded, submits that if the Commission determines that one or more of the restrictions should not be contained in the license agreement, it should not reject out of hand the approach of requiring MCI to sign an agreement with the appropriate restrictions.

Finally, BellSouth argues that if the Commission agrees with MCI and does not allow the consummation of the license agreement, that at least the Commission should modify its Order to state that MCI is prohibited from using the RSAG database in any way other than address validation in the context of providing local service.

Conclusion

Both MCI and BellSouth agree that neither the Interconnection Agreement nor the Commission Orders explicitly provide for a license agreement. While staff notes that neither the Interconnection Agreement nor the Commission Orders explicitly prohibit a license agreement either, staff agrees with MCI and believes that there is nothing in the Agreement or the Commission's Orders that requires a license agreement.

Staff's rationale is consistent with the Commission's decision in Order No. PSC-98-1484-FOF-TP in which the Commission stated with regard to requiring BellSouth to provide the RSAG database and updates to MCI at no charge to MCI that "we find no language in the contract that requires MCI to pay for the RSAG data." (Order, p. 13) Similarly, there is no language in the Interconnection Agreement that requires MCI to enter a license agreement before the RSAG database can be downloaded. Therefore, staff believes that because there was no specific reference to a license agreement, consistent with the Commission's earlier interpretation regarding provisioning of the RSAG at no charge, that MCI is not required to enter into one. In addition, staff believes BellSouth should not be allowed to add requirements to the Agreement after its execution just because BellSouth had a different interpretation of the meaning of the Agreement. Because staff does not believe that the Interconnection Agreement nor the Orders can be read to require the execution of a license agreement, we therefore, recommend that the Commission grant MCI's Motion to Enforce Commission Orders and recommend that MCI should not be required to execute a license agreement before the RSAG database is downloaded. Staff believes, however, that a license agreement is not required in order to limit MCI's use of the RSAG database.

The question becomes, however, whether any restrictions regarding the use of the RSAG data were contemplated either between the parties in their execution of the Interconnection Agreement or by the Commission in its Orders. Staff believes that while no such implication could be derived from the Interconnection Agreement, certain restrictions could be implied from the Commission's Orders. BellSouth argues it can be implied that where MCI's witness testified as to a specific use for the RSAG download - address validation for local service - and no other uses were described, it is reasonable for the Commission to assume that was what the information was intended to be used for. Staff agrees with this assumption. In addition, because it is reasonable to conclude from the testimony that the RSAG data would be used for address validation of local service, staff believes it is also reasonable

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to conclude that the RSAG data provided to MCI may not be transferred to its affiliates or other providers and that the data may only be used for the purposes of local telecommunications. On the other hand, staff believes that it is not reasonable to conclude from the testimony that BellSouth would have the right to retain title to any works MCI derives from the data or that MCI must return the RSAG data upon termination of the agreement. Staff believes that the return of data may make sense if MCI was receiving a daily download of the entire database, however, MCI is receiving daily updates only.

Staff believes reasonable restrictions contemplated by the parties should apply to the use of the RSAG download data. MCI's witnesses testified that the RSAG database was to be used for address validation in the context of providing local service. In addition, MCI stated it has no intention of attempting to sell the data on the open market and would agree to such a restriction. Therefore, Staff recommends that the Commission grant MCI's Motion to Enforce Commission Orders by prohibiting BellSouth from requiring MCI to execute a license agreement prior to the release of the RSAG download data base. However, staff recommends restricting MCI's use of the RSAG download to address validation for local telecommunications service to be consistent with its testimony in the record. In addition, staff recommends that MCI shall not attempt to sell the data on the open market. Finally, staff recommends that the RSAG download data provided to MCI may not be transferred to any entity, including affiliates.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes. Staff recommends that upon the disposition of Issue 1, that this docket be closed. **(Caldwell)**

STAFF ANALYSIS: Staff understands that Issue 1 is the remaining issue to be resolved between the parties before BellSouth is in compliance with Orders Nos. PSC-98-1484-FOF-TP and PSC-99-0081-FOF-TP. Therefore, staff recommends that upon the disposition of Issue 1, that this docket be closed.