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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of)
)
Complaint of WorldCom)
Technologies, Inc. against)
BellSouth Telecommunications,)
Inc. for breach of terms of)
Florida partial interconnection)
agreement under Sections 251 and)
252 of the Telecommunications Act)
of 1996, and request for relief.)

DOCKET NO. 971478-TL
RECORDS AND
REPORTING
Filed: June 30, 1998

Complaint of Teleport)
Communications Group, Inc./TCG)
South Florida against BellSouth)
Telecommunications, Inc. for)
breach of terms of interconnection)
agreement under Section 252 of the)
Telecommunications Act of 1996,)
and request for relief.)

DOCKET NO. 980184-TP

Complaint of Intermedia)
Communications Inc. Against)
BellSouth Telecommunications Inc.)
for breach of terms of Florida)
Partial Interconnection)
Agreement under Sections 251 and)
252 of the Telecommunications Act)
of 1996, and request for relief.)

DOCKET NO. 980495-TP

Complaint by MCI Metro Access)
Transmission Services, Inc. against)
BellSouth Telecommunications, Inc.)
for breach of approved inter-)
connection agreement by failure to)
pay compensation for certain local)
traffic.)

DOCKET NO. 980499-TP

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INTERMEDIA COMMUNICATIONS INC.'S
POST HEARING BRIEF

INTERMEDIA COMMUNICATIONS INC. (Intermedia), pursuant to Rule
25-22.056, Florida Administrative Code, and Orders Nos. PSC-98-
0561-PCO-TP and PSC-98-0584-PCO-TP, hereby files this its post-
hearing brief in the above-referenced matter.

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	2
STATEMENT OF THE FACTS	5
The Agreement	5
The Breach And Intermedia's Response.	6
ISSUE PRESENTED AND RESTATEMENT OF POSITION.	7
ARGUMENT	
UNDER THEIR INTERCONNECTION AGREEMENT, INTERMEDIA AND BELLSOUTH ARE REQUIRED TO COMPENSATE EACH OTHER FOR TRANSPORT AND TERMINATION OF TRAFFIC TO ISPS.	8
A. INTRODUCTION.	8
1. The Applicable Provisions Of The Agreement.	8
2. The Conventional View Of Local Traffic.	9
3. BellSouth's View Of Local Traffic.	9
B. BELLSOUTH'S REFUSAL TO COMPENSATE INTERMEDIA FOR THE TERMINATION OF LOCAL TRAFFIC TO ISPS VIOLATES ITS OBLIGATIONS UNDER THE UNAMBIGUOUS TERMS OF THE INTERCONNECTION AGREEMENT AND THE TELECOMMUNICATIONS ACT	10
1. BellSouth's Current Declaration Of Its Prior Intention Is Not Determinative.	10
2. All Reciprocal Local Traffic Requires Mutual Compensation; There Are No Subcategories Of Local Traffic That Do Not Require Compensation	13

TABLE OF CONTENTS (continued)

	Page
a. The Language Of The Interconnection Agreement Creates No Subcategories Of Local Traffic For Which Compensation Is Not Due	13
b. There Is No System In Place To Distinguish Between Subcategories Of Local Traffic.	14
3. BellSouth's Refusal To Compensate Intermedia For Local Calls To ISPs Violates The Telecommunications Act Of 1996.	15
a. Duty To Compensate.	15
b. Telecommunications Versus Enhanced Service	16
c. Internet Calls Have Two Segments: (1) A Call From The End-User To The ISP Using The Public Switched Network, And (2) An Enhanced Data Transmission Over The Internet Performed By The ISP.	16
4. BellSouth's Argument Has Been Rejected By Every Decisional Authority That Has Addressed This Issue	17
a. BellSouth's Approach Was Rejected In A Recent Federal Case.	18
b. BellSouth's Arguments Have Been Rejected by Numerous Other State Public Service Commissions.	19
5. BellSouth's Arguments Are Incompatible With Precedent Of The Florida Public Service Commission And The FCC	24
a. BellSouth's Position Is Incompatible With Prior Decisions Of This Commission.	24
b. BellSouth's Argument Not Consistent With FCC Precedent.	25

TABLE OF CONTENTS (continued)

	Page
6. BellSouth Misapprehends The FCC.	28
7. The Commission Has Jurisdiction Over This Matter.	30
C. BELLSOUTH'S APPROACH WOULD FURTHER VIOLATE THE REQUIREMENTS OF THE TELECOMMUNICATIONS ACT AND INSULATE ITSELF FROM COMPETITION.	31
1. If ISP Traffic Is Non-Local, Then BellSouth Is Providing InterLATA Service, In Violation Of The Telecommunications Act	31
2. The Commission Must Not Ignore The Bright Legal Distinction Between Telecommunications Services And Enhanced Services.	32
3. CLECs Are Competitive.	33
4. Mutual Compensation Is Designed To Fairly Compensate For The Termination Of Reciprocal Traffic Irrespective Of Whether Competition Produces Transitional Traffic Imbalances . . .	33
D. CONCLUSION.	34

STATEMENT OF THE FACTS

The Agreement

Pursuant to Section 252 of the Telecommunications Act of 1996 (Act), Intermedia and BellSouth negotiated an Interconnection Agreement and filed it with the Florida Public Service Commission (Commission), on June 25, 1996. In accordance with Section 252(e) of the Act, the Commission approved the original interconnection agreement by Order No. PSC-96-1236-FOF-TP, issued on October 7, 1996, and the amended interconnection agreement by Order No. PSC-97-0771-FOF-TP, issued July 1, 1997 (collectively "Agreement").

Pursuant to terms of the Agreement, Intermedia and BellSouth provide local exchange telecommunications services over their respective networks. This enables end-users subscribing to Intermedia's local exchange service to place calls to end-users subscribing to BellSouth's local exchange service and vice versa.

Pursuant to the Agreement, parties owe each other reciprocal compensation for any "Local Traffic" terminated on the other's network. Section 1(D) of the Agreement defines "Local Traffic" as:

any telephone call that originates in one exchange and terminates in either the same exchange, or a corresponding Extended Area Service (EAS) exchange. The terms Exchange, and EAS exchanges are defined and specified in Section A3 of BellSouth's General Subscriber Service Tariff.

