Georgia Public Service Commission

244 WASHINGTON STREET, S.W.
ATLANTA, GEORGIA 30334-5701

(404) 656-4501
(800) 282-5813

FAX: (404) 656-2341
www.psc.state.ga.us

Docket No. 19341-U

In Re: **Generic Proceeding to Examine Issues Related to BellSouth's Obligations to Provide Unbundled Network Elements**

ORDER ON MCI'S MOTION FOR EMERGENCY RELIEF CONCERNING UNE-P ORDERS

On February 21, 2005, MCI MetroAccess Transmission Services, LLC ("MCI") filed with the Georgia Public Service Commission ("Commission") a Motion for Emergency Relief Concerning UNE-P Orders ("Motion"). The Motion asked for the following relief:

(1) Order BellSouth Telecommunications, Inc. ("BellSouth") to continue accepting and processing MCI's unbundled network platform ("UNE-P") orders under the rates, terms and conditions of the parties' interconnection agreement ("Agreement");

(2) Order BellSouth to comply with the change of law provisions of the Agreement with regard to the implementation of the *Triennial Review Remand Order* ("TRRO");

(3) Order such further relief as the Commission deems just and appropriate.

BellSouth filed its Response in Opposition ("Response") on February 23, 2005.

MCI's Motion was in response to Carrier Notification Letters received from BellSouth. The Carrier Notification Letters, in turn, were in response to the February 4, 2005, Triennial Review Remand Order issued by the Federal Communications Commission ("FCC"). The FCC determined on a nationwide basis that incumbent local exchange carriers ("ILECs") are not obligated to provide unbundled local switching pursuant to section 251(c)(3) of the Federal Telecommunications Act ("Federal Act"). (TRRO ¶ 199). For the embedded customer base, the FCC adopted a twelve-month transition period, but specified that this transition period would not permit competitive LECs ("CLECs") to add new customers using unbundled access to local circuit switching. *Id.*

The FCC also made non-impairment findings with regard to dedicated loop and transport. For DS3-capacity loops, requesting carriers were found not to be impaired at any location within the service area of a wire center containing 38,000 or more business lines and four or more fiber-based collocators. (TRRO ¶146). The FCC found that "requesting carriers are not impaired without access to DS-1 capacity loops at any location within the service area of a wire center containing 60,000 or more business lines and four or more fiber-based collocators." *Id.* The FCC's non-impairment finding with respect to dark fiber loops applied to any instance. *Id.*

For DS1 transport, the FCC concluded that competing carriers were not impaired "on routes connecting a pair of wire centers, each of which contains at least four fiber-based collocators *or* 38,000 or more business lines." (TRRO ¶ 66) (emphasis in original). Competing carriers were also found to be not impaired without access to DS3transport "on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators *or* at least 24,000 business lines." *Id.* (emphasis in original). For dark fiber transport, competing carriers were found not to be impaired "without access on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators *or* at least 24,000 business lines." *Id.* (emphasis in original). The FCC made an across the board non-impairment finding for entrance facilities. *Id.*

I. MCI Motion

MCI asserted that its interconnection agreement with BellSouth includes a provision that specifies the necessary steps to be taken in the event of a change in law. (Motion, p. 4). MCI states that on February 8, 2005, and then on February 11, 2005, it received from BellSouth Carrier Notification Letters stating that as a result of the TRRO it was no longer required to provide unbundled local switching at Total Element Long Run Incremental Cost rates or unbundled network platform and as of that date, BellSouth will no longer accept orders that treat those items as unbundled network elements. *Id.* at 7-8.

On February 18, 2005, MCI sent a letter to BellSouth asserting that the actions referenced in its Carrier Notification Letters would constitute breach of the parties' agreement. *Id.* at 8. Specifically, MCI claims that the actions would breach the agreement (i) by rejecting UNE-P orders that BellSouth is obligated by the Agreement to accept and process; and (ii) by refusing to comply with the change of law procedure established by the Agreement. *Id.* at 1. MCI argues that the TRRO does not purport to abrogate the parties' rights under their interconnection agreement. *Id.* at 6. Therefore, MCI contends that BellSouth is required to follow the steps set forth in the parties' interconnection agreement. *Id.* at 9. The change of law provision states that in the event that "any effective and applicable . . . regulatory . . . or other legal action materially affects any material terms of this Agreement . . . or imposes new or modified rights or obligations on the Parties . . . [MCI] or BellSouth may, on thirty (30) days written notice . . . require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required." (Agreement, Part A, § 2.3.)

