

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

April 24, 2002

IN RE:

PETITION OF MCIMETRO ACCESS)	DOCKET NO.
TRANSMISSION SERVICES, LLC AND)	00-00309
BROOKS FIBER COMMUNICATIONS)	
OF TENNESSEE, INC. FOR)	
ARBITRATION OF CERTAIN TERMS)	
AND CONDITIONS OF PROPOSED)	
AGREEMENT WITH BELL SOUTH)	
TELECOMMUNICATIONS, INC.)	
CONCERNING INTERCONNECTION)	
AND RESALE UNDER THE)	
TELECOMMUNICATIONS ACT OF 1996)	

FINAL ORDER OF ARBITRATION AWARD

This matter came before the Directors of the Tennessee Regulatory Authority ("Authority"), acting as arbitrators, immediately following the February 26, 2002 Authority Conference to resolve Issues Nos. 55, 67, and 95 of the arbitration between MCImetro Access Services, LLC and Brooks Fiber Communications of Tennessee, Inc. (collectively "WorldCom") and BellSouth Telecommunications, Inc. ("BellSouth").

I. PROCEDURAL HISTORY

On April 14, 2000, WorldCom filed a petition pursuant to Section 252(b) of the Telecommunications Act of 1996 ("Act") requesting that the Authority arbitrate the interconnection agreement between WorldCom and BellSouth. BellSouth filed a response to the petition on May 9, 2000. At the June 6, 2000 Authority Conference, the Directors accepted the petition for arbitration, appointed themselves as arbitrators, appointed General Counsel or his

designee to serve as the Pre-Arbitration Officer, and directed the parties to participate in mediation.

The Arbitrators held a hearing on May 7th and 8th, 2001. As a result of the hearing and negotiations preceding the hearing, the parties resolved many issues, however, the following twenty-eight (28) issues remained unresolved: 6, 8, 18, 28, 34, 35, 36, 37, 40, 42, 45, 46, 47, 48, 51, 52, 55, 56, 61, 62, 63, 64, 67, 68, 80, 95, 100, and 110. Immediately following a regularly scheduled Authority Conference on December 18, 2001, the Arbitrators deliberated the merits of these issues and ordered the parties to file final best offers on Issue Nos. 55, 67, and 95 and to brief Issue No. 67 by January 11, 2002. As directed, the parties filed their final best offers on each of the three outstanding issues and briefs on Issue No. 67 on January 11, 2002.

On January 28, 2002, WorldCom filed the *Motion of WorldCom to Strike Pages of BellSouth's Best and Final Offer for Issue 95*. In its motion, WorldCom requested that the Arbitrators strike portions of pages 6 through 15 of BellSouth's final best offer for Issue No. 95. BellSouth filed its response to the motion on February 11, 2002.

Immediately following a regularly scheduled Authority Conference on February 26, 2002, the Arbitrators deliberated Issue Nos. 55, 67, and 95 as well as the merits of WorldCom's motion to strike.

II. MOTION TO STRIKE

A. Positions of the Parties

In its motion, WorldCom requests that the Authority strike certain language beginning on page 6 and ending on page 15 of BellSouth's final best offer for Issue No. 95. WorldCom maintains that this relief is necessary because the assertions of fact and arguments contained in those pages were not raised previously in this proceeding and amount to a re-litigation of Issue

No. 95.¹ BellSouth counters that it has not “asked the Authority to reconsider its decision or to consider additional evidence.”² BellSouth argues that its final best offer appropriately explains “how its proposed language complies with the Authority’s decision and how, in many instances, WorldCom’s proposed language either does not comply, or directly conflicts, with [electronic message interexchange (“EMI”)] guidelines.”³ Finally, BellSouth maintains that final best offers are the appropriate vehicle for presenting this analysis.⁴

B. Deliberations and Conclusions

In resolving arbitrations, the Authority has chosen to provide parties with the opportunity to present their positions through an evidentiary hearing. Under this procedure, unless otherwise stated, the appropriate time for arguing a position or proving facts expires with the completion of the hearing and the filing of post-hearing briefs. In its final best offer, BellSouth introduces arguments that were not raised during the hearing or set forth in either its pre-filed testimony or post-hearing brief. Unlike Issue No. 67 where the Arbitrators explicitly requested further briefing, the Arbitrators did not ask the parties to brief Issue No. 95 which BellSouth attempts to do. For the foregoing reasons, the Arbitrators voted to grant WorldCom’s motion to strike.

