

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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In re: Petition by MCI Telecommuni-)
cations Corporation for arbitration) DOCKET NO. 961230-TP
with United Telephone Company of) Filed: November 5, 1996
Florida and Central Telephone Company)
of Florida concerning interconnection)
rates, terms, and conditions,)
pursuant to the Federal Telecommuni-)
cations Act of 1996)
_____)

SPRINT'S MOTION TO DISMISS

Pursuant to Rule 25-22.037, Florida Administrative Code, United Telephone Company of Florida, Inc. and Central Telephone Company of Florida, Inc. (together "Sprint" or the "Companies") move to dismiss those portions of MCI's Petition for Arbitration Under the Telecommunications Act of 1996 ("MCI's Petition"), filed on October 11, 1996, dealing with MCI's proposed Mediation Plus arbitration procedure, provision of dim or dark fiber as an unbundled network element, resale of voice mail, inside wire maintenance and calling cards, any liquidated damages provision, and any issue which MCI has failed to support with relevant documentation, stating as follows:

I.

1. MCI's Petition proposes that the Commission establish a Mediation Plus arbitration procedure to be followed as part of the overall arbitration process. (MCI's Petition, paragraphs 19 through 24.) Neither the Act nor the Commission's procedure contemplate or provide for MCI's proposed procedures. MCI concedes as much, but relies on a belief that the Act leaves the states with

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wide discretion. Although Sprint is not opposed to mediation as a process for dispute resolution, Sprint does not believe that MCI's Mediation Plus procedure, with its bifurcated approach incorporating dual hearings and a telescoped procedural schedule, will improve the traditional process or result in a more timely resolution of unresolved issues. Accordingly, that portion of MCI's Petition should be dismissed.

2. Section 252(a)(2) of the Act provides that any party to the negotiations may at any point in the negotiations, ask the state commission to participate in the negotiations and to mediate any differences arising in the course of the negotiations. Obviously, the Act contemplates mediation and for the Commission to act as the mediator. However, it is also obvious that the Commission cannot serve simultaneously as mediator and arbitrator, as MCI is proposing. The role of mediator and the role of arbitrator are mutually exclusive. The procedure contemplated by the Act would have the Commission serve as a mediator for unresolved issues prior to being asked to arbitrate unresolved issues. The mediator is a facilitator for resolving a disputed issue, while the arbitrator is, in the context of the Act, the decision maker. It would have been acceptable for MCI to propose its Mediation Plus arbitration procedure prior to filing for arbitration under Section 252(b) of the Act. Its request now is untimely.

3. MCI's proposed bifurcated procedure necessitating "a typical Commission hearing on the major issues together with

Commission-supervised mediation followed, if necessary, by a typical Commission hearing on the other unresolved issues" (MCI's Petition, para. 24 (emphasis added)) would introduce considerable complexity and confusion to a process that is already compressed because of the Act's mandated time frames. As proposed, MCI would require the Commission, its Staff and the parties simultaneously to be mediating and arbitrating potentially the same issues. It is unclear as to how and which issues are to be sent to mediation or arbitration. This step in the process alone could be time-consuming and contentious. Additionally, given Sprint's November 5, 1996, deadline for responding to MCI's Petition, the November 15, 1996, deadline proposed by MCI for conclusion of the Mediation Plus negotiations is totally impractical. There is no way for the Commission, and even MCI, to know what issues are unresolved until Sprint files its Response to MCI's Petition.

4. The Commission has completed several arbitration proceedings under the Act. Based upon that experience, in which the parties continue to negotiate up to and through the actual hearings, much has been accomplished in narrowing the issues and focusing the arbitration process on the major, contentious issues. There is nothing about the current process that suggests it is inefficient, wasteful or broken. Even if the current process could be improved, the MCI-proposed Mediation Plus arbitration process would provide no improvement. Indeed, adoption of MCI's proposal would be a step backward.

II.

