ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for Arbitration Concerning Complaint of Intermedia Communications Inc. against BellSouth Telecommunications, Inc. for Breach of Terms of Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 and Request for Relief	**Docket No. 991534-TP** **Filed: June 27, 2000**

INTERMEDIA COMMUNICATIONS INC.'S POST-HEARING BRIEF OF THE EVIDENCE

Jonathan E. Canis
KELLEY DRYE & WARREN, L.P.
1200 19th Street, N.W., Fifth Floor
Washington, D.C. 20036
202 955 9600
202 955 9792 (facsimile)

Patrick K. Wiggins
Charles J. Pellegrini
WIGGINS & VILLACORTA, P.A.
2145 Delta Boulevard
Suite 200
P.O. Box 1657
Tallahassee, Florida 32302
850 385 6007
850 385 6008 (facsimile)

Scott A. Sapperstein
INTERMEDIA COMMUNICATIONS INC.
3625 Queen Palm Drive
Tampa, Florida 33619-13209
813 829 4093
813 829 4923 (facsimile)

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CMP Watts
COM 2
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LEG 2
OPC ___
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TABLE OF CONTENTS

PAGE NO.

TABLE OF CONTENTS, CONTINUED

PAGE NO.

TABLE OF CONTENTS, CONTINUED

PAGE NO.

Intermedia Communications Inc. ("Intermedia"), through its undersigned counsel, hereby respectfully files its Post-Hearing Brief of the Evidence in the above-captioned proceeding.

STATEMENT OF INTERMEDIA'S BASIC POSITION

Under the parties' Interconnection Agreement, approved by this Commission on October 7, 1996, and the Commission's Order No. PSC-98-1216-FOF-TP, BellSouth Telecommunications, Inc. ("BellSouth") is, and has been at all times, obligated to pay Intermedia reciprocal compensation for the exchange of local traffic in Florida on the basis of the composite tandem switching rate of $0.01056 per minute established in Attachment B-1 of the Interconnection Agreement. Intermedia has consistently remitted invoices to BellSouth for reciprocal compensation on this basis. BellSouth has fashioned an incorrect interpretation of the June 3, 1998, Amendment to the Interconnection Agreement to wrongfully withhold substantial amounts of reciprocal compensation from Intermedia. This Commission should find that BellSouth is in breach of the Interconnection Agreement and require BellSouth to remit at once full reciprocal compensation payments, including interest, to Intermedia on the basis of Intermedia's invoices.

STATEMENT OF THE ISSUE AND INTERMEDIA'S POSITION ON THE ISSUE

ISSUE

What is the applicable rate(s) that Intermedia and BellSouth are obligated to use to compensate each other for transport and termination of local traffic in Florida pursuant to the terms of their Interconnection Agreement approved by the Commission?

INTERMEDIA'S POSITION

Performance under the parties' Interconnection Agreement as amended has always required reciprocal compensation payments for the transport and termination of local traffic in Florida on the basis of the composite tandem switching rate of $0.01056 per minute of use in Attachment B-1 of the Interconnection Agreement.

INTRODUCTION

This is a simple case that BellSouth has tried to make complicated. It involves an interpretation of an amendment to the BellSouth/Intermedia Interconnection Agreement known as the "MTA Amendment." At issue is whether the Amendment has been implemented. BellSouth, in a sorely strained interpretation, argues that it has been implemented. Intermedia contends that it has not.

The MTA Amendment is but three pages in length. It has two provisions contained in six paragraphs and an attachment. The first provision, enables Intermedia to elect a network architecture known an "multiple tandem access" or "MTA." In an MTA arrangement, an interconnecting carrier is able to establish transport trunks to just one or, at a minimum, less than all of the BellSouth access tandems in a local access and transport area ("LATA") in order to deliver traffic to BellSouth's end users. Without MTA trunking, an ALEC would have to establish direct trunk lines to all of BellSouth's access tandems within the LATA. As a result, MTA can offer an ALEC significant transport cost savings if it is implemented.

The second provision of the MTA Amendment establishes new rates for reciprocal compensation, derived from state commission arbitration proceedings. These rates, which are referred to as "elemental rates," are applicable to traffic handled over MTA arrangements. They are significantly lower than the reciprocal compensation rates that were originally negotiated in

the BellSouth/Intermedia Interconnection Agreement. For Florida, the original reciprocal compensation rate is 1.056¢ per minute of use. In contrast, the applicable elemental rates under the MTA Amendment are 0.2¢ per minute if Intermedia's traffic is deemed "end office-switched" traffic, or 0.325¢ if it is designated as "tandem-switched."[1] In other words, the elemental MTA rates are at least 60 per cent below the reciprocal compensation rates originally negotiated by BellSouth and Intermedia in their Interconnection Agreement.