III. ISSUE 55 - SHOULD BELL SOUTH BE REQUIRED TO PROVIDE A RESPONSE, INCLUDING A FIRM COST QUOTE, WITHIN FIFTEEN DAYS OF RECEIVING A COLLOCATION APPLICATION?

During the December 18, 2001 deliberations, the Arbitrators ordered BellSouth to provide WorldCom a response, including a firm cost quote, within fifteen calendar days of receiving a collocation application. The Arbitrators further held: “For BellSouth to be subject to

¹ See *Motion of WorldCom to Strike Pages of BellSouth’s Best and Final Offer for Issue 95*, p. 2 (Jan. 28, 2002).

² *BellSouth’s Opposition to WorldCom’s Motion to Strike Pages of BellSouth’s Best and Final Offer for Issue 95*, p. 1 (Feb. 11, 2002).

³ *Id.* at 2.

⁴ See *id.*

this requirement, however, WorldCom has to provide BellSouth with a forecast of its collocation needs in a reasonable amount of time before WorldCom submits its application.”⁵ Thereafter, the Arbitrators directed the parties to submit final best offers on a time frame for the forecast.⁶

A. Final Best Offers

According to BellSouth, “[w]hat constitutes a reasonable time frame . . . depends on whether the space preparation charges at issue are standardized.”⁷ With that qualification, BellSouth offers:

To the extent the requested collocation involves standardized space preparation charges, then the receipt of a forecast from [WorldCom] ten (10) days in advance of the collocation application would be sufficient. But, if the space preparation charges are individual-case-basis (“ICB”), then [WorldCom] should be required to submit its forecast twenty (20) days prior to the submission of an application.⁸

WorldCom, on the other hand, proposes to provide the forecasts to BellSouth “semi-annually for a two year period (i.e., current year plus one), or more frequently if [WorldCom] needs change.”⁹

B. Deliberations and Conclusions

WorldCom’s offer to provide a forecast of its collocation needs semi-annually for a two-year period is a reasonable time frame for forecasting collocation needs. However, WorldCom’s offer to provide forecasts “more frequently if [WorldCom’s] needs change” is conditional and vague.¹⁰ To grant WorldCom the freedom to vary the time frame any way it sees fit could place BellSouth in the position of not being able to respond to WorldCom’s forecasted needs because of near term forecast changes. Thus, it would be inappropriate to adopt WorldCom’s final best

⁵ Transcript of Proceedings, Dec. 18, 2001, p. 36 (Arbitration Deliberations).

⁶ See *id.* at 36-37.

⁷ *BellSouth Telecommunications, Inc. 's Best and Final Offers For Issues 55, 67 and 95*, p. 2 (Jan. 11, 2002).

⁸ *Id.*

⁹ *Best and Final Offer of WorldCom*, p. 1 (Jan. 11, 2002).

¹⁰ *Id.*

offer without clarification. Based on the foregoing, the Arbitrators voted to adopt WorldCom's offer with the following restrictions: (1) For collocation space requirements involving standardized space preparation charges, WorldCom must submit a collocation forecast at least ten (10) days in advance of the date of the collocation space application; (2) For collocation space requirements involving individual case basis space preparation charges, WorldCom must submit a collocation forecast at least twenty (20) days in advance of the collocation space application.

IV. ISSUE 67 - WHEN WORLDCOM HAS A LICENSE TO USE BELL SOUTH RIGHTS-OF-WAY, AND BELL SOUTH WISHES TO CONVEY THE PROPERTY TO A THIRD PARTY, SHOULD BELL SOUTH BE REQUIRED TO CONVEY THE PROPERTY SUBJECT TO WORLDCOM'S LICENSE?

A. Arguments and Final Best Offers

WorldCom asserts that the term "property" as used in this issue refers to BellSouth's rights in real property regardless of the form or extent of BellSouth's ownership interest.¹¹ WorldCom asserts that any BellSouth conveyance of property to which WorldCom possesses a license should be subject to that license.¹² In support of its position WorldCom cites *Daugherty v. Toomey*¹³ and *Farley v. Ellis*.¹⁴ WorldCom also argues that requiring BellSouth to convey its property subject to WorldCom's licenses protects WorldCom's investments, which is beneficial to competition in Tennessee, and will not unreasonably burden BellSouth.¹⁵ Given its position, WorldCom proposed the following final best offer:

No Effect on BellSouth's Right to Convey Property. Nothing contained in this Attachment or in any license issued hereunder shall in any way affect the right of BellSouth to convey to any other person or entity any interest in real or personal property, including any poles, conduit or ducts to or in which [WorldCom] has

¹¹ See *Supplemental Brief of WorldCom on Issue 67*, p. 3 (Jan. 11, 2002).

