

State of Florida



Public Service Commission

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

DATE: NOVEMBER 16, 2000

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

FROM: DIVISION OF COMPETITIVE SERVICES (HINTON) ^{DH}
DIVISION OF LEGAL SERVICES (VACCARO) *Vaccaro*

RE: DOCKET NO. 991755-TP - REQUEST FOR ARBITRATION CONCERNING COMPLAINT OF MCIMETRO ACCESS TRANSMISSION SERVICES LLC AND MCI WORLD COM COMMUNICATIONS, INC. AGAINST BELLSOUTH TELECOMMUNICATIONS, INC. FOR BREACH OF APPROVED INTERCONNECTION AGREEMENT.

AGENDA: 11/28/00 - REGULAR AGENDA - POST HEARING DECISION - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\CMP\WP\991755.RCM

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CASE BACKGROUND

On November 23, 1999, MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. (MCIm and MWC, respectively, or jointly referred to as WorldCom) filed a complaint for arbitration regarding interconnection agreements with BellSouth Telecommunications, Inc. (BellSouth).

An administrative hearing was held on September 6, 2000. At the hearing the parties indicated that Issue 4 had been stipulated. The parties agreed that if the Commission were to determine that payment is due to WorldCom in this proceeding, such payment would be retroactive to July 8, 1999. Therefore, this is staff's recommendation on the remaining issues.

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JURISDICTION

Part II of the Federal Telecommunications Act of 1996 (Act) sets forth provisions regarding the development of competitive markets in the telecommunications industry. Section 251 of the Act regards interconnection with the incumbent local exchange carrier and Section 252 sets forth the procedures for negotiation, arbitration, and approval of agreements.

Section 252(b) addresses agreements arrived at through compulsory arbitration. Specifically, Section 252(b)(1) states:

(1) Arbitration. - During the period from the 135th to 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

Section 252(b)(4)(C) states that the state commission shall resolve each issue set forth in the petition and response, if any, by imposing the appropriate conditions as required. Section 252(c)(1) of the Act states that in resolving arbitrations, state commissions shall ensure that resolution and conditions meet the requirements of Section 251, including regulations prescribed by the Federal Communications Commission (FCC) pursuant to Section 251.

Pursuant to the Act, this Commission established rates and terms for reciprocal compensation for end office and tandem switching for MCI and BellSouth by Order No. PSC-97-0309-FOF-TP, issued March 21, 1997 in Docket No. 960833-TP. The resulting agreement was also adopted by MWC, and approved by the Commission on September 20, 1999. Pursuant to Section 252(c)(1) of the Act, it was incumbent upon the Commission to ensure that the parties' interconnection agreement complied with Section 251 and the rules implementing that section, which it did. At that time, the FCC's pricing rules, including 47 C.F.R. Section 51.711 (Rule 51.711), had been stayed by the Eight Circuit Court of Appeals in Iowa Utilities Bd. v. Federal Communications Commission, 109 F.3d 418 (8th Cir. 1996). The Eight Circuit vacated the pricing rules on July 18, 1997. Iowa Utilities Bd. v. Federal Communications Commission, 120 F.3d 753 (8th Cir. 1997). The U.S. Supreme Court reversed the Eight Circuit's decision in AT&T v. Iowa Utils. Bd., 525 U.S. 366 (1999). On remand, Rule 51.711 was reinstated by the Eight Circuit in Iowa Utils. Bd. V. Federal Communications Commission, No. 96-3321 (8th Cir. June 10, 1999).

DOCKET NO. 991755-TP
DATE: November 16, 2000

State commissions retain primary authority to enforce the substantive terms of agreements they have approved pursuant to Sections 251 and 252 of the Act. Iowa Utils. Bd. v. Federal Communications Commission, 120 F. 3d 753, 804 (8th Cir. 1997). MCI and MCW have petitioned the Commission to review the agreement it approved to determine if that agreement is in compliance with Rule 51.711. Based on Iowa Utils. Bd. and Section 252(c)(1), the Commission has the authority to review MCI's and MCW's complaint.

ISSUE 1: Under FCC Rule 51.711, would MCI 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?

RECOMMENDATION: No. Staff recommends that under FCC Rule 51.711, compensation at the tandem interconnection rate is only appropriate when the tandem switching function is performed, and the switch serves a geographic area comparable to the area served by BellSouth's tandem switch. **(HINTON)**

POSITION OF THE PARTIES

WORLDCOM: Yes. Under FCC Rule 51.711 and the FCC's Local Interconnection Order, MCI and MWC are automatically entitled to receive the tandem interconnection rate in addition to the end office interconnection rate when their switches serve a geographic area comparable to the area served by BellSouth's tandem switch.

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

STAFF ANALYSIS

The issue before the Commission is to determine if WorldCom should be entitled to be compensated at the tandem interconnection rate and the end office rate for calls terminated on their switches, if those switches serve a geographic area comparable to the area served by a BellSouth tandem switch. WorldCom witness Argenbright asserts that when an ALEC's switch serves a comparable geographic area to that served by the ILEC's tandem switch, "the ALEC **automatically** is entitled to receive the tandem interconnection rate in addition to the end office interconnection rate." (emphasis in original) (TR 70) However, BellSouth witness Cox contends that BellSouth should not be required to pay the end office interconnection rate plus the tandem rate for every local call WorldCom terminates, regardless of which elements are actually used to terminate the call, as WorldCom proposes. (TR 156) Arguing that WorldCom should be compensated for only those functions WorldCom actually performs, witness Cox contends that if WorldCom's switch "is not used to provide a tandem function during a specific call, it is not appropriate to pay reciprocal compensation for the tandem switching function." (TR 156)

The crux of this issue lies in the appropriate interpretation and application of 47 C.F.R. 51.711 (Rule 51.711), and the related discussion in ¶1090 of the FCC's First Report and Order in CC Docket No. 96-98 (FCC 96-325). Rule 51.711 and ¶1090 of FCC 96-325 both deal specifically with setting symmetrical rates for reciprocal compensation. Rule 51.711 reads in part:

- (a) Rates for transport and termination of local telecommunications traffic shall be symmetrical, except as provided in paragraphs (b) and (c) of this section.
 - (1) For purposes of this subpart, symmetrical rates are rates that a carrier other than an incumbent LEC assesses upon an incumbent LEC for transport and termination of local telecommunications traffic equal to those that the incumbent LEC assesses upon the other carrier for the same services.
 - (2) In cases where both parties are incumbent LECs, or neither party is an incumbent LEC, a state commission shall establish the symmetrical rates for transport and termination based on the larger carrier's forward-looking costs.
 - (3) Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.

Paragraph 1090 of FCC 96-325 reads:

We find that the "additional costs" incurred by a LEC when transporting and terminating a call that originated on a competing carrier's network are likely to vary depending on whether tandem switching is involved. We, therefore, conclude that states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem

switch or directly to the end-office switch. In such event, states shall also consider whether new technologies (e.g., fiber ring or wireless networks) perform 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. Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate.

BellSouth witness Cox contends that in ¶1090, the FCC identified two requirements that an ALEC must satisfy in order to be compensated at the tandem rate: (1) the ALEC's switch must perform functions similar to those performed by BellSouth's tandem switch; and (2) the ALEC's switch must serve a geographic area comparable to the area served by BellSouth's tandem switch. (TR 158) Witness Cox refers to this as the "two-prong test" for receiving the tandem switching rate. (TR 159)

WorldCom witness Argenbright contests this interpretation, arguing that the FCC reached three conclusions in ¶1090. First, it is appropriate for ILECs to receive an additional rate for transport and termination of traffic through a tandem switch. Second, states may consider whether all or some calls terminated by an ALEC may be priced at the tandem rate if the ALEC uses alternative technologies or architectures to perform functions similar to those performed by the ILEC's tandem switch. Third, the tandem rate must be applied when the ALEC's switch serves a geographic area comparable to that served by the ILEC's tandem switch. (TR 70) Witness Argenbright states:

It is clear that the Local Competition Order [FCC 96-325] did not create a two-pronged, tandem functionality/geographic comparability test, but rather stated that an ALEC is entitled to the tandem interconnection rate (in addition to the end office interconnection rate) whenever the ALEC's switch serves an area comparable to the area served by an ILEC tandem switch. This reading is confirmed by

the FCC Rule 51.711(a)(3), which contains no tandem functionality requirement. (TR 82)

Looking at Rule 51.711(a)(3), witness Argenbright asserts that the FCC could not have been more clear. He contends that the "geographic comparability rule was adopted without exception or qualification." (TR 72) Witness Argenbright states that when this rule is satisfied, no proof of functional comparability is required to receive the tandem rate. (TR 71)

BellSouth witness Cox argues that WorldCom witness Argenbright's contention, that the tandem rate must be applied automatically simply based on the geographic area its switch may serve, is incorrect. (TR 169) She refers back to Rule 51.711(a)(1), which provides that:

symmetrical rates are rates that a carrier other than an incumbent LEC assesses upon an incumbent LEC for transport and termination of local traffic equal to those that the incumbent LEC assesses upon the other carrier for the same services. (emphasis added by witness) (TR 157)

Witness Cox argues that while WorldCom downplays this portion of the rule, Rule 51.711(a)(1) fully comports with the FCC's discussion in ¶1090 of FCC 96-325 which, she states, sets forth a two-prong test for receiving the tandem rate. (TR 157) She asserts that the "same services" mentioned in 51.711(a)(1) equates to the same functions that the ILEC performs in terminating traffic. Witness Cox contends that WorldCom is only entitled to assess tandem switching charges upon BellSouth when WorldCom actually performs the tandem switching function and serves an area comparable to the area served by BellSouth's tandem switch. (TR 170)

However, WorldCom witness Argenbright states that an ALEC providing transport and termination services on its network, through a switch which serves a comparable geographic area to the area served by the ILEC's tandem switch, is providing the same services. (TR 95) Witness Argenbright explains:

The concept of a single, geographic scope test was adopted largely because the FCC recognized that when an ALEC switch covers a geographic area that is comparable to the area covered by an ILEC tandem switch, the ALEC switch is

necessarily providing similar functionality.
(TR 88)

He further asserts that in the event an ALEC's geographic service area is smaller than that served by the ILEC's tandem, then the ALEC can qualify for the tandem rate if its network performs call aggregation and distribution functions similar to those performed by the ILEC's tandem switch. (TR 95)

Refuting the "either/or" approach to interpreting the FCC's rules as presented by WorldCom, BellSouth witness Cox asserts that "the Commission's [FPSC] past decisions on this issue are consistent with the FCC's two-prong test." (TR 158) She cites the March 14, 1997 decision involving MCI, Order No. PSC-97-0294-FOF-TP in Docket No. 961230-TP, in which this Commission states:

We find that the Act does not intend for carriers such as MCI to be compensated for a function they do not perform. Even though MCI argues that its network performs 'equivalent functionalities' as Sprint in terminating a call, MCI has not proven that it actually deploys both tandem and end office switches in its network. If these functions are not actually performed, then there cannot be a cost and a charge associated with them. Upon consideration, we therefore conclude that MCI is not entitled to compensation for transport and tandem switching unless it actually performs each function. (TR 158)

In addition, witness Cox cites Order No. PSC-96-1532-FOF-TP in Docket No. 960838-TP, dated December 16, 1996, which states:

The evidence in the record does not support MFS' position that its switch provides the transport element; and the Act does not contemplate that the compensation for transporting and terminating local traffic should be symmetrical when one party does not actually use the network facility for which it seeks compensation. (TR 159)

WorldCom witness Argenbright contests BellSouth's citing of the MCI/Sprint and MFS/Sprint Orders, stating that these decisions were both made when the FCC's pricing rules, including Rule 51.711, were stayed. He argues that neither of these Orders has bearing

DOCKET NO. 991755-TP
DATE: November 16, 2000

here, because WorldCom is requesting the Commission make its determination in this docket based on the reinstated FCC pricing rules that the Commission did not rely upon in these two previous rulings. (TR 84)

BellSouth witness Cox also refers to the more recent Commission decision in the ICG Telecom Group, Inc./BellSouth Arbitration. She cites Order No. PSC-00-0128-FOF-TP, dated January 14, 2000, in which the Commission decided:

While FCC Rule 47 C.F.R. Section 51.711 allows us to provide for reciprocal compensation at the tandem rate if the switch of a carrier other than an incumbent LEC serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the evidence of record does not provide an adequate basis to determine that ICG's network will fulfill this geographic criterion. 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. (TR 159)

While witness Cox cites this Order in support of BellSouth's position that this Commission has traditionally held to the two-prong test, WorldCom witness Argenbright contends that the ICG Order supports the conclusion that an ALEC showing only geographic coverage is entitled to the tandem rate. (TR 85) He states that "the Commission did not suggest that ICG had to prove both geographic comparability **and** tandem functionality." (emphasis in original) (TR 84) WorldCom also asserts in its brief that the first sentence of the quotation above demonstrates that the Commission has recognized that geographic coverage alone is sufficient for recovery of the tandem switching rate. (BR 13-14) Witness Argenbright asserts that the discussion in this Order was consistent with the principle that an ALEC must prove geographic coverage or tandem functionality in order to receive the tandem rate, but not necessarily both. (TR 85)

Witness Cox contends that it "is clear from the Commission's prior decisions that WorldCom must satisfy both requirements of the FCC's rule in order to receive compensation for the tandem switching function. WorldCom fails to show that it satisfies the geographic area prong of the test and does not even allege in the Complaint that it meets the functionality prong." (emphasis in original) (TR 159-160)

The parties also rely on certain court opinions under this issue. In its brief, BellSouth cites U.S. West Communications, Inc. V. Minnesota Public Utilities Commission, 55 F. Supp. 2d 968, 978 (D. Minn. 1999). BellSouth asserts that the District Court held that in order to evaluate whether an ALEC should receive the same reciprocal compensation rate as if traffic were being transported and terminated via the ILEC's tandem switch, "it is appropriate to look at both the function and geographic scope of the switch at issue." (BR 6-7) WorldCom counters that the District Court treated the inquiry as an "either-or" question. Citing page 979 of the District Court's opinion, WorldCom states that the District Court upheld the Minnesota PUC based upon a finding of comparable functionality alone, not geographic comparability. WorldCom adds that the Court also noted that a finding of geographic comparability alone would provide sufficient grounds for the tandem switch rate. (BR 9-10)

BellSouth witness Cox also cites a decision by the Ninth Circuit Court of Appeals which states that "the [Washington] Commission properly considered whether MFS's switch performs similar functions and serves a geographic area comparable to US West's tandem switch." (U.S. West Communications v. MFS Intelenet, Inc, et. al, 193 F. 3d 1112, 1124 (9th Dist. 1999) (TR 161) However, WorldCom argues that one cannot tell from the Court's decision whether it was endorsing an "either-or" test or a two-prong test. "At most the decision says that it was proper for the [Washington] Commission to consider both questions." (BR 11) WorldCom witness Argenbright states that the Court merely held that the Washington Utilities and Transportation Commission was not arbitrary or capricious when it ruled that MFS was entitled to the tandem interconnection rate, in so doing considering both function and geographic coverage. (TR 87) WorldCom argued in its brief that the Washington Utilities and Transportation Commission applied, and the Ninth Circuit in the MFS case upheld, an end result test under which the completion of a call from widespread remote locations is treated for pricing purposes as the equivalent of what a tandem switch does, even when no traditional trunk-to-trunk switching is involved. (BR 11) WorldCom argues that this reading of the Washington Commission's decision is supported by the

fact that "MFS had deployed only a single switch, and therefore could not have performed the trunk-to-trunk switching function which BellSouth claims is required." (WorldCom BR 11; TR 115; EXH 1 Arbitrator's Report and Decision (November 1996) and Order Approving Negotiated and Arbitrated Interconnection Agreement (January 1997), In the Matter of MFS and US West, Docket No. UT-960323)

Analysis

The issue before the Commission is to determine if WorldCom should be entitled to compensation at both the tandem and end office rates for calls terminated on their switches, if those switches serve a geographic area comparable to the area served by a BellSouth tandem switch. While the matter of determining if WorldCom's switch does in fact serve a comparable geographic area is left to Issue 2, the crux of this issue is the appropriate interpretation and application of Rule 51.711 and ¶1090 of FCC 96-325. In particular, this recommendation deals with the debate over the "two-prong" interpretation versus the "either/or" interpretation in evaluating if an ALEC is entitled to the tandem rate for the purposes of reciprocal compensation.

Section 251(b)(5) of the Act imposes on each local exchange carrier the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications. Section 252(d)(2)(A) of the Act provides:

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the

additional costs of terminating such calls.

Rule 51.711 sets forth conditions regarding the application of symmetrical compensation rates based upon the ILEC's costs of transport and termination, as does the related discussion in paragraphs 1085 through 1093 of FCC 96-325. Symmetrical compensation provides for a "proxy" rate, based upon the ILEC's costs, that both parties would charge for specific elements of transporting and terminating traffic originated on the other carrier's network.

WorldCom witness Argenbright asserts that Rule 51.711(a)(3) states that the tandem rate must be applied when the ALEC's switch serves a geographic area comparable to that served by the ILEC's tandem switch. (TR 70) He argues that when geographic comparability is established, no proof of functional similarity is required. (TR 71) Witness Argenbright contends that an ALEC is entitled to the tandem rate if its switch either performs similar functions, or serves a comparable geographic area to that of the ILEC's tandem. He argues that the lack of any functionality requirement in rule 51.711(a)(3) confirms this "either/or" interpretation. (TR 82)

On the other hand, BellSouth witness Cox argues that the FCC has established a two-prong test for determining if the ALEC is entitled to the tandem rate. (TR 158) Witness Cox refers to the discussion in ¶1090 of FCC 96-325 to support this conclusion, arguing that the FCC states that an ALEC's switch must perform a similar function and cover a comparable geographic area to that of the ILEC's tandem switch. In addition, BellSouth witness Cox points to Rule 51.711(a)(1) in support of the two-prong test. She argues that subpart (a)(1) clearly sets forth the fact that symmetrical compensation rates are to be assessed when parties perform the same services. (TR 157)

Staff finds BellSouth's argument persuasive. In reading ¶1090 and Rule 51.711 together, staff believes that the FCC establishes an initial threshold consideration of functionality. Paragraph 1090 provides the following:

states shall also consider whether new technologies (e.g., fiber ring or wireless networks) perform 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

DOCKET NO. 991755-TP
DATE: November 16, 2000

transport and termination via the incumbent
LEC's tandem switch. (§1090, FCC 96-325)

While Rule 51.711(a)(3) states that the tandem rate is the appropriate rate for an ALEC whose switch covers a comparable geographic area to that of an ILEC tandem switch, Rule 51.711(a)(1) establishes the assumption that symmetrical compensation is the mechanism by which parties will assess the same rate for performing the same services.

Therefore, staff believes that once similar functionality is established and it is concluded that compensation for this function is appropriate, then the determination of geographic coverage is considered. Staff does not believe this second condition, by itself, would entitle an ALEC to be compensated; instead, it is a condition for determining whether the ILEC's tandem rate should apply, when compensating similar functions.

In past decisions cited by BellSouth witness Cox (PSC-97-0294-FOF-TP and PSC-96-1532-FOF-TP), the Commission found that neither the FCC nor the Act intended that carriers should be entitled to recover costs for functions they do not perform. WorldCom witness Argenbright argues that these decisions have no bearing in this proceeding because the Commission did not consider Rule 51.711 in making these determinations. Nevertheless, under cross-examination he concedes that the Commission did consider §1090 of FCC 96-325 and Section 252(d)(2)(A) of the Act when making its decision in these Orders. (TR 108-110) Rule 51.711 was stayed by the 8th Circuit Court of Appeals due to its belief that petitioners would show on appeal that the FCC did not have authority to set pricing rules, not based upon a particular policy flaw in Rule 51.711. (EXH 1, Iowa Utils. Bd. v. Federal Communications Commission, 109 F.3d 418 (8th Cir. 1996)) Staff believes that Rule 51.711 was and is consistent with §1090 of 96-325, and as such, the reinstatement of Rule 51.711 in 1999 had no adverse affect upon the Commission's decisions. In other words, staff believes that the Commission decisions based upon §1090 of FCC 96-325 are inherently consistent with Rule 51.711; therefore, staff disagrees that these past decisions have no bearing in this proceeding.

Staff disagrees with BellSouth's and WorldCom's assertions, however, that Order No. PSC-00-0128-FOF-TP rendered in the ICG Telecom/BellSouth arbitration, supports their respective positions. Witness Cox states that the Commission's Order specifies a two-prong test. (TR 159) WorldCom witness Argenbright states that the Order provides for an either-or test. (TR 85) WorldCom also asserts that the Order recognizes that geographic coverage alone is

sufficient for recovery of the tandem switch rate. (BR 13-14) Staff believes that the quotation from the Order identified at page 9 of staff's analysis in this recommendation merely illustrates that the Commission evaluated both geographic and functional comparability in making its decision. The Commission did not specifically state, however, whether an "either-or" or a "two-prong" test was appropriate. Further, with regard to WorldCom's assertion that the Order recognizes that geographic coverage alone is sufficient for recovery of the tandem switch rate, WorldCom emphasizes the following language from the aforementioned quotation:

While Rule 47 C.F.R. Section 51.711 allows us to provide for reciprocal compensation at the tandem rate if the switch of a carrier other than an incumbent LEC serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the evidence of record does not provide an adequate basis to determine that ICG's network will fulfill the geographic criterion. (EXH 1; WorldCom BR 13-14)

While the Commission states that geographic comparability is a basis for allowing the tandem switch rate under Rule 51.711, it does not indicate whether that criterion alone is sufficient. As mentioned above, the Commission also evaluated similar functionality. The Commission also addressed this issue in the Intermedia/BellSouth Arbitration Order No. PSC-00-1519-FOF-TP, issued in Docket No. 991854-TP. Again the Commission evaluated the geographic and functional comparability but never made a specific finding whether or not both were required for recovery of the tandem switch rate. (EXH 1, Order at page 14)

The above mentioned FCC discussion and rules establish the application of symmetrical rates for the reciprocal compensation of additional costs incurred in performing certain functions while terminating traffic originated on the network of another carrier. As stated in Section 252(d)(2)(A) of the Act, reciprocal compensation is designed to "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier." (Emphasis added) Staff believes that the recovery of costs not incurred, as would occur if ALECs were entitled to the tandem rate for merely covering a certain geographic area without actually performing the tandem function, was never intended by the Act or

the FCC when establishing rules governing reciprocal compensation. Therefore, staff believes that ¶1090 of FCC 96-325 does, in fact, set forth the test of "similar functionality" as a threshold matter. Similarly, staff believes that the resulting Rule 51.711 intends for the application of a symmetrical tandem rate only when the ALEC actually performs the "same services," and in so doing incurs a cost.

Staff does not believe the terms and conditions for reciprocal compensation as presented by WorldCom are "just and reasonable" under the Act since they provide for the recovery of costs (i.e., tandem switching costs), regardless of whether these costs are actually incurred. Therefore, based on the evidence in this docket, staff recommends that WorldCom is not entitled to compensation at the tandem interconnection rate if its switches merely serve a comparable geographic area to that served by BellSouth's tandem switch; rather, staff recommends that WorldCom is entitled to compensation at the tandem switching rate only if WorldCom in fact also performs a tandem switching function and serves a comparable geographic area.

While conceding that this Commission has consistently held that in order to prove tandem functionality an ALEC must show that it performs a traditional trunk-to-trunk tandem switching function, in its brief WorldCom states that the record in this proceeding provides sound policy reasons for a change in this position. WorldCom states that the Commission should adopt a new policy under which an ALEC can meet the "comparable functionality test" through the use of alternative network architectures that provides the same underlying function. (BR 15) WorldCom suggests that this underlying function would be the aggregation and distribution of traffic from widespread geographic locations. (BR 15; Argenbright TR 88-90) Staff believes that WorldCom's statements are inappropriate, because the question of whether or not WorldCom's switches perform a tandem function is not at issue in this docket. Staff also notes that WorldCom provided no evidence to support a change in established Commission policy in that regard.

Staff also believes that the court decisions cited by the parties are not dispositive of this issue. With regard to U.S. West Communications, Inc. V. Minnesota Public Utilities Commission, it appears that WorldCom's reading of the U.S. District Court of Minnesota's decision is correct. The Court does state that under Rule 51.711 geographic comparability alone is sufficient grounds for application of the tandem switch rate. Nevertheless, the District Court's interpretation of Rule 51.711 is merely

DOCKET NO. 991755-TP
DATE: November 16, 2000

illustrative and does not bind this Commission's authority to make a decision in this docket.

With regard to the MFS case, staff also believes that WorldCom's reading of the Ninth Circuit Court's decision is correct. The Court merely determined that the Washington Commission was not arbitrary or capricious in making its decision. The Court did not, however, make a finding on its own regarding whether a single switch can perform a tandem function. WorldCom's discussion on this point appears irrelevant, because that question is not at issue in this docket. Further, the MFS case is merely illustrative and does not bind the Commission's authority to make a decision in this docket.

Staff notes that if WorldCom is unable to recover the cost of terminating BellSouth's traffic at the BellSouth end office rate, Rule 51.711(b) sets forth conditions by which an ALEC may request a rate higher than the rate based upon the ILEC's costs. Rule 51.711(b) states:

A state commission may establish asymmetrical rates for transport and termination of local telecommunications traffic only if the carrier other than the incumbent LEC (or the smaller of two incumbent LECs) proves to the state commission on the basis of a cost study using the forward-looking economic cost based pricing methodology described in Secs. 51.505 and 51.511, that the forward-looking costs for a network efficiently configured and operated by the carrier other than the incumbent LEC (or the smaller of two incumbent LECs), exceed the costs incurred by the incumbent LEC (or the larger incumbent LEC), and, consequently, that such that [sic] a higher rate is justified.

Conclusion

Staff recommends that pursuant to FCC Rule 51.711, WorldCom is not entitled to compensation at the sum of the tandem interconnection rate and the end office interconnection rate for calls terminated on their switches if those switches only serve a geographic area comparable to the area served by BellSouth's tandem switches. As set forth in the evidence, staff believes that Rule 51.711 establishes that symmetrical rates are to be assessed by one carrier upon another carrier for performing the same services.

DOCKET NO. 991755-TP
DATE: November 16, 2000

Staff does not believe this rule establishes that serving a comparable geographic area alone entitles WorldCom to the tandem rate, but rather that WorldCom must also perform a tandem function.

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

RECOMMENDATION: No. Staff recommends that the Commission find that MCI's and MWC's switches do not serve geographic areas comparable to those served by BellSouth tandem switches. (HINTON)

POSITION OF THE PARTIES

WORLDCOM: Yes. The geographic areas served by MCI's single switch in the Orlando area and the four MCI and MWC switches in Miami and Pompano Beach areas are comparable to those served by BellSouth's tandem switches in those areas.

BELLSOUTH: No. MCI fails to establish that its switches are actually serving customers in a geographic area comparable to the geographic area served by BellSouth's tandem switches.

STAFF ANALYSIS

The issue before the Commission is whether MCI's and MWC's (jointly WorldCom) switches serve geographic areas comparable to those served by a BellSouth tandem switch. BellSouth witness Cox notes that this issue only addresses one prong of a two-prong test set forth by the FCC to determine if WorldCom is entitled to the tandem switching rate. (TR 160) In any event, witness Cox contends that according to FCC Rule 51.711(a)(3), for WorldCom to establish that its switch serves a geographic area comparable to BellSouth's tandem switch, "WorldCom must show the particular geographic area its switch actually serves, not the geographic area that its switch may be capable of serving." (emphasis in original) (TR 160)

WorldCom witness Argenbright states that there are two geographic areas at issue: the Orlando area in central Florida, and the Miami/Ft. Lauderdale area in south Florida. (TR 73) Witness Argenbright originally testified that WorldCom had a single switch in the Orlando area providing service to 14 rate centers, six of which are served by BellSouth's Orlando tandem switches. (TR 73) Witness Argenbright subsequently clarified, however, that in the Orlando area the parties actually have only four rate centers in common. (TR 131) In addition, witness Argenbright states that WorldCom has four switches serving the Miami/Ft. Lauderdale area. (TR 91) He states that these switches have been configured to serve 12 rate centers, all of which are served by BellSouth tandems. (TR 73) In support of his assertion that WorldCom

switches serve geographic areas comparable to those served by BellSouth's Orlando and Miami/Ft. Lauderdale tandem switches, witness Argenbright presents maps depicting the coverage areas of WorldCom's switches. (EXH 6)

Commenting on these maps, BellSouth witness Cox argues that "what WorldCom means by 'covers' is that its switch is capable of serving these areas. It is a very simple matter to outline areas on a map and claim that its switches serve these areas." (emphasis in original) (TR 171) Witness Cox contends that for WorldCom to establish that WorldCom's switches actually serve areas comparable to BellSouth's tandem switches, as required by the FCC rule, WorldCom must show the areas actually served by its switches. She argues that it is insufficient to merely show the area that its switch may be capable of serving. (TR 171) Witness Cox asserts that WorldCom has not provided the location of WorldCom's customers in Florida, and absent such evidence, WorldCom has failed to satisfy the burden of proof in this issue. (TR 162)

WorldCom witness Argenbright also presented confidential information regarding customers served by WorldCom's switches in the Orlando and Miami/Ft. Lauderdale areas. In this information, witness Argenbright describes the capacity of WorldCom's network in these two areas, as well as the number of local circuits and on-net buildings served by WorldCom in a certain number of cities within these geographic areas. (EXH 4)

Analysis

The issue to be determined is whether WorldCom's switches serve geographic areas comparable to those served by BellSouth tandem switches. The difficulty in this issue lies in how to establish whether a geographic area is actually served. While the confidential information provided by witness Argenbright depicts a certain network capacity and describes the number of customers served, it does not show where these customers are located within these geographic areas. Witness Argenbright's confidential information also describes the number of on-net buildings served in a certain number of cities. However, this information does not state which cities contain these on-net buildings, or where in these cities the on-net buildings are located. (EXH 4) As such, staff believes this information is insufficient for determining if WorldCom's switches serve comparable geographic areas to those served by BellSouth tandems.

WorldCom witness Argenbright has provided maps depicting WorldCom's coverage area, stating that these areas are comparable

to the geographic areas served by BellSouth's tandem switches in the Orlando and Miami/Ft. Lauderdale areas. (EXH 6) However, there is still the issue of whether the coverage areas depicted on WorldCom's maps are actually "served" by WorldCom's switches. BellSouth witness Cox argues that for WorldCom to show that its switch serves a geographic area equal to or greater than that served by BellSouth's tandem, WorldCom must show the location of their customers. (TR 171) Witness Cox asserts that "although the maps attached to Mr. Argenbright's testimony supposedly reflect the 'Rate Centers served by MCIW,' WorldCom has presented no evidence to support its assertion." (TR 171) Staff agrees with BellSouth witness Cox that the maps depicting coverage area presented by WorldCom witness Argenbright do not allow for a reasonable determination of whether WorldCom's switches actually serve customers in these areas. In fact, witness Argenbright admits that you cannot determine by looking at the maps where WorldCom is actually serving customers, as opposed to just being capable of serving customers. (TR 132-133)

Staff believes BellSouth's argument that the capacity to serve an area does not equate to actually serving the area, is persuasive. (TR 160) WorldCom witness Argenbright states that in the Orlando market, WorldCom has a network configured and equipped to serve fourteen rate centers. However, WorldCom currently has customers in only nine of these 14 rate centers. (TR 91) In addition, during cross-examination witness Argenbright states that in the four Orlando area rate centers that BellSouth and WorldCom have in common, WorldCom does not serve customers in two of those rate centers. (TR 131)

Regarding South Florida, witness Argenbright states that in the Miami/Ft. Lauderdale area the WorldCom network has four switches, and has been configured and equipped to serve 12 rate centers. (TR 131) However, he states that WorldCom currently has customers in only 11 of these 12 rate centers. (TR 91) Staff believes that the discrepancy between the geographic area presented by WorldCom as their coverage area, and the area in which they presently are actually serving customers is compelling. In light of these discrepancies, and the insufficiency of other evidence in the record, staff does not believe WorldCom's switches serve areas comparable to those served by BellSouth's tandem switches.

Conclusion

Staff recommends that the Commission find that WorldCom's switches do not serve geographic areas comparable to those served by BellSouth tandem switches. While WorldCom has presented

DOCKET NO. 991755-TP
DATE: November 16, 2000

evidence showing that they are willing to serve customers in certain geographic areas that would appear to be comparable to those served by BellSouth's tandem switches, WorldCom has not shown that they actually serve those areas.

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 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?

RECOMMENDATION: No. BellSouth should not 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 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.
(VACCARO)

POSITION OF THE PARTIES

WORLDCOM: Yes. The compensation provisions of the existing Interconnection Agreements are unlawful under the reinstated FCC Rule 51.711 because they do not provide reciprocal compensation when MCIm and MWC terminate calls throughout areas comparable to those served by BellSouth's tandem switches. These provisions must therefore be amended under the change-of-law provisions of the Interconnection Agreements.

BELLSOUTH: 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.

STAFF ANALYSIS

Section 2.4.2 of Part A of the interconnection agreement provides the following:

2.4.2 When BellSouth terminates calls to MCIm's subscribers using MCIm's switch, BellSouth shall pay MCIm the appropriate interconnection rates(s). BellSouth shall not compensate MCIm for transport and tandem switching unless MCIm actually performs each function. (TR 62-63)

DOCKET NO. 991755-TP
DATE: November 16, 2000

WorldCom witness Argenbright testifies that under this language, WorldCom is precluded from receiving compensation at the tandem interconnection rate unless it actually performs a tandem switching function. (TR 75, 101-102) Witness Argenbright states that this preclusion has been made unlawful by the reinstatement of Rule 51.711, because WorldCom is now affirmatively entitled by that rule to receive the tandem interconnection rate based solely on the comparable geographic coverage provided by its switches in Florida. (TR 75, 101-102) Therefore, WorldCom argues that the Commission should order that the interconnection agreement be amended to permit WorldCom to recover the tandem interconnection rate based on the geographic coverage of its switches. (BR 22)

WorldCom asserts that two provisions in the parties' interconnection agreement require that the agreement be amended. Part A, Section 2.2 of the agreement provides in pertinent 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 in order to amend the Agreement to substitute contract provisions which are consistent with such rules, regulations or orders. (TR 74-75)

Part A, Section 2.4 of the agreement provides in pertinent part:

In the event that any final and nonappealable legislative, regulatory, judicial or other legal action materially affects any terms of this Agreement, or the ability of MCI or BellSouth to perform any material terms of this Agreement, or in the event a judicial or administrative stay of such action is not sought or granted, MCI or BellSouth may, on thirty (30) days written notice (delivered not later than thirty (30) days following the date on which such action became binding and has otherwise become final and nonappealable) require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. (TR 75-76)

DOCKET NO. 991755-TP
DATE: November 16, 2000

The crux of BellSouth witness Cox's testimony is that there are no provisions in the current agreements that are made unlawful by the reinstatement of Rule 51.711. (TR 162-163) Therefore, BellSouth argues that WorldCom fails to establish a basis upon which the Commission can reform the agreement. (BR 15)

Analysis

This issue hinges upon the outcome of Issue 1. Issue 1 asks whether or not WorldCom is entitled to be compensated at the end office and tandem interconnection rates under FCC Rule 51.711, if WorldCom's switches serve a geographic area comparable to the area served by BellSouth's tandem. As discussed within the Issue 1 analysis, staff has recommended that, based upon the evidence in the record, WorldCom should not receive compensation at the tandem interconnection rate based solely upon geographic comparability, because the parties' current interconnection agreement is consistent with Rule 51.711. Therefore, contrary to WorldCom's assertion, Part A, Section 2.4.2 has not been made unlawful by the reinstatement of Rule 51.711. Therefore, the provisions in Part A, Sections 2.2 and 2.4 of the interconnection agreement are inapplicable, and the interconnection agreement should not be amended.

Conclusion

Based on the foregoing, staff recommends that BellSouth should not be required, pursuant to Part A Section 2.2 or 2.4 of the interconnection agreement, to execute amendments to its interconnection agreements with MCI and MWC requiring BellSouth to compensate MCI and MWC at the sum of the tandem interconnection rate and 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.

DOCKET NO. 991755-TP
DATE: November 16, 2000

ISSUE 4: Are MCI 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?

RECOMMENDATION: This issue has been stipulated by the parties; therefore, no decision is necessary. (VACCARO)

POSITIONS OF THE PARTIES

WORLD COM: This issue has been stipulated.

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

STAFF ANALYSIS

The parties announced at the beginning of the September 6, 2000 hearing that this issue had been stipulated. The parties agreed that if the Commission determined that WorldCom should be compensated at the tandem interconnection rate, payment would be due from BellSouth retroactive to July 8, 1999, the date that WorldCom requested an amendment to the interconnection agreement. Because the parties have stipulated this issue, no decision is necessary.

DOCKET NO. 991755-TP
DATE: November 16, 2000

ISSUE 5: Should this docket be closed?

RECOMMENDATION: Yes. There are no outstanding matters; therefore, this docket should be closed. **(VACCARO)**

STAFF ANALYSIS

There are no outstanding matters; therefore this docket should be closed.