

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20054**

In the Matter of)	
)	
MCI Telecommunications Corporation)	
and MCImetro Access Transmissions)	
Services, Inc.,)	
)	
Complainants,)	File No. E-98-32
)	
v.)	
)	
Bell Atlantic Corporation, <i>et al.</i> ,)	
)	
Defendants.)	

MEMORANDUM OPINION AND ORDER

Adopted: November 26, 2001

Released: December 3, 2001

By the Commission:

I. INTRODUCTION

1. In this Order, we deny a complaint filed by MCI Telecommunications Corporation and MCImetro Access Transmissions Services, Inc. (collectively, "MCI"),¹ against Bell Atlantic Corporation ("BAC") and its telephone operating company subsidiaries (collectively, "Bell Atlantic")² pursuant to section 208 of the Communications Act of 1934, as amended (the "Act").³ MCI alleges that Bell Atlantic violated the obligation to negotiate in good faith that the Commission imposed on Bell Atlantic in connection with approving the merger between Bell Atlantic and NYNEX Corporation

¹ Since this complaint was filed, WorldCom, Inc., acquired MCI. *See Application of WorldCom, Inc. and MCI Comm. Corp. for Transfer of Control of MCI Comm. Corp. to WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 18025 (1998).

² These subsidiaries were Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, DC, Inc., Bell Atlantic-West Virginia, Inc., New England Telephone and Telegraph Co., and New York Telephone Co. *See Letter dated May 13, 1998, from Lisa B. Smith, MCI Counsel, to Magalie Roman Salas, Secretary, FCC*, File No. E-98-32 (filed May 18, 1998). BAC moved to dismiss on the grounds that it was not a proper party-defendant under section 208 of the Act. *See Motion to Dismiss*, File No. E-98-32 (filed Apr. 27, 1998). We need not reach BAC's motion, because we rule in Bell Atlantic's favor on the merits. *Cf.*, 47 U.S.C. § 411(a) (providing that interested non-carriers may be included as parties along with carrier defendants).

³ 47 U.S.C. § 208.

(“NYNEX”). We conclude that the record fails to demonstrate by a preponderance of the evidence that Bell Atlantic did not negotiate with MCI in good faith. In addition, we dismiss Bell Atlantic’s “Conditional Cross Complaint” alleging that MCI violated section 251(c)(1) of the Act by failing to negotiate interconnection arrangements in good faith.⁴

II. BACKGROUND

A. The Good Faith Merger Conditions

2. On August 14, 1997, the Commission issued an order granting applications for transfer of certain licenses and authorizations from NYNEX to Bell Atlantic in connection with their proposed merger.⁵ The Commission approved the license transfer applications subject to several conditions that were first proffered by the applicants and then incorporated into the *Merger Order* as “express conditions of our transfer of licenses and certificates.”⁶

3. As part of the *Merger Order* conditions, the Commission required Bell Atlantic to “negotiate with requesting carriers to establish in interconnection agreements performance standards for network performance and the following OSS [operating support systems] functions: pre-ordering, ordering, provisioning, billing, and maintenance and repair.”⁷ The Commission also required Bell Atlantic to “negotiate with requesting carriers to establish enforcement mechanisms to ensure compliance with each performance standard, including private or self-executing remedies.”⁸ To ensure that competing carriers would obtain the full benefit of these conditions, the Commission required Bell Atlantic to negotiate the OSS and enforcement conditions in good faith: “Bell Atlantic/NYNEX shall engage in good faith negotiations with carriers purchasing interconnection in response to reasonable requests to establish performance standards In addition Bell Atlantic/NYNEX shall engage, upon reasonable request, in good faith negotiations to establish appropriate enforcement mechanisms to ensure compliance”⁹

⁴ *Id.* § 251(c)(1).