¹² See *id.*

¹³ See *Daugherty v. Toomey*, 222 S.W.2d 195 (Tenn. 1949).

¹⁴ See *Farley v. Ellis*, No. W2000-00354-COA-R3-CV, 2000 WL 1876431 (Tenn. Ct. App. Dec. 27, 2000)

¹⁵ See *Supplemental Brief of WorldCom on Issue 67*, pp. 6-7 (Jan. 11, 2002).

attached or placed facilities pursuant to licenses issued under this Section provided however that BellSouth shall give [WorldCom] reasonable advance written notice of such intent to convey, and further provided that BellSouth shall only convey the property subject to any licenses granted hereunder.¹⁶

During the arbitration deliberations on December 18, 2001, BellSouth agreed that Issue No. 67 encompasses real property.¹⁷ In its brief, although BellSouth did not explicitly state how the term "property" as used in Issue No. 67 should be defined, BellSouth confines its argument to real property interests.¹⁸ As to the merits, BellSouth relies on the cases of *United States v. Anderson County*¹⁹ and *Barksdale v. Marcum*²⁰ for the propositions that a license is not a real property interest, is not generally assignable, and, absent language to the contrary, is generally revocable by the licensor.²¹ BellSouth also contends that other state courts "have held that the conveyance of a licensor's interest in land may terminate a license to use that land."²² Lastly, BellSouth contends that WorldCom is seeking to transform its interest from a license to an easement and that BellSouth is not obligated to provide WorldCom an easement.²³ Given its position, BellSouth proposed the following final best offer:

2.5. No Effect on BellSouth's Right to Convey Property. Nothing contained in this Attachment or in any license issued hereunder shall in any way affect the right of BellSouth to convey to any other person or entity any interest in real or personal property, including any poles, conduit or ducts to or in which [WorldCom] has attached or placed facilities pursuant to licenses issued under this Section provided however that BellSouth shall give [WorldCom] reasonable advance written notice of such intent to convey. If BellSouth conveys any poles, conduit or ducts to or in which [WorldCom] has attached or placed facilities pursuant to licenses issued under this Attachment, [WorldCom] may request that

¹⁶ *Best and Final Offer of WorldCom*, p. 2 (Jan. 11, 2002). This is the same language proposed by WorldCom in its petition for arbitration. See *Petition of MCIMetro Access Services, LLC and Brooks Fiber Communications of Tennessee, Inc. for Arbitration Under the Telecommunications Act of 1996*, MCIMetro/BellSouth Interconnection Agreement Attachment VI, 6-7, para. 3.6 (Apr. 14, 2000).

¹⁷ See Transcript of Proceedings, Dec. 18, 2001, p. 42 (Arbitration Deliberations).

¹⁸ See *BellSouth Telecommunications, Inc.'s Best and Final Offers for Issues 55, 67 and 95*, pp. 3-6 (Jan. 11, 2002).

¹⁹ See *United States v. Anderson County*, 575 F. Supp. 574 (E.D. Tenn. 1983).

²⁰ See *Barksdale v. Marcum*, 7 Tenn. App. 697 (Tenn. Ct. App. 1928).

²¹ See *BellSouth Telecommunications, Inc.'s Best and Final Offers for Issues 55, 67 and 95*, pp. 3-4 (Jan. 11, 2002).

²² *Id.* at 4.

²³ See *id.* at 5-6.

BellSouth convey such poles, conduit or ducts subject to [WorldCom's] rights to maintain such facilities pursuant to the rates, terms and conditions of this Agreement until the original term of this Agreement expires.²⁴

B. Deliberations and Conclusions

This issue involves possible constraints on BellSouth's ability to convey real property to which WorldCom possesses a license.²⁵ Tennessee courts have held: "A 'license' with respect to real estate, is an authority to do a particular act or series of acts on another's land without possessing any estate therein. It is not assignable, and is generally revocable at the will of the licensor."²⁶ "A license creates no estate in land and generally is not considered an interest in land."²⁷ "Parties can contract as to the terms for revocation,"²⁸ although one could argue that an irrevocable license is nothing more than an easement.²⁹

WorldCom cites *Daugherty* and *Farley* for the proposition that a license survives the conveyance of property. These cases do not, however, stand for this proposition. In both cases, there was an oral license.³⁰ In each case, the court determined that the statute of frauds required that the license be in writing, but rather than rule in favor of the licensor, the court applied the principle of equitable estoppel to prevent the licensor from denying the existence of the license.³¹

²⁴ *Id.* at 6. It appears that the reference to paragraph 2.5 is an error. The disputed paragraph is 3.6 of Attachment 6. Paragraph 2.5 of Attachment 6 only defines the term "available." See *Petition of MCIMetro Access Services, LLC and Brooks Fiber Communications of Tennessee, Inc. for Arbitration Under the Telecommunications Act of 1996*, MCIMetro/BellSouth Interconnection Agreement Attachment VI, 6-2, para. 2.5 & 6-7, para. 3.6 (Apr. 14, 2000).

²⁵ Tennessee's sales and use tax laws treat poles and conduit as real property. See Tenn. Code Ann. § 67-6-102(29) (Supp. 2001).

²⁶ *Barksdale*, 7 Tenn. App. at 708; see *Anderson County*, 575 F. Supp. at 578; *Farley*, 2000 WL 1876431 at *7; *Lee Highway & Assocs., L.P. v. Pryor Bacon Co.*, No. 03A01-9507-CV-00237, 1995 WL 619941, *3 (Tenn. Ct. App. Oct. 19, 1995).

²⁷ *Anderson County*, 575 F. Supp. at 578; see *Lee Highway*, 1995 WL 619941 at *3.

²⁸ 25 Am. Jur. 2d *Easements and Licenses* § 143 (1996).

²⁹ See *Childers v. W.M. H. Coleman Co.*, 118 S.W. 1018, 1022 (Tenn. 1909) (finding that an irrevocable license is in the nature of an easement and must be in writing); see also RESTATEMENT (THIRD) OF PROPERTY § 1.2 (Tentative Draft No. 7, 1998) (defining the term easement to include irrevocable licenses). Despite the holding in *Childers*, other cases note that a writing conveying an easement must contain specific words of grant and describe the property. See e.g. *Nunnally v. Southern Iron Co.*, 29 S.W. 361, 364-65 (Tenn. 1895).

³⁰ See *Daugherty*, 222 S.W.2d at 199; *Farley*, 2000 WL 1876431, at *1 & *6.

³¹ See *Daugherty*, 222 S.W.2d at 200; *Farley*, 2000 WL 1876431, at *6-8.

It was the application of equitable estoppel that passed with the conveyance, not the license.³²

These cases do, however, lend support for the proposition that a licensee should not be harmed by a unilateral decision to terminate the agreement when equity would require otherwise. Thus, in both cases, the courts recognized that the licensors can revoke the licenses only if the licensors reimbursed the licensees for expenditures or otherwise returned the licensees to the status quo.³³

In order to compete with an incumbent local exchange carrier ("ILEC"), absent duplication of facilities, a competing carrier must obtain permission from the ILEC to use the ILEC's property. Pursuant to the Act, ILECs must permit competing carriers to use the ILECs' property if requested.³⁴ Thus, both parties are forced into agreements as to the use of the ILEC's property, albeit by different forces. The ILEC, however, receives compensation for permitting the use of its property, and if the ILEC ultimately conveys the property, it may receive compensation for the conveyance. At the time permission is granted, the competing carrier receives the benefit of access to the property, but at the time the property is conveyed the competing carrier is left only with unrecoverable expenses. While this outcome may be acceptable under the rules of law cited above in circumstances not involving telecommunications carriers and competition, such an outcome can not be permitted in this instance because to do so would hinder competition in contravention of the purpose and intent of the Act and Tenn. Code

³² See *Daugherty*, 222 S.W.2d at 200; *Farley*, 2000 WL 1876431, at *8.

³³ See *Farley*, 2000 WL 1876431, at *7-8 (citing *Daugherty*, 222 S.W.2d at 196).

³⁴ Section 251(c) of the Act requires ILECs: (1) to "provide . . . interconnection with the local exchange carrier's network"; (2) "to provide . . . nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory"; and (3) to provide for the "physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier." 47 U.S.C. § 251(c)(2), (3), (6) (Supp. 2000). Section 251(a)(4) of the Act imposes a duty on local exchange carriers to "afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224." *Id.* § 251(a)(4). Section 224(f) provides: "A utility shall provide a cable television system or any telecommunications carrier with non-discriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." *Id.* § 224(f)(1). The term telecommunications carrier as used in Section 224 "does not include any incumbent local exchange carrier as defined in Section 251(h)." *Id.* § 224(a)(5).