Next, Section IV(A) of the Agreement regarding reciprocal compensation states in part:

The delivery of local traffic between the parties shall be reciprocal and compensation will be mutual according to the provisions of this Agreement.

Section IV(B) of the Agreement states in part that:

Each party will pay the other party for terminating its local traffic on the other's network the local interconnection rates as set forth in Attachment B-1, by this reference incorporated herein.

The Breach And Intermedia's Response

On August 12, 1997, BellSouth sent a letter from Mr. Ernest L. Bush to "All Competitive Local Exchange Carriers" stating that BellSouth considers local calls made to internet service providers (ISPs) to be jurisdictionally interstate, and that it would not submit payment for the termination of local calls made to ISPs on the networks of Competitive Local Exchange Carriers (CLECs). Intermedia received a copy of this letter. [Exh. 4, MAV-Exh. B] In accordance with this letter, BellSouth now refuses to pay reciprocal compensation for these BellSouth end-user calls terminated by Intermedia as required by the Agreement.

Intermedia responded to BellSouth by letter dated September 2, 1997, rejecting BellSouth's position and urging BellSouth to issue a prompt retraction of the August 12, 1997 letter, and that Intermedia would aggressively pursue every legal avenue available to it should BellSouth implement its decision to withhold mutual compensation for ISP traffic. [Exh. 4, MAV-Exh. C]

By letter dated September 11, 1997, BellSouth responded to Intermedia's letter. BellSouth reiterated its erroneous position that traffic being delivered to ISPs is not eligible for reciprocal compensation. [Exh. 4, MAV-Exh. D]

**ISSUE PRESENTED
AND
RESTATEMENT OF POSITION**

ISSUE 4: Under their Interconnection Agreement, are Intermedia Communications Inc., and BellSouth Telecommunications, Inc., required to compensate each other for transport and termination of traffic to Internet Service Providers? If so, what action, if any, should be taken?

INTERMEDIA'S POSITION: ** Yes. The Agreement requires reciprocal compensation for all calls terminated within a local calling area. There is no exception for end-user ISPs. This comports with the 1996 Act, FCC orders and rules, and decisions in Florida and other jurisdictions. The Commission must enforce the Agreement and require payment by BellSouth. **

ARGUMENT

UNDER THEIR INTERCONNECTION AGREEMENT, INTERMEDIA AND BELL SOUTH ARE REQUIRED TO COMPENSATE EACH OTHER FOR TRANSPORT AND TERMINATION OF TRAFFIC TO ISPS

A. INTRODUCTION

This is an action by Intermedia to enforce the reciprocal compensation provisions in its Interconnection Agreement with BellSouth as applied to the transport and termination of traffic to ISPs. As framed in the prehearing order, the central issue presented in this action is as follows:

Under their Interconnection Agreement, are Intermedia Communications Inc., and BellSouth Telecommunications, Inc., required to compensate each other for transport and termination of traffic to Internet Service Providers? If so, what action, if any, should be taken?

1. The Applicable Provisions Of The Agreement

There is no dispute as to which provisions of the agreement define the requirement of mutual compensation for Local Traffic. The first provision is found in Section 1(D) of the Agreement, which defines "Local Traffic" as:

any telephone call that originates in one exchange and terminates in either the same exchange, or a corresponding Extended Area Service (EAS) exchange. The terms Exchange, and EAS exchanges are defined and specified in Section A3 of BellSouth's General Subscriber Service Tariff.

Next, Section IV(A) of the Agreement regarding reciprocal compensation states in part:

The delivery of local traffic between the parties shall be reciprocal and compensation will be mutual according to the provisions of this Agreement.

And finally, Section IV(B) of the Agreement states in part that:

Each party will pay the other party for terminating its local traffic on the other's network the local interconnection rates as set forth in Attachment B-1, by this reference incorporated herein.

Thus, Intermedia and BellSouth agree as to which provisions of the agreement control. The disagreement, of course, is whether under the unambiguous language in Section 1(D) of the Agreement a local call to an ISP terminates at the ISP or whether it continues as an interexchange call.

2. The Conventional View Of Local Traffic

The conventional view is that when a BellSouth end-user places a local call to an ISP that is a customer of Intermedia, the call terminates at the ISP and the ISP begins an enhanced transmission over the Internet. This comports with the common understanding of the term "Local Traffic," and it meets perfectly the technical and legal definition of the word "terminates." This is why every forum that addressed the issue of mutual compensation of local calls to ISPs has rejected the position taken by BellSouth.

3. BellSouth's View Of Local Traffic

BellSouth's interpretation of the Section 1(D) is based on two arguments. First, BellSouth contends that it never intended to compensate Intermedia for local traffic to ISPs. In other words, BellSouth's current declaration of its prior intent in executing the Agreement must control the application of that provision. Second, BellSouth argues that the local call to the ISP does not terminate at the ISP but continues as an interexchange communication. Under this view, the CLEC is not a carrier but rather a "conduit" between BellSouth and the interexchange world

[Tr. 231], and this Commission has no jurisdiction over the use of the local network to place these calls to the ISP. [Tr. 267-268] As will be shown below, neither argument provides a credible basis for BellSouth's interpretation of Section 1(D) of the Agreement.