⁵ *See Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985 (1997) (“*Merger Order*”). Hereinafter, “Bell Atlantic” refers to the post-merger entity that consists of the former Bell Atlantic and the former NYNEX. Bell Atlantic subsequently merged with GTE Corporation to form Verizon Communications, Inc. *See Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 14032 (2000).

⁶ *Merger Order*, 12 FCC Rcd at 20070, ¶ 180. *See generally id.* at 20069–71, ¶¶ 177–82.

⁷ *Id.* at 20071, ¶ 182; *see id.* at 20111, App. C, ¶ 7 (listing each of the OSS functions that Bell Atlantic must negotiate in good faith).

⁸ *Id.* at 20071, ¶ 182; *see id.* at 20111, App. C, ¶ 7 (requiring Bell Atlantic to establish enforcement mechanisms through good faith negotiations).

⁹ *Id.* at 20111, App. C, ¶ 7; *see id.* at 20070–71, ¶ 181.

B. The Negotiation Process

4. In August 1997, MCI requested that Bell Atlantic begin negotiating performance standards, performance reporting, and enforcement mechanisms for interconnection agreements covering states in the Bell Atlantic and former-NYNEX regions, as required by the *Merger Order* conditions.¹⁰ On August 18, 1997, Bell Atlantic indicated that it would be ready to begin negotiating interconnection agreements with MCI in the first two weeks of September.¹¹ On September 17, 1997, MCI submitted a proposal to Bell Atlantic setting forth performance standards and enforcement mechanisms, and requested that the parties begin negotiations.¹² On or about October 9, 1997, Bell Atlantic stated that it was evaluating MCI's proposal and would provide MCI with Bell Atlantic's own performance standard proposal.¹³ Bell Atlantic submitted a proposal to MCI on November 4, 1997, and amended that proposal on November 10, 1997.¹⁴

5. On November 17, 1997, the parties met with representatives of the Commission's Common Carrier Bureau to discuss the status of Bell Atlantic's compliance with the *Merger Order*. According to the record in this proceeding, the parties indicated at the November 17, 1997, meeting that they would attempt to resolve the major areas of dispute regarding performance standards and enforcement mechanisms on their own.¹⁵ At a subsequent meeting between the parties on November 25, 1997, they discussed a region-wide approach to performance standards and enforcement mechanisms.¹⁶ At an executive-level meeting on December 9, 1997, the parties agreed to conduct additional negotiations without counsel in an attempt to expedite the negotiation process.¹⁷ The parties met again on December 22, 1997, and exchanged e-mails on or about January 16, 1998, but the parties did not resolve their differences concerning performance standards and enforcement mechanisms.¹⁸

¹⁰ See *Complaint of MCI Telecommunications Corporation and MCImetro Access Transmissions Services, Inc.*, File No. E-98-32, at 6 (filed Mar. 17, 1998) ("*MCI Complaint*"); *Answer of Bell Atlantic Corporation*, File No. E-98-32, at 4 (filed Apr. 27, 1998) ("*Bell Atlantic Answer*").

¹¹ See *MCI Complaint* at Exhibit A2; *Reply Brief of MCI*, File No. E-98-32, at 3 (filed Oct. 21, 1998) ("*MCI Reply*"); *Bell Atlantic Answer* at 4; *Brief of Bell Atlantic*, File No. E-98-32, at 2 (filed Oct. 2, 1998) ("*Bell Atlantic Brief*").

¹² See *MCI Complaint* at Exhibit A3; *Initial Brief of MCI Telecommunications Corporation and MCImetro Access Transmissions Services, Inc., in Support of Complaint*, File No. E-98-32, at 4, Exhibit F at 1 (filed Oct. 2, 1998) ("*MCI Brief*"); *MCI Reply* at 3; *Reply Brief of Bell Atlantic*, File No. E-98-32, Attachment B at 1 (filed Oct. 16, 1998) ("*Bell Atlantic Reply*").