5. MCI's Petition asks that the Commission resolve MCI's request for dim or dark fiber and Sprint's refusal to provide dim or dark fiber as an unbundled network element. Section 251(c)(3) of the Act requires Sprint to provide MCI "... nondiscriminatory access to network elements on an unbundled basis ...". Section 3(45) of the Act defines "network element" to mean a facility or equipment used in the provision of a telecommunications service." Dim or dark fiber - meaning fiber without the electronics - is not used by Sprint to provide any telecommunications service. MCI's argument that it can more efficiently provide the electronics does not address the fundamental fact that dark fiber without the electronics cannot provide any telecommunications service. Such unbundling is not required by the Act and is, therefore, not subject to arbitration under the Act.

III.

6. MCI's Petition also requests that Sprint be required to make its voice mail, inside wire maintenance and calling card services available to MCI for resale. Section 251(c)(4)(A) of the Act requires Sprint "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." Whether Sprint must make these services available to MCI for resale turns on the definition of a "telecommunications service." Section 3(51) of the Act defines "telecommunications service" to mean "the offering of telecommunications for a fee directly to the public."

Section 3(48) of the Act defines "telecommunications" to mean "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." (Emphasis added.) Because none of these three services meet the definition of "telecommunications" and "telecommunications service," these services are not within the purview of Section 251(c)(4)(A) of the Act. It is also without question that these are services for which there are other suppliers in the Sprint market area providing the same or similar services on a competitive basis.

IV.

7. In Attachment X to MCI's Model Interconnection Agreement (MCI's Petition, Exhibit 2), MCI would impose "a delay credit equal to \$25,000 per day for each day of delay." This requirement equates to a liquidated damages provision which is against Florida public policy and is not an item subject to arbitration. Nowhere in MCI's Petition or testimony does MCI indicate this was even an item that was negotiated. However, because it is included in an exhibit that is incorporated by referenced in MCI's Petition, Sprint raises its concerns out of an abundance of caution and believes that this provision should not be included in this Arbitration proceeding. Sprint notes that the Commission rejected a similar liquidated damages provision proposed by MFS in its Arbitration proceeding, Docket No. 960838-TP. See Order No. PSC-96-1321-FOF-TP, issued October 30, 1996.

V.

8. Section 252(b)(2)(A) of the Act requires that:

. . . A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning -

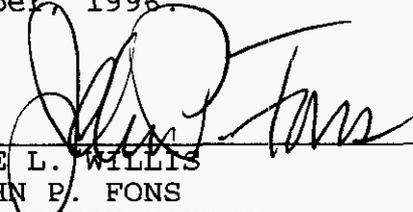
(i) the unresolved issues; . . .

As noted in Sprint's Answer and Response to MCI's Petition for Arbitration, MCI has identified a great number of issues in its Petition for Arbitration for which it is requesting Commission arbitration. However, MCI has failed, with respect to claimed unresolved issues, to support its request with all relevant documentation at the same time as it submitted its Petition. For example, with respect to MCI's request for resale of Sprint's voice mail, inside wire maintenance and calling card services, MCI has failed to furnish any documentation - in the form of testimony or exhibits - which supports MCI's request.

9. In view of the jurisdictional nature of the Act, MCI cannot, after-the-fact, supplement its filing with the necessary documentation. Moreover, if MCI attempts to provide the missing documentation as part of its "Rebuttal Case," Sprint will have no opportunity thereafter to address the new documentation, and its due process rights will be denied. Therefore, as to any issue raised in MCI's Petition which is not supported, either in whole or in part, in the documentation accompanying its filing, those portions of MCI's Petition should be dismissed.

WHEREFORE, Sprint respectfully requests that the Commission dismiss those portions of the MCI Petition addressed in this Motion.

DATED this 5th day of November, 1996.



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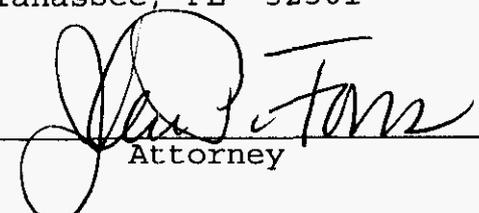
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail or hand delivery (*) this 5th day of November, 1996, to the following:

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