B. BELLSOUTH'S REFUSAL TO COMPENSATE INTERMEDIA FOR THE TERMINATION OF LOCAL TRAFFIC TO ISPs VIOLATES ITS OBLIGATIONS UNDER THE UNAMBIGUOUS TERMS OF THE INTERCONNECTION AGREEMENT AND THE TELECOMMUNICATIONS ACT

1. BellSouth's Current Declaration Of Its Prior Intention Is Not Determinative

BellSouth's first argument for viewing local calls to ISPs as not terminating with the ISP is that it never intended to compensate Intermedia for such calls. In the words of Mr. Hendrix:

If both of the parties did not mutually intend to treat this traffic as local for purposes of reciprocal compensation, then BellSouth is under no contractual obligation to pay reciprocal compensation for such traffic. Moreover, given that traffic is clearly interstate traffic and not local traffic as shown later, reciprocal compensation should not apply. [Tr. 227-228]

This argument raises a fundamental question of contract law: which shall control, the plain terms of a contract or what a party later says it intended after entering into a contract? The answer is simple: the terms of the contract control, not the shifting subjective intentions of the parties. Indeed, Justice Holmes once observed that "The making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs - not on the parties having meant the same thing, but on the parties having said the same thing." The Path of Law, 10 Harvard Law Review 457 (1896). Thus, BellSouth's obligations under the Agreement are defined by the terms of the

agreement, not by its declared intent after executing the agreement.¹

If the supremacy of the written word were not the rule, then there would be no binding contracts because the evolving interests and malleable memories of the parties would eviscerate even the plainest of terms previously agreed upon. Thus, where a contract has been formed validly, courts are obligated to enforce the terms

¹ BellSouth's argument is grounded in an absolute "subjective theory" of contract formation. Under this theory, if BellSouth executed the contract with a different understanding of Section 1(D) than did Intermedia then there was no mutual assent and thus no binding obligation on either party to compensate the other for Local ISP traffic. As reflected the two cases discussed infra, Florida emphasizes the written terms of the contract and thus leans toward the "objective theory" of contract formation as espoused by Justice Holmes, supra.

Whether allegation of mutual misunderstanding defeats manifestation of mutual assent has been long debated in English and American jurisprudence. Some modern theorists attempt to balance the objective and subjective approaches. For example, The Second Restatement of Contracts (Restatement 2d) emphasizes that interpretation of a contractual term is to be based on the common meaning of the language attached by the parties, not that declared by the court. But where material differences in meaning trigger a contract dispute, the Restatement 2d would enforce the contract according to the court's objective interpretation of the disputed terms unless the party alleging misunderstanding can demonstrate that it was without fault in the misunderstanding.

To demonstrate the failure of mutual assent under this "fault" approach, BellSouth would have to demonstrate that neither Intermedia nor it knew or had a reason to know the interpretation held by the other. Restatement 2d, Section 20. BellSouth, of course, made no such demonstration. On the contrary, BellSouth had ample reason to know that Intermedia did not contemplate subcategories of Local Traffic for which there would be no compensation. (See this brief's argument in Section B. 2., supra.) In sum, neither Florida case law nor academic authority support BellSouth's subjective theory of the manifestation of mutual assent.

of the contract according to the plain meaning of the words used to prescribe those terms. This Commission can do no less.

Florida endorses this general rule. For example, in Gendzier v. Bielecki, 97 So.2d 604 (Fla. 1957), the Supreme Court of Florida emphasized the terms of the contract must control in interpretation:

. . . The rule is well established in this state as well as everywhere else that when competent parties reduce their engagements to writing in terms that create a legal obligation without any uncertainty as to the object or extent of the engagement as between them, it is conclusively presumed that the whole engagement and the extent and manner of their undertaking is contained in the writing. The writing itself is the evidence of what they meant or intended by signing it. The test of the meaning and intention of the parties is the content of the written document. Id. at 608.

In a more recent case, Gilmore v St. Paul Fire & Mar. Ins., 708 So. 2d 679 (Fla. App. 1st DCA 1998), the First DCA was required to interpret contractual language in an insurance policy. The Court emphasized that as in the instant case the interpretation would be controlled by the written contract, not extraneous evidence, and that the interpretation involved a question of law, not fact:

The interpretation of a document generally is a question of law rather than a question of fact. 'If an issue of contract interpretation concerns the intention of parties, that intention may be determined from the written contract, as a matter of law, when the nature of the transaction lends itself to judicial interpretation.' Peacock Construction Co., Inc. v. Modern Air Conditioning, Inc., 353 So.2d 840, 842 (Fla. 1977) . . . Id.

Thus, in the instant dispute the interpretation of the Agreement is a question of law, the resolution of which must be

controlled by the applicable language of the agreement.

2. All Reciprocal Local Traffic Requires Mutual Compensation; There Are No Subcategories Of Local Traffic That Do Not Require Compensation

BellSouth's second argument is equally implausible because it is incompatible with the language of the Agreement, conventional industry understanding, orders of the Federal Communications Commission, the Telecommunications Act of 1996, and common sense.

BellSouth says that a local call to the ISP does not terminate at the ISP but rather continues an interexchange communication. As explained by Mr. Hendrix:

. . . an ISP takes a call and, as part of the information service it offers the public, transmits that call to and from the communications network of other telecommunications carriers . . . whereupon it is ultimately delivered to internet host companies, almost all of which are not located in the local serving area of the ISP.

Thus, the call from an end user to the ISP only transits through the local ISPs point of presence; it does not terminate there. There is no interruption of the continuous transmission of signals between the end user and the host computers. [Tr. 230]

Under this idiosyncratic view, the CLEC is not a local exchange provider but rather a "conduit" between BellSouth and the interexchange world:

. . . In other words, if an ALEC puts itself between BellSouth's end-office and the internet service provider, it is acting like an intermediate transport carrier or conduit, not a local exchange provider entitled to reciprocal compensation. [Tr. 231, emphasis added]

a. The Language Of The Interconnection Agreement Creates No Subcategories Of Local Traffic For Which Compensation Is Not Due

There is no dispute that when a BellSouth end-user calls a

local ISP served by Intermedia the traffic is handled between BellSouth and Intermedia just as if it were any other local call. Thus, under BellSouth's argument, the Agreement contemplates subcategories of local traffic, with some categories being eligible for reciprocal compensation and at least one subcategory not. There is, however, not one word in the Agreement that suggests such an approach. Moreover, nothing in the agreement creates a distinction for calls placed to telephone exchange end-users that happen to be ISPs. [Tr. 144] BellSouth's understanding of Section 1(D) of the Agreement is based not on interpretation but on invention. BellSouth's argument must be rejected because it violates the fundamental principle that the terms of the contract control, not the shifting subjective intentions of the parties.

b. There Is No System In Place To Distinguish Between Subcategories Of Local Traffic

If ISP traffic is not local as BellSouth contends, it would have been imperative for the parties to develop a system to identify and measure ISP traffic, because there is no ready mechanism in place for tracking local calls to ISPs. [Tr. 68, 124, 154-155] The calls at issue are commingled with all other local traffic and are indistinguishable from other local calls. If BellSouth intended to exclude traffic terminated to ISPs from other local traffic, it would have needed to develop a way to measure traffic that distinguishes such calls from all other types of local calls with long-holding times, such as calls to airlines and hotel reservations, and banks. [Tr. 154-155, 184] In fact, there is no

such agreed-upon system in place today. [Tr. 184-189]

Upon questioning, BellSouth's witness states:

COMMISSIONER CLARK: So would it be fair to say that your assumption was it was not local traffic, but concurrent with that assumption you did not negotiate with them how to separate that traffic out from the local traffic in order to come up with the appropriate way they should bill you and you should bill them?