¹³ See *MCI Complaint* at Exhibit A4, Exhibit A5; *MCI Brief*, Exhibit F at 1; *MCI Reply* at 3; *Bell Atlantic Reply*, Attachment B at 1.

¹⁴ See *MCI Complaint* at Exhibit A8, Exhibit A9; *MCI Brief* at 11, Exhibit F at 1; *Bell Atlantic Answer* at 5; *Bell Atlantic Reply*, Attachment B at 1.

¹⁵ See *MCI Complaint* at 9; *MCI Brief*, Exhibit F at 1; *MCI Reply* at 4; *Bell Atlantic Answer* at 7.

¹⁶ See *MCI Complaint* at 9; *MCI Brief*, Exhibit F at 1; *MCI Reply* at 4, 19; *Bell Atlantic Answer* at 7.

¹⁷ See *MCI Complaint* at 9; *MCI Brief*, Exhibit F at 1; *Bell Atlantic Answer* at 7.

¹⁸ See *MCI Complaint* at 10; *MCI Brief*, Exhibit F at 2; *MCI Reply* at 19; *Bell Atlantic Answer* at 7-8; *Bell Atlantic Reply*, Attachment B at 2.

6. On February 10, 1998, MCI sent a letter to the Commission formally requesting mediation of performance standards with Bell Atlantic based on MCI's understanding that the parties had previously established a negotiation deadline of February 1, 1998.¹⁹ On March 17, 1998, MCI filed the above-referenced formal complaint. Bell Atlantic filed its answer and a "Conditional Cross Complaint" on April 27, 1998.²⁰

III. DISCUSSION

7. MCI alleges that Bell Atlantic violated the good faith negotiation provisions of the *Merger Order* by intentionally delaying negotiations, submitting inadequate or incomplete proposals, and failing to propose meaningful, self-executing enforcement mechanisms.²¹ Based on a careful review of all the submitted evidence, we believe the record does not support a finding that Bell Atlantic negotiated in bad faith. Thus, we determine that MCI has failed to establish by a preponderance of the evidence that Bell Atlantic violated the *Merger Order*.²²

8. MCI relies on various alleged delays and missteps by Bell Atlantic during the negotiation process from September 1997 through February 1998 as evidence that Bell Atlantic intentionally delayed negotiations in bad faith.²³ MCI also relies on two of Bell Atlantic's own internal documents indicating that Bell Atlantic was aware that MCI would likely refuse Bell Atlantic's initial proposal regarding performance standards²⁴ and enforcement mechanisms²⁵ and seek to continue negotiations with Bell Atlantic.

9. Bell Atlantic, on the other hand, claims that it took numerous steps to advance the negotiations.²⁶ Bell Atlantic states that MCI failed to provide convenient times for an initial meeting and, even though MCI was late in submitting its critical measures proposal, Bell Atlantic followed up to keep the negotiations moving.²⁷ According to Bell Atlantic, MCI's actions, such as

¹⁹ See *MCI Complaint* at 9–10; *MCI Brief*, Exhibit F at 2. Bell Atlantic claims that the parties did not agree to a February 1, 1998, deadline. See *Bell Atlantic Answer* at 7.

²⁰ According to Bell Atlantic, the "conditional" cross complaint was "filed to protect Bell Atlantic's rights in the event that the Complaint is not dismissed." *Bell Atlantic Answer* at 13. Thus, because we are denying MCI's complaint, we are also dismissing Bell Atlantic's "Conditional Cross Complaint." We note that the pleadings in this matter were filed under a prior version of our rules. Our existing rules do not allow parties to file cross complaints. See 47 C.F.R. § 1.725 (2000).

²¹ See *MCI Complaint* at 6–11; *MCI Reply* at 2–3, 6–18.

²² See generally *Hi-Tech Furnace Sys., Inc. v. FCC*, 224 F.3d 781, 787 (D.C. Cir. 2000) (affirming that the burden of proof is on the complainant in proceeding conducted under 47 U.S.C. § 208); *Consumer.Net v. AT&T*, Order, 15 FCC Rcd 281, 284–85, ¶ 6 (1999) (applying preponderance of the evidence standard).