Ann. § 65-4-123. Creating an environment in which competing carriers may be left bearing unrecoverable expenses as a result of BellSouth's actions does not allow for competition in all telecommunications services markets³⁵ or promote competition.³⁶

Given the general proposition that licenses are revocable along with the theory that equity and the promotion of competition may require compensation, the Arbitrators rejected both final best offers and ordered that, absent an agreement to the contrary, BellSouth does not have to convey its real property interests subject to WorldCom's licenses. Nevertheless, if BellSouth voluntarily conveys for consideration real property to which WorldCom possesses a license and the conveyance is not subject to that license or the purchaser will not honor the license, then BellSouth shall reimburse WorldCom for all costs associated with removal and reinstallation of WorldCom's equipment. A majority³⁷ of the Arbitrators further agreed that BellSouth is prohibited from entering into any agreement with the purchaser as to BellSouth's access to or use of the conveyed property unless the purchaser offers the same terms to WorldCom.

V. ISSUE 95 - SHOULD BELL SOUTH BE REQUIRED TO PROVIDE WORLDCOM WITH BILLING RECORDS WITH ALL ELECTRONIC MESSAGE INTEREXCHANGE ("EMI") STANDARD FIELDS?

A. Final Best Offers

During deliberations on December 18, 2002, the Arbitrators determined that BellSouth is required to provide WorldCom with EMI billing records and directed the parties to submit final best offers clarifying how the EMI records will be provided.³⁸ The parties responded to the Arbitrators' request differently. BellSouth submitted specific language to be included in the

³⁵ See Tenn. Code Ann. § 65-4-123 (Supp. 2001).

³⁶ See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (purpose of Act).

³⁷ Chairman Kyle did not agree with this final determination.

³⁸ See Transcript of Proceedings, Dec. 18, 2002, p. 46 (Arbitration Deliberations).

interconnection agreement.³⁹ WorldCom's response simply read: "With respect to issue 95, WorldCom's position has not changed since [its] original submittal (Attachment 8)."⁴⁰

B. Deliberations and Conclusions

BellSouth proposed language pertaining to the provision of EMI standard billing records. WorldCom failed to put forth a final best offer on this issue. Therefore, the Arbitrators voted to require the parties to include BellSouth's language in their interconnection agreement.

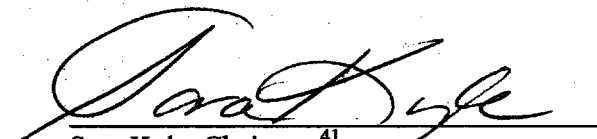
³⁹ *BellSouth Telecommunications, Inc.'s Best and Final Offers for Issues 55, 67 and 95*, pp. 15-28 (Jan. 11, 2002).

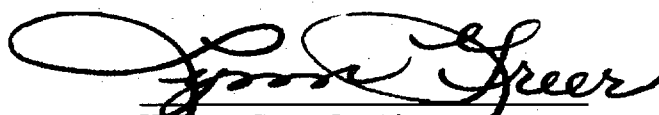
⁴⁰ *Best And Final Offer of WorldCom*, p. 2 (Jan. 1, 2002).

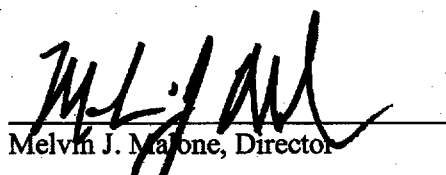
VI. ORDERED

The foregoing *Final Order of Arbitration Award* reflects the Arbitrators resolution of Issue Nos. 55, 67, and 95. All resolutions contained herein comply with the provisions of the Telecommunications Act of 1996 and are supported by the record in this proceeding. BellSouth Telecommunications, Inc; MCImetro Access Services, LLC; and Brooks Fiber Communications of Tennessee, Inc. shall file their interconnection agreement no later than Thursday, March 28, 2002.


TENNESSEE REGULATORY AUTHORITY,
BY ITS DIRECTORS ACTING AS
ARBITRATORS


Sara Kyle, Chairman⁴¹


H. Lynn Greer, Jr., Director


Melvin J. Malone, Director

ATTEST:


K. David Waddell, Executive Secretary

⁴¹ Chairman Kyle did not vote with the majority as to the final determination of Issue No. 67. See *supra* note 37.