WITNESS HENDRIX: Both assumptions are right; that's correct. . . .

And upon further examination:

COMMISSIONER CLARK: So even though at the time you negotiated this contract you had no intention of paying for ISP traffic, you didn't take the next step and determine how you would separate out that traffic?

WITNESS HENDRIX: Exactly right. . . . [Tr. 298-299]

Thus, if BellSouth's position was that local traffic to ISPs should be considered as something other than local, it was incumbent on BellSouth to raise as an issue a system for accounting and removing that traffic from all other local traffic at the time of negotiating the Agreement. [See Tr. 300-301]

3. BellSouth's Refusal To Compensate Intermedia For Local Calls To ISPs Violates The Telecommunications Act Of 1996

a. Duty To Compensate

Sections 251(b)(5), 251(c)(2) and 252(d)(2) of the 1996 Act establish the obligation of ILECs to interconnect with competitive carriers and to provide reciprocal compensation for the exchange of traffic. The 1996 Act defines the interconnection obligations of ILECs in very broad terms and provides no basis for excluding local calls to ISPs from interconnection and reciprocal compensation arrangements.

b. Telecommunications Versus Enhanced Service

Moreover, the 1996 Act defines "telecommunications" as "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." 47 U.S.C. Section 153(43) (Supp. 1998) The local telephone call from an end-user to an ISP clearly meets the definition of telecommunications.

In contrast, "information service" is defined as the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes any electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service. 47 U.S.C. Section 153(20) (Supp. 1998).

c. Internet Calls Have Two Segments:
(1) A Call From The End-User To The
ISP Using The Public Switched
Network, And (2) An Enhanced Data
Transmission Over The Internet
Performed By The ISP

Moreover, the enhanced transmission from the ISP over the Internet is not even regulated under Title II of the Act. BellSouth acknowledges that ISPs are a subset of enhanced service providers. Specifically, "enhanced service" refers to

services, offered over common carrier transmission facilities, which employ computer processing applications that act of the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve

subscriber interaction with stored information. Enhanced services are not regulated under title II of the Act. (47 CFR 64.702(a), emphasis added)

Once a call is sent to an ISP, the ISP performs Internet protocol conversion and also directly involves the subscriber direct access to stored information. Therefore, the ISP segment of call meets the enhanced services definition. [Tr. 151-152]

Moreover, Internet communications consists of two distinct segments: 1) a call from the end-user to the ISP using the public switched network, and 2) an enhanced data transmission over the Internet performed by the ISP. As a matter of law, the first segment of the Internet communication is a telecommunications service which is regulated under Title II of the Act. In most instances, this segment consists of a local call from the end-user to the ISP. Once the call reaches the ISP, the telecommunications service is completed and the call is terminated. The second segment, an enhanced service, is not a call because it is not a telecommunications service and is not regulated under Title II of the Act. Thus, as a matter of law, the telecommunications call ends when it reaches the ISP, and any enhanced data communications provided by the ISPs over the Internet are not telecommunications services.

4. BellSouth's Argument Has Been Rejected By Every Decisional Authority That Has Addressed This Issue

As stated previously, the contract is clear that the parties owe each other reciprocal compensation for any local traffic terminated on the other's network, and there is no exception for

calls to ISP customers. Every state and federal decision to date has consistently reached the conclusion that calls from an end-user to an ISP are local traffic subject to reciprocal compensation. The persuasive authority of these cases is consistent with the Commission's historic treatment of services provided to ISPs. Moreover, these holdings support the conclusion that the term "local traffic" includes calls from end-users to ISPs, which is consistent with the way it was used in the Agreement and as understood by those in the industry and by regulatory bodies.

a. BellSouth's Approach Was Rejected In
A Recent Federal Case

The U.S. District Court in Texas recently held that "as end-users, ISPs may receive local calls that terminate within the local exchange network." Southwestern Bell Telephone Company v. PUC of Texas, et. al, (Western District of Texas, filed June 16, 1998, (MO-98-CA-43) The Court found that "[i]n the instant case, the "call" from Southwestern Bell's customers to Time Warner's ISPs terminates where the telecommunications service ends at the ISPs' facilities. As a technically different transmission, the ISPs' information service cannot be a continuation of the "call" of a local customer." [Id.] The Court determined that the PUC correctly interpreted the interconnection agreement as unambiguous, and correctly ordered Southwestern Bell to comply with the agreement's reciprocal compensation terms for termination of local traffic.

b. BellSouth's Arguments Have Been Rejected By Numerous Other State Public Service Commissions

At least 17 state commissions that have addressed this issue determined that calls from an end-user to an ISP are local traffic and are subject to reciprocal compensation. These states include Arizona, Colorado, Connecticut, Delaware, Maryland, Michigan, Minnesota, New York, North Carolina, Oregon, Pennsylvania, Texas, Virginia, Washington, and West Virginia. The initial decisions of hearing officers in Tennessee and Georgia regarding complaints against BellSouth are consistent as well. Decisions in several other states are pending.

In BellSouth's region, the North Carolina Commission and the initial decisions of the hearing officers in Tennessee and Georgia have decided the issue of reciprocal compensation in favor of the CLECs and against BellSouth.