²³ See *MCI Complaint* at 6–12; *MCI Brief* at 20–24; *MCI Reply* at 2–3.

²⁴ See *MCI Brief* at 4–5, Exhibit A at BEL-2-000761 to 768.

²⁵ See *MCI Brief* at 16–17, Exhibit B at BEL-2-000769 to 072.

²⁶ See *Bell Atlantic Answer* at 20; *Bell Atlantic Brief* at 9.

²⁷ See *Bell Atlantic Answer* at 4, 18–19; *Bell Atlantic Brief* at 9; *Bell Atlantic Reply*, Attachment B at 3.

MCI's failure to supply a redlined version of Bell Atlantic's proposal, precluded Bell Atlantic from addressing MCI's concerns more expeditiously.²⁸

10. Although the evidence certainly suggests that the negotiations between Bell Atlantic and MCI could have progressed more smoothly, the evidence does not demonstrate that Bell Atlantic purposely stalled negotiations to thwart MCI's entry into local markets. MCI's primary evidence of such "intent" are documents indicating that Bell Atlantic was aware that MCI would likely reject Bell Atlantic's first proposal.²⁹ MCI's contention that this amounts to an intentional delay of negotiations by Bell Atlantic is unpersuasive, however.³⁰ The *Merger Order* does not require Bell Atlantic to commence negotiations with proposals that it believed would be satisfactory to MCI without additional negotiations. Such a requirement would not reflect the practical realities of the negotiation process, wherein parties routinely begin negotiations with the expectation of movement in future discussions. Moreover, MCI has proffered no evidence that Bell Atlantic did or would refuse indefinitely to move from the terms of Bell Atlantic's initial proposal.

11. MCI also claims that Bell Atlantic refused to provide information necessary to reach an agreement by failing to start negotiations with the interconnection terms that Bell Atlantic had already established in the State of New York.³¹ We do not doubt that the negotiation process would have been streamlined if Bell Atlantic had used the New York agreement as a starting point for negotiations with MCI. The *Merger Order*, however, does not require Bell Atlantic automatically to give MCI the same deal throughout Bell Atlantic's region. Therefore, Bell Atlantic's attempt to negotiate different terms with MCI than those already agreed to in New York does not establish that Bell Atlantic failed to meet its good faith obligations under the *Merger Order*.

12. In sum, we conclude that the record does not support a finding that Bell Atlantic violated the *Merger Order* by intentionally delaying the negotiation process or by failing to provide information necessary to reach an agreement. Although Bell Atlantic surely could have done more to expedite the negotiation process with MCI, we do not believe that MCI has established that any delays were the result of a lack of good faith by Bell Atlantic.

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 208, that MCI's complaint IS DENIED and that this proceeding IS TERMINATED WITH PREJUDICE as of the Release Date of this Order.

²⁸ See *Bell Atlantic Answer* at 20–22; *Bell Atlantic Brief* at 14–15; *Bell Atlantic Reply* at 8.

²⁹ See *MCI Brief* at 4–5, 16–17, Exhibit A at BEL-2-000761 to 768, Exhibit B at BEL-2-000769 to 072.

³⁰ Compare *MCI Communications, Corp. v. AT&T*, 708 F.2d 1081, 1158 (7th Cir. 1983) (upholding jury decision that AT&T had negotiated in bad faith, where AT&T had (i) filed "sham tariffs" causing MCI to face the prospect of litigation in 49 forums and (ii) forced MCI to bear additional costs and expenses in connection with litigation before various courts and this Commission, costing MCI almost 18 months of time and lost revenue).

³¹ See *MCI Brief* at 18–20; *MCI Reply* at 4–6.

14. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 208, that Bell Atlantic's "Conditional Cross Complaint" IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary