COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION BY MCI FOR ARBITRATION OF CERTAIN TERMS AND CONDITIONS OF A PROPOSED AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC. CONCERNING INTERCONNECTION AND RESALE UNDER THE TELECOMMUNICATIONS ACT OF 1996	)))))))	CASE NO. 96-431

O R D E R

On August 21, 1997, the Commission entered its Order in this case approving as submitted the interconnection agreement between MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. (collectively, "MCI"), and BellSouth Telecommunications, Inc. ("BellSouth"). Among the terms in that agreement were [1] an overall discount rate of 15.1 percent based on a residential discount rate of 15.56 percent and a business discount rate of 14.41 percent; and [2] a provision permitting MCI to elect to take a specific term given to another carrier in the latter's agreement with BellSouth.

Prior to the Commission's entry of its Order approving the agreement, MCI filed, on August 12, 1997, a motion requesting the Commission to conform the arbitrated resale discount rates to the Commission's "more favored provisions policy" or to grant a hearing on the resale discount rate prescribed. Regardless of procedural vehicle, the end result desired by MCI is to obtain the resale discount prescribed by the Commission

in Case No. 96-482.[1] In that case, AT&T received a more favorable rate than MCI: a residential discount of 16.79 percent and a business rate of 15.54 percent. The Commission did not rule immediately on MCI's motion, electing to await BellSouth's response to the motion. No such response has been filed; and, based on testimony given by BellSouth in Case No. 96-608,[2] the Commission concludes that MCI's motion should now be addressed.

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 47 U.S.C. 151 et seq. (the "Act") provides that state commissions shall set a wholesale rate for incumbent local exchange carriers ("ILECs") on the "basis of retail rates charged to subscribers for the telecommunications services requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." 47 U.S.C. 252(d)(3). Further, the Act prohibits ILECs from charging discriminatory rates. The different wholesale discounts prescribed by the Commission in Case Nos. 96-431 and 96-482, respectively, were based upon different information submitted by the parties in those cases. They were not based upon any finding that, in some way, BellSouth would avoid more costs when selling to AT&T. Thus, the wholesale discount calculations applied in Case No. 96-482 were simply adjustments

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1 Case No. 96-482, In the Matter of The Interconnection Agreement Negotiations Between AT&T Communications of the South Central States, Inc. and BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. 151 *et seq.*, Order dated February 6, 1997 ("AT&T Arbitration Order").

2 Case No. 96-608, Investigation Concerning the Propriety of Provision of InterLATA Services by BellSouth Telecommunications, Inc., Pursuant to the Telecommunications Act of 1996; See Transcript of Evidence taken at the hearing held August 25 - 29, 1997 (hereinafter "TE 96-608").

based on a more complete presentation of facts equally relevant to Case No. 96-431; and, pursuant to the Act, the wholesale discount given to AT&T in Case No. 96-482 is the appropriate discount BellSouth should give to any carrier which resells its services.

Until recently, the discrepancy between the wholesale rate provisions in the AT&T and MCI agreements did not appear to pose a problem, because a "most favored" provision appears in BellSouth's interconnection agreement with MCI. It is true that the Eighth Circuit Court of Appeals in Iowa Utilities Board et al. v. Federal Communications Com'n and United States of America, No. 3321 and Consolidated Cases (Opinion of July 18, 1997) ruled that government regulatory bodies could not require ILECs to permit interconnecting carriers to pick and choose isolated portions of the ILEC's interconnection agreements with other carriers. However, BellSouth and MCI submitted their final agreement to the Commission on August 13, 1997, several weeks after the Eighth Circuit had rendered its decision. The "most favored" provision appeared, without objection by BellSouth, in the agreement. Because BellSouth had not been under legal compulsion at that point to include such a provision, it appeared that it had been negotiated freely. As BellSouth has stated, parties to an interconnection agreement "can negotiate anything they want."[3] Accordingly, the Commission approved the agreement, satisfied that the "most favored" provision would prevent discriminatory pricing.

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[3] TE 96-608, Vol. III, at 140.

During the hearing held in Case No. 96-608, however, BellSouth indicated, specifically in the context of MCI's wholesale discount rate, that it did not intend to honor the "most favored" provision, basing its decision on the Eighth Circuit opinion:

> Since the time this Agreement was reached, the Eighth Circuit acted and dealt specifically with the issue of Most Favored Nation, which is basically what this is, and what the Eighth Circuit said was it's sort of an all or nothing . . . So that would basically override these provisions . . . .[4]

Whatever the eventual legal fate of the disputed "most favored" provision, the germane point here is that the provision will not, at least in the immediate future, cure the discriminatory wholesale rate provided to MCI under the agreement. The wholesale rates prescribed in Case No. 96-482 are based upon facts that apply equally in this case, because they are based entirely on costs avoided by BellSouth that do not change regardless of the carrier buying the service.

IT IS THEREFORE ORDERED that:

1. The parties hereto shall reform their interconnection agreement to substitute for the wholesale rates currently approved the wholesale rates that appear in the interconnection agreement between BellSouth and AT&T.

2. The Commission's Order dated August 21, 1997 is hereby modified as stated herein.

3. The parties shall file their agreement, reformed as specified herein, within 10 days of the date of this Order.

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[4] TE 96-608, Vol. III, at 139.

Done at Frankfort, Kentucky, this 22nd day of October, 1997.

PUBLIC SERVICE COMMISSION

Linda K Breathitt
Chairman

Vice Chairman

B. J. Helton
Commissioner

ATTEST:

Don Mills
Executive Director