MCI also argues that BellSouth is obligated to provide UNE-P under state law. *Id.* at 10. Finally, MCI states that section 271 of the Federal Act independently supports MCI's right to obtain UNE-P from BellSouth at the just and reasonable rates set forth in the Agreement. *Id.* at 14.

II. BellSouth Response

BellSouth argues that the TRRO is self-effectuating, and that as of March 11, 2005 (effective date of TRRO), it does not have any obligation to provide unbundled mass market local switching. (Response, p. 3). BellSouth construes the TRRO to abrogate the change of law provisions of the parties' agreements. BellSouth argues that under the *Mobile-Sierra* doctrine the FCC has the authority to negate any contract terms of regulated carriers, under the condition that it makes adequate public findings of interest. *Id.* at 5.

BellSouth argues that MCI is not entitled to UNE-P under state law. First, BellSouth argues that the Commission has not held the necessary impairment proceedings. *Id.* at 8-9. Second, BellSouth argues the Commission is preempted from granting the relief sought by MCI on this issue. *Id. at* 9-11. Third, BellSouth states that state law does not provide for the combination of unbundled network elements. *Id.* at 11.

Finally, BellSouth rebuts MCI's section 271 arguments. BellSouth claims that although it is obligated to provide unbundled local switching under section 271, switching under this code section is not combined with a loop, is subject to exclusive FCC jurisdiction and is not provided via interconnection agreements. *Id.*

III. Conclusions of Law

A. Parties must abide by the change of law provisions in their interconnection agreements to implement the terms of the *Triennial Review Remand Order* ("TRRO").

At this time, there is no dispute between the parties as to the meaning or purpose of the change of law provision. The difference between the parties is over whether the TRRO alters the parties' rights under their interconnection agreement. That is, whether the TRRO should be construed to negate the change of law provision so that as of the effective date of the TRRO the parties rights under their agreement change. The first step in this analysis is to determine whether the FCC has the authority to issue an order that would alter the parties' rights under the interconnection agreements. If this question is answered in the affirmative, then the next question is whether the FCC exercised that authority in the TRRO with regard to the change of law provision.

BellSouth cites to the *Mobile-Sierra* doctrine in its Response. This doctrine allows for the modification to the terms of a contract upon a finding that such modification will serve the public need, and it has been held that the FCC has the authority to employ the doctrine. Cable & Wireless, P.L.C. v. FCC, 166 F.3d 1224, 1231-32 (D.C. Cir. 1999). Therefore, it appears that the answer to the first question is that the FCC does have the authority under the proper circumstances to amend agreements between private parties.

In order to determine whether the FCC intended to employ the doctrine in this instance it is necessary to examine more closely what is required for its application. In a case involving the Federal Energy Regulatory Commission ("FERC"), the D.C. Circuit Court of Appeals held that it

is a violation of the *Mobile-Sierra* doctrine for an agency to modify a contract without "making a particularized finding that the public interest requires modification . . ." Atlantic City Electric Company, et al. v. FERC, et al., 295 F.3d 1, 40-41 (2002). In Texaco Inc. and Texaco Gas Marketing Inc. v. FERC et al., 148 F.3d 1091 (1998), the Court of Appeals for the D.C. Circuit expanded on the high public interest standard necessary to invoke the *Mobile-Sierra* doctrine. The Court explained that the finding of public interest necessary to override the terms of a contract is "more exacting" than the public interest that FERC served when it promulgated its rules. 148 F.3d at 1097. The Court held that the public interest necessary to alter the terms of a private contract "is significantly more particularized and requires analysis of the manner in which the contract harms the public interest and of the extent to which abrogation or reformation mitigates the contract's deleterious effect." *Id.* Therefore, in order to determine whether the FCC intended to invoke the *Mobile-Sierra* doctrine, it is necessary to examine the analysis, if any, that the FCC conducted to decide whether modification of the agreements satisfied the public interest.

BellSouth's Response does not include a single reference to a statement in the TRRO that modification of the agreements was in the public interest, much less a citation to analysis of why such reformation would be in the public interest. In fact, BellSouth does not cite to any express language in the TRRO at all that says that the FCC intends to reform the contracts. Instead, BellSouth quotes the FCC's statement that the transition period "shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching." (BellSouth Response, p. 4, *quoting* TRRO ¶ 199). BellSouth follows this quotation with the question, "How much clearer could the FCC be?" (Response, p. 4). The answer to this question is provided in the very order cited by BellSouth later in its brief for support that the FCC has the authority to invoke the *Mobile-Sierra* doctrine. In its *First Report and Order,* prior to addressing contracts between ILECs and commercial mobile radio service providers, the FCC explained the basis for its authority to modify contracts when such modifications served the public interest. BellSouth does not cite to any language in the TRRO even approaching that level of clarity.

Even if the strict standard did not apply, the TRRO could not be read to abrogate the rights of the parties related to the change in law provisions of their agreements. To the contrary, parties are directed to implement the rulings of the TRRO into their agreements through negotiation.

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to

monitor this area closely to ensure that parties do not engage in unnecessary delay.

(TRRO § 233, footnotes omitted).

If the FCC had not intended for parties to negotiate amendments related to their interconnection agreements related to new customers, then it seems likely that it would have made that exception clear in the above paragraph.

To support its position, BellSouth first cites to a portion of the order that states the requirements of the TRRO shall take effect March 11, 2005. (BellSouth Response, p. 2, citing TRRO, ¶ 235). However, examination of that paragraph makes it clear that all the FCC is addressing is that the TRRO would be effective March 11, 2005, "rather than 30 days after publication in the Federal Register." (TRRO, ¶ 235). It is not reasonable to construe this language as indicative of intent to abrogate the parties' interconnection agreements. Next, BellSouth claims that the FCC expressly stated that the TRRO would not supersede "any alternative arrangements that carriers voluntarily have negotiated on a commercial basis . . ." (BellSouth Response, pp. 2-3, quoting TRRO ¶199). BellSouth reasons that the express exemption for commercial agreements must mean that the lack of exemption for conflicting provisions in interconnection agreements means they are superseded. (Response, p.3). The flaw in BellSouth's analysis is that it fails to characterize the TRRO correctly. The FCC did not state that the TRRO would not supersede the commercial agreements; it stated that the *transition period* would not supersede the commercial agreements. (TRRO, ¶ 199). Nothing about the transition period has any bearing on the application of the change of law provision to the question of "new adds" after March 11. Consequently, supersession is not an issue between the transition period and this application of the change of law provision.

BellSouth also relies upon the use of the term "self-effectuating" in paragraph 3 of the TRRO. However, BellSouth does not characterize this paragraph accurately. BellSouth states that the use of the term "self-effectuating" refers only to "new adds." (Response, p. 2). That is not a distinction the FCC makes. The FCC simply states that the impairment framework is, *inter alia,* "self-effectuating." (TRRO, ¶3). BellSouth must acknowledge, at minimum, that for the embedded customer base subject to the transition period the order recognizes the need for negotiations to implement the provisions into interconnection agreements. Therefore, unless it can link the FCC's use of the term "self-effectuating" solely to the "new adds," its argument cannot prevail. It cannot do so convincingly; however, and its argument on this issue must fail.

Finally, the Commission's decision is consistent with the conclusion it reached in Docket No. 14361-U related to the effective date of the rates in that proceeding. In its September 2, 2003 Order on Reconsideration, the Commission held that "the rates ordered in the Commission's June 24, 2003 Order are available to CLECs on June 24, 2003, *unless the interconnection agreement indicates that the parties intended otherwise.*" (Order on Reconsideration, p. 4) (emphasis added). That this ordering paragraph contemplated consideration of change of law provisions was demonstrated in Docket No. 17650-U, *Complaint of AT&T Communications of the Southern States, LLC of the Southern States, LLC Against BellSouth Telecommunications, Inc.* In its Order Adopting Hearing Officer's Initial Decision, the Commission concluded that the change of law provision in the parties' interconnection

agreement applied, and justified an effective date other than June 24, 2003. In its brief in that docket, BellSouth, then in a position to benefit from the application of the change of law provision, stated that, "The change-in-law provision contains specific steps which the parties must follow to change the terms, when a regulatory action materially affects any material terms of the Agreement." (BellSouth Brief in Support of its Motion to Dismiss and Response to Complaint and Request for Expedited Review, p. 3). The Commission agreed with this argument raised by BellSouth in that docket, and concludes that such reasoning applies in this instance as well.