On February 26, 1998, the North Carolina Commission ruled in favor of U.S. LEC's petition against BellSouth for failure to pay reciprocal compensation for ISP traffic. (Thereafter, the Commission issued a stay, which has expired, of its order and BellSouth filed an appeal in federal court.) In fact, Section 1.C. of the U.S. LEC agreement that defines local traffic is the same as in Intermedia's agreement with BellSouth:

any telephone call that originates in one exchange and terminates in either the same exchange, or in a corresponding Extended Area Service ("EAS") exchange. The terms Exchange and EAS exchanges are defined and specified in Section A3 of BellSouth's General Subscriber Service Tariff. (Order at 5)

Moreover, the Commission found:

The Interconnection Agreement speaks of reciprocal compensation for local traffic. There is no exception for local traffic to an end user who happens to be an ISP. For the purposes of reciprocal compensation, the Commission concludes that the call terminates when it is delivered to the called local exchange telephone number of the end-user ISP. (Order at 6)

Ultimately the Commission held that the

. . . reciprocal compensation provision contained in the Agreement . . . is fully applicable to telephone exchange service calls that terminate to ISP customers when the originating caller and the called number are associated with the same local calling area, and BellSouth shall bill and pay reciprocal compensation for all such calls. (Order at 7)

Also instructive is the initial decision of the hearing officer in Tennessee, which determined that calls made to ISPs constitute local traffic. (Docket No. 98-00118, Issued April 21, 1998, In Re: Petition of Brooks Fiber to Enforce Interconnection Agreement and for Emergency Relief)² The parties agreed that the FCC declared for many years that enhanced service providers, which include ISPs, may obtain services as end-users under intrastate tariffs. Of BellSouth's position that this does not amount to a holding that ISP traffic is considered local for purposes of reciprocal compensation, the hearing officer held that "[a]lthough the FCC may not have explicitly held that ISP traffic is local for purposes of reciprocal compensation, such a conclusion flows effortlessly, both legally and logically, from the long-established position of the FCC." [Id. at 17-18]

The Hearing Officer decided that the word "terminate" as used

² Subsequently, by unanimous vote, the full Tennessee Regulatory Authority adopted the Hearing Officer's initial decision. An order is forthcoming.

in the interconnection agreement is unambiguous and may not be fairly understood in more than one way; therefore, the matter needed to be resolved within the four corners of the agreement. Regarding BellSouth's position that calls do not terminate at the ISP but transit through them, he stated:

Even so, that has little to do with the focus of attention in this case. The fact that an ISP launches an information service after being connected with via a telecommunications service is of no import in this analysis. Given the current state of the law, BellSouth's logic is difficult to follow, and its conclusions almost impossible to reach. [*Id.* at 18-19]

The initial decision against BellSouth in Georgia held that because a call that is terminated to the ISP is a local call, it must be compensated pursuant to reciprocal compensation. (Docket No. 8196-U, *In Re: Complaint of MFS Intelnet of Georgia, Inc. Against BellSouth Telecommunications, Inc., and request for Immediate Relief*) Regarding BellSouth's contention that calls do not terminate at the ISP, the hearing officer stated: "[t]he fact that an ISP may provide a caller information from services available over the Internet does not alter the legal status of the connection between the customer and the ISP as being a local call." [*Id.* at 4]

The decisions in other states comport with these findings as well. For instance, the Virginia State Corporation Commission determined that calls to ISPs are local and that the presence of an ALEC does not change the local nature of the call.³ The New York

³ Petition of Cox Virginia Telecom, Inc. for Enforcement of Interconnection Agreement with Bell Atlantic-Virginia, Inc. and Arbitration Award for Reciprocal Compensation for Termination of

Public Service Commission ordered New York Telephone to continue to pay reciprocal compensation for local exchange traffic delivered to ISPs.⁴ Similarly, the Maryland Public Service Commission ruled that local exchange traffic to an ISP is local in nature and is eligible for reciprocal compensation and ordered Bell Atlantic-Maryland, Inc. to pay reciprocal compensation previously withheld.⁵ Likewise, the Connecticut Department of Public Utility Control issued a decision holding that local exchange traffic to ISPs is local in nature and eligible for reciprocal compensation.⁶ Moreover, the states of Arizona,⁷ Colorado,⁸ Minnesota,⁹ Oregon,¹⁰

Local Calls to Internet Service Providers, Case No. PUC970069 (Va. State Corp. Comm'n Oct. 27, 1997). Bell Atlantic has appealed this decision to the Virginia Supreme Court.

⁴ Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic, Case 97-C-1275, Order Denying Petition and Instituting Proceeding (N.Y.P.S.C. July 17, 1997). The Order also instituted a proceeding to consider issues related to Internet access traffic. Comments and Reply Comments have been filed.

⁵ Letter dated September 11, 1997 from Daniel P. Gahagan, Executive Secretary, Maryland Public Service Commission, to David K. Hall, Esq., Bell Atlantic-Maryland, Inc. On October 1, 1997, the Commission confirmed that decision rejecting a BA-MD Petition for Reconsideration. Bell Atlantic has appealed this decision to the Circuit Court of Montgomery County, Maryland.

⁶ Petition of the Southern New England Telephone Company for a Declaratory Ruling Concerning Internet Services Provider Traffic, Docket No. 97-05-22, Decision (Conn. D.P.U.C. Sept. 17, 1997).

⁷ Petition of MFS Communications Company, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions with US WEST Communications, Inc., Pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996, Opinion and Order, Decision No. 59872, Docket No. U-2752-96-362 et al. (Arizona Corp. Comm. Oct 29, 1996) at 7.

Pennsylvania¹¹, Washington¹², and West Virginia¹³ declined to treat traffic to ISPs any differently than other local traffic.

⁸ Petition of MFS Communications Company, Inc. for Arbitration Pursuant to 47-U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions with US WEST Communications, Inc., Decision Regarding Petition for Arbitration, Docket No. 96A-287T, at 30 (Col. PUC Nov. 5, 1996). The Colorado Public Utilities Commission has since affirmed its rejection of US West's efforts to exclude ISP traffic from reciprocal compensation by rejecting such a provision in a proposed US West tariff. The Investigation and Suspension of Tariff Sheets Filed by US West Communications, Inc. With Advice Letter No. 2617, Regarding Tariffs for Interconnection, Local Termination, Unbundling and Resale of Services, Docket No. 96A-331T, Commission Order, at 8 (Colo. P.U.C. July 16, 1997).

⁹ Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCImetro Access Transmission Services, Inc., and MFS Communications Company for Arbitration with US WEST Communications, Inc., Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996, Order Resolving Arbitration Issues, Docket Nos. P-442, 421/M-96-855, P-5321, 421/M-96-909, P-3167, 421/M-96-729 (Minn. PUC Dec. 2, 1996) at 75-76.

¹⁰ Petition of MFS Communications Company, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to 47 U.S.C. Sec. 252(b) of the Telecommunications Act of 1996, Commission Decision, Order No. 96-324 (Ore. PUC Dec. 9, 1996) at 13.

¹¹ Petition for Declaratory Order of TCG-Delaware Valley, Inc. for Clarification of Section 5.7.2 of its Interconnection Agreement with Bell-Atlantic Pennsylvania Inc. P-00971256. (Order released June 16, 1998) (Adopting TCG's position that calls to the Internet via ISPs terminate from the ISP premise.)

¹² In the Matter of Petition for Arbitration of an Interconnection Agreement Between MFS Communications Company, Inc. and US WEST Communications, Inc., Pursuant to 47 USC § 252, Arbitrator's Report and Decision, Docket No. UT-960323 (Wash. Utils. and Transp. Comm. Nov. 8, 1996) at 26.

¹³ Case No. 97-1210-T-PC, MCI Telecommunications Corporation Petition for Arbitration of Unresolved Issues for the Interconnection Negotiations Between MCI and Bell-Atlantic - West Virginia, Inc. (W. Virginia PUC January 13, 1998)

5. **BellSouth's Arguments Are Incompatible With Precedent Of The Florida Public Service Commission And The FCC**

a. BellSouth's Position Is Incompatible With Prior Decisions Of This Commission

This Commission even completed an investigation into access to the local network for providing information services by concluding, among other things, that end-user access to an ISP is local service. (Order No. 21815, issued September 5, 1989, in Docket No. 880423-TP) This decision was reached after hearing testimony and argument from a number of parties, including BellSouth (then Southern Bell). In fact, in reaching its conclusion that ISP traffic is local, the Commission relied in part on testimony from BellSouth's witnesses. In its order, the Commission cited BellSouth testimony that "calls to a VAN (value added network) which use the local exchange lines for access are considered local even though communications take place with data bases or terminals in other states" and "such calls should continue to be viewed as local exchange traffic."¹⁴ The Order also quoted the BellSouth witness who testified that "connection to the local exchange network for the purpose of providing an information service should be treated like any other local exchange service."¹⁵ On reconsideration, the Commission reaffirmed its decision; however, it stayed its prior ruling pending an appeal in the ninth circuit. (Order No. 23183, issued July 13, 1990)

¹⁴ Order No. 21815, at 24; 89 F.P.S.C. 9:30.

¹⁵ Order 21815, at 25; 89 F.P.S.C. 9:31.

b. BellSouth's Argument Not Consistent
With FCC Precedent

This Commission's determination in Docket No. 880423-TP and the decisions of other state regulatory agencies are consistent with those of the FCC. Under current FCC rules, traffic to an ISP is local traffic. The FCC has repeatedly affirmed the rights of ISPs to employ local exchange services, under intrastate tariffs, to connect to the public switched telecommunications network.¹⁶ The mere fact that an ISP may enable a caller to access the Internet does not alter the legal status of a local connection between the customer and the ISP. The local call to the telephone exchange service of an ISP is a separate and distinguishable transmission from any subsequent Internet connection enabled by the ISP.

The FCC's recent *Report and Order on Universal Service and First Report and Order on Access Charge Reform* affirm this fact.¹⁷ In the *Universal Service Order*, the FCC determined that Internet access consists of severable components. "When a subscriber obtains a connection to an Internet service provider via voice

¹⁶ Amendments to Part 69 of the Commission's Rules Relating to Enhanced Service Providers, 3 FCC Rcd 2631, para. 2 n. 8 (1988). In its First Report and Order regarding Access Charge Reform, the Commission reaffirmed this position explicitly and declined to impose access charges on ISPs. In the Matter of Access Charge Reform, First Report and Order, CC Docket No. 96-262 (rel. May 17, 1997) ("Access Charge Reform Order"), ¶¶344-348.

¹⁷ In the Matter of Federal-State Joint Board on Universal Service, Report and Order, CC Docket No. 96-45 (rel. May 8, 1997) ("Universal Service Order"); In the Matter of Access Charge Reform, First Report and Order, CC Docket No. 96-262 (rel. May 17, 1997) ("Access Charge Reform Order").

grade access to the public switched network, that connection is a telecommunications service and is distinguishable from the Internet service provider's service offering." [*Id.* at para. 789]¹⁸ In other words, the first component is a simple local exchange telephone call. Such a call is eligible for reciprocal compensation under the Agreement. Moreover, the Commission reaffirmed its holding that all services previously considered "enhanced services" are "information services," and that "to ensure regulatory certainty and continuity, it was preserving the definitional scheme by which certain services (enhanced and information services) are exempted from regulation under Title II of the Act." [*Id.* at para. 788, and *Non-Accounting Safeguards*, at para. 106.]

In the *Access Charge Reform Order*, the FCC declined to allow LECs to assess interstate access charges on ISP.¹⁹ Indeed, the FCC characterized the connection from the end-user to the ISP as local traffic: "To maximize the number of subscribers that can reach them through a local call, most ISPs have deployed points of presence."²⁰ Moreover, the FCC specifically concluded that "ISPs should remain classified as end-users for purposes of the access charge system." [*Id.* at 348, emphasis added]

In the FCC's *Non-Accounting Safeguards Order*, the Commission determined that the local call placed to an ISP was separate from

¹⁸ Universal Service Order, paras. 83, 788-789.

¹⁹ Access Charge Reform Order, paras. 344-348.

²⁰ *Id.*, at n. 502 (emphasis added).

the subsequent information service provided.²¹ The severability of these components was key to the FCC's conclusion that if each was provided, purchased, or priced separately, the combined transmissions did not constitute a single interLATA transmission.²² There can be no doubt that at this time the FCC does not consider the local exchange call to an ISP to be an interstate or international communication -- to the contrary, the FCC views such a call to be an intrastate call for jurisdictional purposes.

Although the FCC currently is examining the issue of the use of the public switched network by ISPs, it has not altered the existing rules.²³ Currently, the FCC's web site contains a section called "Frequently Asked Questions on Internet Services and Access Charges" which reflects this view [Exh. 3, pp. 64-65]:

ISPs purchase local phone lines so that customers can call them. Under FCC rules, enhanced service providers [sic] ISPs are considered 'end users' when they purchase services from local telephone companies. Thus, IPSS [sic] pay the same rates as any other business customer, and these rates are set separately in each state. By contrast, long-distance companies are considered 'carriers,' and they pay interstate access charges by the FCC. [Id. at 64]

²¹ Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-149 (rel. Dec. 24, 1996), para. 120.

²² Id.

²³ Notice of Inquiry, Usage of the Public Switched Network by Information Service and Internet Access Providers, F.C.C., CC Docket 96-263 (released Dec. 24, 1996) ("NOI Proceeding"); see also In the Matter of Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic, F.C.C., CCB/CPD 97-30 (F.C.C.) ("ALTS Proceeding") (decision pending).

Thus, any alteration at this time by the FCC would not affect the terms of Intermedia's Agreement with BellSouth - ISPs are end-users and Intermedia is entitled to be compensated for termination of local traffic to its customers who happen to be ISPs.

6. BellSouth Misapprehends The FCC

Against the weight of the actual definitions in the Telecommunications Act, the definition of enhanced service, and the numerous FCC orders previously discussed, BellSouth insists that the FCC has jurisdiction over the disputed traffic to ISPs. BellSouth relies not on the Telecommunications Act, or current FCC orders and rules; instead it relies on sparse language from an antiquated 1983 *Access Charge Reconsideration Order*, an NPRM regarding access, the May, 1997, *Access Charge Reform Order*, and a footnote in a *Report to Congress*. [Exh. 7, pp. 120-122]

BellSouth relies on the 1983 *Access Charge Reconsideration Order* [supra] for the proposition that the FCC "decided not to impose access charges on ESPs/ISPs." [Id. at 120] There is no explicit assertion of jurisdiction by the FCC in this order; instead, the FCC briefly contemplates what would happen if access charges were to be applied to ESPs/ISPs.

Further, BellSouth relies on an NPRM regarding access, (NPRM in CC Docket No. 87-215) which failed to become final. BellSouth relies on paragraph one granting temporary exemption to ESPs, based on the 1983 *Access Charge Reconsideration Order*. Further in that paragraph, the FCC tentatively concluded that ESPs be assessed access charges. This never became the rule. Moreover, the current

rules specifically state that ESPs are not even regulated under Title II of the Act.

As for BellSouth's reliance on the May 1997 *Access Reform Order*, Intermedia agrees that the FCC has declined to impose access charges on ISPs - which is different than asserting jurisdiction over the traffic. In fact, BellSouth reminds the Commission that ISPs may take under the LECs' intrastate tariffs - those calls are treated as local.

Finally, BellSouth relies on Footnote 220 of the April 10, 1998 *Report to Congress*:

We make no determination here on the question of whether competitive LECs that serve Internet Service Providers (or Internet service providers that have voluntarily become competitive LECs) are entitled to reciprocal compensation for terminating Internet traffic. That issue, which is now before the Commission, does not turn on the status of the Internet service provider as a telecommunications carrier or information service provider.

Although the footnote is admittedly obscure, the most rational understanding of the FCC's observation is this: whether a CLEC is entitled to reciprocal compensation for terminating interstate traffic does not turn on the status of the ISP as a telecommunications carrier or information service provider, because a CLEC can be an ISP and an ISP can be a CLEC. Therefore, the status of the entity cannot be dispositive, but rather the nature of the transmission. Simply put, once the transmission becomes an enhanced service, the telecommunications service segment of the transmission has terminated. Irrespective of how one interprets this obscure comment, it remains only a footnote in a report: it

is not the Act, a rule, nor even an FCC order.

7. The Commission Has Jurisdiction Over This Matter

BellSouth argues that because local calls to an ISP are jurisdictionally interstate this Commission allegedly has no jurisdiction over the use of the local network to place these calls to the ISP. As observed by Mr. Hendrix:

The FCC has claimed this traffic to be interstate. There is no question. There is nothing more to interpret. The FCC has jurisdiction over that traffic. It doesn't matter whether it's enhanced or even the initial piece where you dial a 7-digit number; it's interstate traffic. [Tr. 274]

BellSouth argues that for the type of calls at issue, the termination of a call made by the end-user is at the ISP host and not the ISP POP and that is the reason the FCC has jurisdiction over that traffic. [Tr. 267-268] When asked whether the whole line of traffic from the end-user to the host is interLATA telecommunications service or interLATA information service, Mr. Hendrix responded:

To me, it really doesn't matter. I don't know that you need to really get into defining what this traffic is. The key point is that the jurisdiction rests with the federal -- with the FCC, and they will determine when it is appropriate to assess access charges. [Tr. 272]

Although it may not matter to BellSouth, it does matter under the law. As stated previously, calls to ISPs have two segments: 1) a call from the end-user to the ISP using the public-switched network; and 2) an enhanced data transmission over the Internet performed by the ISP. As a matter of law, segment one is a regulated telecommunications service, and segment two is an

enhanced service and, as a matter of law, is not a regulated telecommunications service. The calls in dispute are calls terminated in the local calling exchange to customers who happen to be ISPs - and, therefore, this Commission clearly has jurisdiction.

BellSouth is again wrong. This is a complaint against BellSouth for breach of the terms of the Agreement between BellSouth and Intermedia approved by the Commission, which has jurisdiction to enforce the terms of the Agreement. The United States Court of Appeals for the Eighth Circuit recently confirmed that pursuant to Section 252 of the Act, state commissions, like this one, "are vested with the power to enforce the terms of the agreements they approve." Iowa Utilities Board v. FCC, 120 F.3rd 753 (8th Cir. 1997).

The Commission also has jurisdiction to consider this complaint pursuant to Sections 364.01, 364.03, and 364.05, Florida Statutes, Rule 25-22.036(5), Florida Administrative Code, and Orders No. PSC-96-1236-FOF-TP, issued on October 7, 1996, and PSC-97-0771-FOF-TP, issued July 1, 1997.

C. BELLSOUTH'S APPROACH WOULD FURTHER VIOLATE THE REQUIREMENTS OF THE TELECOMMUNICATIONS ACT AND INSULATE ITSELF FROM COMPETITION

1. If ISP Traffic Is Non-Local, Then BellSouth Is Providing InterLATA Service, In Violation Of The Telecommunications Act

Traffic transported and terminated by CLECs to their ISP customers is local and subject to reciprocal compensation. If the Commission were to disregard clear and convincing evidence that ISP traffic is in fact local, the Commission necessarily must find that

all ISP traffic is interexchange in nature. Such a finding will put BellSouth in direct violation of the Act, which expressly precludes the BOCs from providing in-region, interLATA services unless certain criteria are met. BellSouth.net, a subsidiary of BellSouth, provides full Internet service to end-user customers. If, as BellSouth appears to argue, all Internet traffic is inherently interstate in nature, then BellSouth is now providing interLATA service through its BellSouth.net subsidiary, in direct violation of the Act.

2. The Commission Must Not Ignore The Bright Legal Distinction Between Telecommunications Services And Enhanced Services

During cross-examination Ms. Strow, BellSouth made notable attempts to depict the traffic to ISPs as interstate in nature. [Tr. 166-178] BellSouth's attorney even went so far to propose a hypothetical where a rabid sports fan turned to Intermedia's ISP customer to listen over the Internet to a radio broadcast of a football game. In a calculated manner, BellSouth attempted to blur the historical distinctions between voice and data, and local and long distance.

These attempts are nothing more than a red-herring. This Commission, however, must not ignore the bright, legal distinction between telecommunication services and enhanced services. As discussed previously, enhanced services are not even regulated under Title II of the Act: therefore, the telecommunications service ends when it reaches the ISP end-user. To reiterate, "[t]he fact that an ISP launches an information service after being

connected with via telecommunications service is of no import in this analysis." [Tennessee Decision, supra at 18-19]

3. CLECs Are Competitive

At hearing Commissioner Deason asked each of the ALEC witnesses whether the ALEC provided the ISP customer a commission on its volume of terminated traffic. [Tr. 73-74, 129, 185, 213-214] In other words, Commissioner Deason was asking whether the ALECs were winning ISPs through the use of kickbacks.

Each ALEC affirmed that they did not use such a ploy. Indeed, what may be overlooked is the fundamental reality that ALECs have won these customers in the marketplace, i.e., that the market is indeed becoming more competitive. Moreover, although not addressed at length, the record reflects that ALECs have won ISP customers by providing a higher value of service through such offerings as collocation, timely responses, and customer-friendly strategies. [Tr. 212-213]

4. Mutual Compensation Is Designed To Fairly Compensate For The Termination Of Reciprocal Traffic Irrespective Of Whether Competition Produces Transitional Traffic Imbalances

Throughout the hearing there was discussion about potential imbalances in the termination of Local Traffic. In addition, BellSouth's "conduit" theory apparently suggests that Intermedia merely places itself "between" BellSouth and its ISP customer to collect terminating fees as a windfall. [Tr. 231] If this is indeed BellSouth's view, then it ignores three key points.

First, as reflected above, Intermedia has not merely placed itself between BellSouth and its ISP customer; rather Intermedia

has won the customer as its own by competing effectively in the market. Next, under reciprocal compensation the carrier is being compensated for the costs incurred in terminating the traffic, and this termination is of value to the originating carrier. If compensation rates are appropriately set, it should not matter to BellSouth whether there are imbalances or not. And third, to the extent there are imbalances, these are transitional patterns that will change as these competitive markets mature. In short, existing traffic patterns are not fixed and they do not make mutual compensation unfair.

D. CONCLUSION

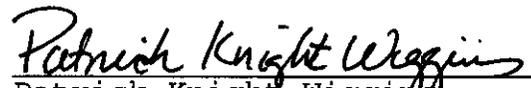
Under BellSouth-Intermedia Agreement, all calls that terminate within a local calling area, regardless of the identity of the end-user, are local calls for which reciprocal compensation is due. Nothing in the Agreement creates a distinction for calls placed to telephone exchange end-users that happen to be ISPs. As a matter of law, BellSouth owes reciprocal compensation to Intermedia for all such calls, including those that terminate to Intermedia's local ISP end-users.

BellSouth attempts to circumvent its contractual obligation by declaring that local calls to ISPs are actually interstate calls passing through the ALEC which merely serves as a "conduit." BellSouth ignores the reality that locally generated Internet communications consist of two segments: (1) a local telephone call from an end-user to an ISP; and (2) an enhanced transmission from the ISP over the Internet. Thus, in this context, the ISP does not

serve as a telecommunications carrier and the local telephone call to the ISP terminates at the ISP. It is only by ignoring the clear meaning of the Agreement and the clear distinction between telecommunications and information service that BellSouth can attempt to avoid its contractual obligation.

The Commission must enforce the Interconnection Agreement by ordering BellSouth to pay Intermedia for terminating such local traffic under the reciprocal compensation provisions of the Agreement and by granting such other relief as the Commission deems appropriate.

Respectfully submitted this 30th day of June, 1998.


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery(*) or U.S. Mail this 30th day of June, 1998, to the following:

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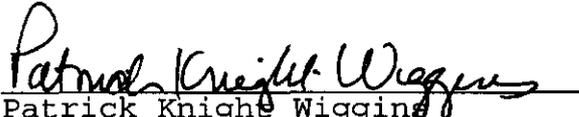
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