

**ORDER NO. 75954**

<b>IN THE MATTER OF THE PETITIONS * FOR APPROVAL OF AGREEMENTS * AND ARBITRATION OF UNRESOLVED * ISSUES ARISING UNDER SECTION * 252 OF THE TELECOMMUNICATIONS * ACT OF 1996. *</b>	<b>BEFORE THE PUBLIC SERVICE COMMISSION OF MARYLAND</b> <hr/> <b>CASE NO. 8731 PHASE B-II</b>
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**ORDER ON ARBITRATION**

**I. Procedural History**

On August 27, 1996, MCI Telecommunications Corporation (“MCI”)<sup>1</sup> filed a petition for arbitration of unresolved issues. During the course of this arbitration, MCI and Bell Atlantic-Maryland, Inc. (“BA-MD”) resolved many of the disputed issues. A hearing on the outstanding issues was conducted before a Hearing Examiner on July 15, 1997, and a Proposed Order was issued on July 31, 1997. MCI and BA-MD each filed an appeal of this Proposed Order. In Order No. 73725, issued October 9, 1997, the Commission resolved the issues raised by the parties regarding interconnection points, access to BA-MD’s directory assistance database, and information needed by switch.<sup>2</sup>

However, disputes continued between the parties. On January 16, 1998, MCI filed an Interconnection Agreement with the Commission as well as a Motion requesting that the Commission adopt this Interconnection Agreement as the Agreement between MCI and BA-

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<sup>1</sup> MCI’s corporate name changed to MCI Worldcom Corporation during the course of this arbitration proceeding.

MD. At this juncture, both parties contended that the issues remaining to be resolved were the provision of directory assistance data, combinations of unbundled network elements (“UNEs”) and reciprocal compensation for traffic to Internet Service Providers (“ISPs”). On March 25, 1998, a further hearing was held before a Hearing Examiner, who issued a Proposed Order on April 27, 1998. Again, both parties appealed the Hearing Examiner’s decision. However, the parties formally withdrew their appeals on February 24, 1999. Of the three issues on appeal, the directory assistance data issue was resolved by settlement between the parties, and the UNE and ISP issues were resolved by Commission Orders issued in generic proceedings.<sup>3</sup> By letter dated March 5, 1999, the Commission accepted the settlement and directed the parties to notify the Commission of any remaining issues by March 19, 1999.

On March 19, 1999, MCI responded to the Commission’s directive, noting that there were no further issues requiring Commission resolution and filing a proposed Interconnection Agreement that it requested be adopted by the Commission. However, MCI contended that BA-MD refused to execute the agreement due to a dispute regarding the language addressing the combination of UNEs. BA-MD also filed a letter on March 19, 1999 and stated that there were “no remaining issues in this proceeding that require Commission resolution, and the entire proceeding should be dismissed.”

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<sup>2</sup> 88 Md PSC 223 (1997). The Commission specifically noted that these issues “apparently are the only three remaining unresolved issues between MCI and BA”. *Id.* at 224.

<sup>3</sup> In Order No. 74671 issued in Case No. 8731, Phase II (c), the Commission determined that under authority of Maryland law, the Commission may require the provision of combined UNEs and that it is in the public interest to require BA-MD to provide combined network elements in order to facilitate the efficient provisioning of local services. 89 Md. PSC 215 (1998). In Order No. 75280, issued on June 11, 1999, the Commission determined that parties who do not have approved interconnection agreements should receive the arbitrated reciprocal compensation rates contained in the approved Statement of Generally Available Terms as an interim compensation mechanism for ISP-bound traffic until the FCC establishes an appropriate inter-carrier compensation mechanism.

Despite both parties' contention that there were no further issues requiring Commission resolution, a subsequent letter submitted by BA-MD on April 12, 1999, in response to the MCI proposed Interconnection Agreement, indicated that there was an ongoing dispute regarding the specific language governing the combination of UNEs.<sup>4</sup> By letter dated April 21, 1999, MCI reiterated its request that the Commission adopt MCI's March 19, 1999 proposed Agreement.

The Commission considered MCI's request to adopt its proposed Interconnection Agreement as well as the language governing the combination of UNEs to be included in that Agreement at the weekly Administrative Meeting of May 19, 1999. At the conclusion of the Administrative Meeting, the parties were directed to negotiate language regarding the combination of UNEs. If the parties were unable to reach an agreement on this language within 30 days, each party was directed to submit proposed language that is consistent with Commission policy.

By letters dated June 18, 1999, both parties indicated that the ordered negotiations were not successful. Both parties submitted proposed language governing combinations of UNEs. Each party's proposed language was the same language proposed during the prior Administrative Meeting. BA-MD argued that its proposed language was necessary to preserve its legal rights in the event that regulatory decisions, statutes or regulations change. In its letter, MCI contended that its proposed language was consistent with all previous rulings of the Commission.<sup>5</sup>

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<sup>4</sup> As noted earlier, this dispute was alluded to in MCI's letter of March 19, 1999.

<sup>5</sup> In a subsequent letter dated June 24, 1999, MCI further argued that BA-MD's proposed language was inconsistent with prior Commission orders.

The Commission's Staff reviewed the proposed language of both parties and contended that MCI's proposed language more closely represented the Commission's policies on the combination of UNEs. However, in recognition of BA-MD's concerns regarding the preservation of its legal rights, Staff proposed that language recognizing BA-MD's position should be incorporated into the Interconnection Agreement.

On September 3, 1999,<sup>6</sup> BA-MD filed a letter indicating that several additional issues were outstanding between BA-MD and MCI. BA-MD also questioned MCI's representation that the terms and provisions of the Agreement are the same as those which were negotiated in Virginia, with the only exceptions reflecting negotiations between MCI and BA-MD after the Virginia Agreement was executed or orders issued by the Maryland Commission. BA-MD specified several areas where it believed that MCI's proposed agreement was inconsistent with the Virginia Agreement. BA-MD further identified alleged errors in the price table that MCI had attached to its proposed agreement. MCI responded to BA-MD's correspondence on September 7, 1999. In its letter, MCI did not make substantive reply to BA-MD's contentions but argued that BA-MD failed to timely raise these issues.

On September 14, 1999, BA-MD responded to MCI's letter, stating that it had failed to study the Interconnection Agreement in detail because MCI had erroneously represented that the filing reflected the agreement of the parties with the exception of the UNE issue. Accordingly, BA-MD argued that it had raised these issues in a timely manner, as these issues were raised as soon as BA-MD discovered the changes to the proposed agreement.

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<sup>6</sup> The original letter was actually filed September 2, 1999, with a corrected copy filed September 3, 1999.

On September 29, 1999, the Commission again considered the proposed Interconnection Agreement as well as the issues raised by BA-MD at its weekly Administrative Meeting. After oral argument, the Commission took the matter under advisement.

## **II. Discussion**

This dispute concerns the arbitration of an Interconnection Agreement between BA-MD and MCI. This arbitration has been the subject of several hearings and subsequent Commission decisions since MCI's initial petition was filed on August 27, 1996. While agreement basically has been reached between the two parties, disputes regarding the specific language to be included in the Agreement remain.

Until September 3, 1999, the Commission was under the impression that the only remaining issue concerned the specific language governing the combination of UNEs. On that date, BA-MD filed a letter raising issues regarding compensation for internet traffic, dedicated transport service, the termination date of the contract, inconsistencies between the language of the Virginia Agreement and MCI's proposed agreement, as well as errors in the price tables submitted by MCI.

The Commission shares the concerns raised by MCI regarding the timeliness of BA-MD's objections. However, MCI did represent to the Commission that the alterations to the Virginia Agreement were designed solely to conform that agreement to decisions of this Commission. It is the Commission's understanding that the parties generally intended to adopt the interconnection agreement as negotiated on a region-wide basis as conformed to the arbitration rulings and specific agreements within Maryland. Thus, the Commission finds that it

is appropriate to review the changes to the Virginia Agreement for the limited purpose of ensuring that those alterations are, in fact, necessary to conform the Virginia Agreement to Maryland Commission Orders. Therefore, each issue raised by BA-MD will be addressed below.

With regard to the language governing the combination of UNE's, BA-MD proposed extensive language designed for a dual purpose: (1) to explicitly acknowledge the parties disagreement with respect to the effect of the *Iowa Utilities Board*<sup>7</sup> decision on the requirement to provide combinations of UNEs; and (2) to have the parties agree to be bound by subsequent decisions of this Commission, the Federal Communications Commission ("FCC") and the courts. BA-MD contends that MCI must "acknowledge" BA-MD's legal position in the Interconnection Agreement. Otherwise, according to BA-MD, it would be forced to abandon its legal position by signing an interconnection agreement. According to BA-MD, if the Agreement does not reflect BA-MD's legal position, MCI could subsequently argue that BA-MD voluntarily agreed to provide combinations of UNEs regardless of its legal obligations to do so.

In recognition of BA-MD's concerns, Staff suggested additional language which specifies BA-MD's position that it is not required to provide combinations of UNEs to MCI until the effective date of an unstayed FCC order which prescribes the network elements that must be provided, in addition to language stating that the Agreement does not limit either party's appeal rights.

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<sup>7</sup> *AT&T Corp. v. Iowa Utilities Board*, 525 US 366, 119 SCt 721 (1999).

As the Commission found in the recent Sprint/BA-MD arbitration order<sup>8</sup>, it is inappropriate to include a party's arbitration position in the interconnection agreement itself. The record in this proceeding is replete with BA-MD's position on the combination of UNEs issue. BA-MD has emphatically stated in several instances on the record that it disagrees with the Commission's decision in Order No. 74671. The mere fact that the Commission was forced to resolve this issue demonstrates that BA-MD is not voluntarily agreeing to provide such combinations. Given the record in these proceedings, there is no reasonable manner by which BA-MD's obligation to provide combinations of UNEs could be interpreted as voluntary. The Commission finds that BA-MD's legal position is fully protected without resort to the addition of inappropriate language into the Agreement. Therefore, the Commission rejects BA-MD's proposed language describing its position. The Commission finds that the proposed MCI agreement language is consistent with Commission policy. This language shall be included in the executed interconnection agreement without the additions proposed by BA-MD or Staff.

BA-MD's arguments regarding the proposed additional language governing the receipt of reciprocal compensation for ISP-bound traffic are the same as those it raised concerning the combinations of UNEs. Thus, the Commission's determination of this issue is also the same. Again, the record amply demonstrates BA-MD's disagreement with the Commission's ISP decision. Included in the evidence of this disagreement is the fact that BA-MD has appealed not only the Commission's decision, but the FCC's Declaratory Order as well. Therefore, the Commission finds that the language governing receipt of reciprocal compensation for ISP-bound

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<sup>8</sup> Order No. 75717 at page 8. (October 19, 1999).

traffic contained in MCI's proposed interconnection agreement shall be included in the executed agreement without alteration.

A third issue raised by BA-MD concerns MCI's proposed language relating to dedicated transport. The language regarding dedicated transport contained in the MCI proposal is the same as that contained in the Virginia Agreement. In reality, BA-MD does not oppose the language itself, but MCI's potential interpretation of this language. BA-MD seeks additional language specifying that its interpretation of this language is correct. At this point, the issue regarding the appropriate interpretation of the Agreement's language is not before the Commission, and may never need to be presented to the Commission. If, in the future, the parties cannot reach agreement regarding how any clause of the Interconnection Agreement should be interpreted, that issue may be presented to the Commission in the context of an enforcement action. The Commission finds that the additional language which has not been agreed upon by the parties should not be incorporated into the Agreement. Therefore, BA-MD's proposed modification is rejected.

The fourth issue raised by BA-MD is with respect to the termination date of the Agreement. MCI's proposed agreement sets the termination date at March 31, 2002. This date is approximately three years from the date that MCI filed the agreement with the Commission. However, BA-MD notes that the Virginia Agreement terminates on July 17, 2000. BA-MD argues that in instances where companies have sought to "opt in" to pre-existing agreements, the Commission has required acceptance of the entire terms

including the termination date of the prior agreement.<sup>9</sup>

The Commission finds that the present situation is not analogous to an “opt in” request. Rather than opt into the Virginia Agreement, the parties used that agreement as a model or starting point and thereafter altered the Virginia Agreement based on either Maryland Commission decisions or negotiated changes agreed to by the parties. In this instance, the Virginia Agreement was a three-year contract.

The Commission finds the three-year period to be a reasonable part of the negotiated contract. Therefore, the Commission determines that a three-year period which will terminate three years after the issuance of this Order, to be a reasonable term for the Agreement.

BA-MD also objects to MCI’s revision of Section 2.2.16.3 of the Virginia Agreement. This section, marked to show MCI’s revisions, states:

For Combinations of Network Elements, Bell Atlantic shall not physically disconnect Network Elements that are currently connected and ordered together.

BA-MD contends that it did not agree to this change and that no order compels it. BA-MD further argues that the MCI language would deny BA-MD the ability to disconnect network elements even for technical reasons.

The Commission disagrees with BA-MD that no order compels the change proposed by MCI. In Order No. 74671, the Commission prohibited BA-MD from disconnecting network elements.<sup>10</sup> Subsequent to this Order, the Supreme Court upheld

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<sup>9</sup> In Order No. 75360, issued July 15, 1999, the Commission denied Global Naps South Inc.’s request to opt into the MFS – Bell Atlantic Interconnection Agreement, finding that a party cannot opt into an agreement while at the same time changing the terms of that agreement and also finding that any agreement terms are only available to other companies for a reasonable period of time.

the FCC rule which also prohibits the disconnection of network elements.<sup>11</sup> The Commission's Order is a blanket prohibition against BA-MD's disconnection of network elements. The Order does not establish any exceptions to this prohibition. The Commission's "technically feasible" language applies only to those network elements requested by a competitive carrier which are not currently combined. Therefore, since MCI's proposed language is consistent with Order No. 74672 and FCC rules, it will be accepted.

BA-MD also objects to MCI's revision of Section 2.1, which addresses the collocation of equipment. Again, BA-MD argues that no order justifies this change. BA-MD suggested its own language which it contends conforms the section to a recent FCC collocation order.

BA-MD argues that MCI is permitted to collocate Remote Switching Modules (RSM) for purposes of interconnection and access to unbundled network elements but not for switching.<sup>12</sup> However, in Order No. 73010, this Commission specifically found that RSM could be used to provide switching functions. Furthermore, the FCC recently issued a clarifying rule which states that "an incumbent LEC may not place any limitations on the ability of requesting carriers to use all the features, functions, and capabilities of equipment collocated [for interconnection or access to unbundled network elements], including but not limited to,

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<sup>10</sup> *Re Agreements and Arbitration of Unresolved Issues Arising Under Section 252 of the Telecommunications Act of 1996*, Case No. 8731, Phase II (c), Order No. 74671, 79 MD PSC Rep. 215, 223 (Nov. 2, 1998).

<sup>11</sup> *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 19 S.Ct. 721, 737-738 (1999).

<sup>12</sup> An RSM has limited switching capability and can perform a local routing function when one customer served by a loop connected to the RSM calls another customer who is also connected to that same RSM.

switching and routing features.” 47 C.F.R. § 51.323(c). Therefore, MCI’s proposed language accurately reflects this Commission’s

Order and the recent FCC rule and will be accepted by the Commission.

BA-MD also objects to MCI’s inclusion of a definition for the term “Remote Switching Module”. BA-MD contends that this definition is inaccurate and unnecessary.

There is no Commission order that addresses the definition of Remote Switching Module. Thus, inclusion of a section defining this term was not mandated by any Commission decision. The only justifications for changes to the Virginia Agreement are to reflect negotiation by the parties or to conform the agreement to Maryland Commission orders. Neither justification is applicable in this instance. While the Commission discussed Remote Switching Modules in Order No. 73010, the Commission did not specifically define the term. Therefore, the definition of Remote Switching Module shall be deleted from the proposed Interconnection Agreement.

BA-MD also contends that MCI completely rewrote Section 4.5 of Attachment I in an apparent attempt to conform that section to the Commission’s November 8, 1996 Order regarding reciprocal compensation rates. BA-MD argues that MCI’s changes do not accurately reflect that decision. BA-MD proposes that Section 4.5 be revised to specifically reference the Order at issue.

The Commission is concerned about the specific reference to Order No. 73010 to the exclusion of any other Commission Orders which may be relevant to this section, including

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This limited switching function avoids the more costly and inefficient routing of the call to a distant main switch and back.

decisions which the Commission may render in the future. Therefore, the Commission finds that Section 4.5 shall be revised as follows:

Bell Atlantic will pay MCIM a reciprocal and symmetrical compensation rate(s) for the termination of traffic at an MCIM Tandem Office Switch or Single Combination Class 5/Class 4 switch in accordance with Orders issued by the Commission and in accordance with the rules, regulations and orders of the FCC.

Finally, BA-MD claims that the price table submitted by MCI contains a number of errors.<sup>13</sup> BA-MD submitted its own corrected price table. At the Administrative Hearing, MCI stated "if in fact we are wrong in any of the prices, we will sit down with Bell Atlantic and go through your order and make sure the price we agree on the pricing table."<sup>14</sup> Therefore, the Commission directs the parties to submit a corrected pricing table when they file the Interconnection Agreement.

IT IS, THEREFORE, this 10th day of February, in the year Two Thousand by the Public Service Commission,

ORDERED: That Bell Atlantic-Maryland, Inc. and MCI Telecommunications Corporation shall file a joint interconnection agreement incorporating the directives set forth above within ten days of the issuance of this Order.

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/s/ Glenn F. Ivey

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/s/ Claude M. Ligon

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<sup>13</sup> BA-MD also notes several typographical errors. These errors should be corrected without the need for Commission intervention.

/s/ Susanne Brogan

Commissioners

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<sup>14</sup> TR at 136.