While MCI's Motion was entitled "Motion for Emergency Relief Concerning UNE-P Orders," the relief sought included could apply to both mass market local switching and dedicated loop and transport. MCI asked that BellSouth be ordered to implement the TRRO using the change of law provisions in the Agreement. In addition, MCI asked that the Commission order the relief it deemed just and reasonable. The Commission finds it just and reasonable to order parties to abide by the change of law provisions in their interconnection agreements for all changes, regardless of whether the change is on UNE-P or loops and transport. The analysis illustrating that the FCC did not intend to abrogate the parties' rights under their contracts applies as well to dedicated loop and transport.

In addition, the Commission concludes that it is just and reasonable to impose the requirement that parties abide by the terms of their interconnection agreements to implement the TRRO on all parties and the modification of all interconnection agreements. The question of whether the TRRO must be implemented pursuant to the parties' interconnection agreements must be resolved on an expedited basis. This same threshold question applies equally to all carriers. There is no reason why the TRRO would be deemed to abrogate some parties' contractual rights and not others. In light of the preceding, the most just and administratively efficient manner to resolve MCI's Motion is to apply the conclusions to the implementation of the TRRO in all interconnection agreements.

B. Issues related to a possible true-up mechanism should be decided at a later time.

The Commission finds that it is prudent to defer ruling on the question of a true-up mechanism until after it has had the opportunity to consider the issues more closely. This matter was brought before the Commission on an expedited basis. While it is necessary for the Commission to resolve the issue related to the change of law provisions prior to March 11, 2005, the same urgency does not apply to the issue of a true-up mechanism. The Commission determines that it may be of assistance for the Commission to confirm, prior to voting on this issue, that it has the benefit of all the arguments related to the appropriateness and operation of a true-up mechanism as well as any other potential issues involved.

C. Issues related to BellSouth's obligations to continue to provide mass market unbundled local switching under either Georgia law or section 271 should be resolved by the Commission in the regular course of this docket.

The Order Initiating Docket set forth among the issues to be addressed: "whether BellSouth is obligated to provide Unbundled Network Elements ("UNEs") under section 271 of

the Telecommunications Act of 1996," and "whether BellSouth is obligated to provide UNEs under Georgia State Law." Because those issues as well do not need to be decided prior to March 11, the Commission will decide those issues in the regular course of this docket.

IV. Ordering Paragraphs

WHEREFORE IT IS ORDERED, parties must abide by the change of law provisions in their interconnection agreements to implement the terms of the Triennial Review Remand Order and this condition applies to all carriers, not just MCI and BellSouth, and to all changes, regardless of whether the change is on UNE-P or loops and transport.

ORDERED FURTHER, that issues related to a possible true-up mechanism should be decided at a later time.

ORDERED FURTHER, that issues related to BellSouth's obligations to continue to provide mass market unbundled local switching or dedicated loop and transport under either Georgia law or Section 271 should be resolved by the Commission in the regular course of this docket.

ORDERED FURTHER, that all findings, conclusions and decisions contained within the preceding sections of this Order are adopted as findings of fact, conclusions of law, and decisions of regulatory policy of this Commission.

ORDERED FURTHER, that any motion for reconsideration, rehearing or oral argument shall not stay the effectiveness of this Order unless expressly so ordered by the Commission.

ORDERED FURTHER, that jurisdiction over this proceeding is expressly retained for the purpose of entering such further order or orders as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 1st day of March, 2005.

Reece McAlister
Executive Secretary

Date: 3-8-05

Angela Elizabeth Speir
Chairman

Date: 3/8/05