Intermedia's position is that the two provisions of the MTA Amendment are interrelated, and have a single purpose, as is clearly specified in Attachment A to the Amendment. They make MTA arrangements available to Intermedia, upon its election. If elected, Intermedia accepts the lower, elemental reciprocal compensation rates as a quid pro quo, when and where MTA trunking is implemented. BellSouth's position, which is manifestly flawed, is that the two provisions are not tied together, and that the MTA Amendment actually served two purposes: it made MTA available to Intermedia; and it put the lower, elemental rates into effect, immediately upon execution of the Amendment, throughout the entire nine-state BellSouth territory, regardless of whether MTA trunking was requested or implemented. As Intermedia explains below, because Intermedia has neither requested nor implemented MTA trunking anywhere, BellSouth's position would mean that Intermedia accepted a reduction in reciprocal compensation rates of 60 per cent or more in exchange for absolutely nothing.

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[1] The rates referenced in the MTA Amendment are called "elemental" because they break down reciprocal compensation into several components that reflect various network functions. Thus, if Intermedia's switch is deemed to act solely as an end office switch, Intermedia would collect only the local switching elemental rate of $0.002 per minute. If Intermedia's switch is deemed to function both as a local and tandem switch, Intermedia would collect the end office rate plus the $0.00125 tandem switching rate. Added together, the end office and tandem switching elemental rates total $0.00325, or 0.325¢ per minute.

Intermedia demonstrated at hearing and demonstrates below that its position is: (1) supported by the plain language of the MTA Amendment and the tenets of contract construction; (2) the circumstances existing at the time the Amendment was executed; and (3) the actions of the parties after the Amendment was executed. In contrast, BellSouth's interpretation of the Amendment would render major provisions of the Amendment superfluous or nonsensical, and is inconsistent with the conduct of the parties at the time the Amendment was signed, and after. Moreover, BellSouth rests its case on the testimony of a single witness – testimony which is not corroborated by a single shred of documentation. For these reasons, the Commission should adopt Intermedia's interpretation of the contract, and find that the elemental rates of the MTA Amendment are not now, and have not previously been, in effect.

STATEMENT OF FACTS

A. Significant Events

On July 1, 1996, Intermedia and BellSouth negotiated an Interconnection Agreement pursuant to section 252 of the Telecommunications Act of 1996 ("Act"). (Direct Testimony Gold, TR 21) As required by section 251(b)(5) of the Act, Intermedia and BellSouth reciprocally compensate each other for the transport and termination of traffic originated on the network of the other within the same local calling area according to rates, terms and conditions set forth in the Interconnection Agreement. (TR 21; Exh. 2) As BellSouth and Intermedia negotiated, Attachment B-1 of the Interconnection Agreement sets a composite rate of $0.01056 (1.056¢) per minute as the reciprocal compensation rate. (Exh. 2)

In early 1998, Intermedia learned that BellSouth was refusing to pay Intermedia's invoices for reciprocal compensation, in breach of the BellSouth/Intermedia Interconnection Agreement. BellSouth refused to pay these invoices, arguing that traffic bound for internet

service providers ("ISPs") on Intermedia's network was not subject to reciprocal compensation. (Complaint at 6) On April 6, 1998, Intermedia filed a complaint with the Commission seeking payment of the full amounts it invoiced, and the Commission held a hearing on Intermedia's complaint on June 3, 1998.

Also in early 1998, BellSouth cut off traffic from Intermedia end users destined for BellSouth end users near Atlanta, Georgia. (Thomas, TR 129) At that time, Intermedia had established a direct trunk to BellSouth's Buckhead tandem office, but not to the neighboring Norcross tandem. Previously BellSouth had been routing Intermedia's traffic from Buckhead to Norcross, from which it routed the traffic to BellSouth end users served by the Norcross tandem. In early 1998, however, BellSouth apparently determined that this routing was against BellSouth's policy, and so cut off Intermedia's traffic flowing from Buckhead to Norcross. (TR 129) BellSouth proposed to Intermedia that the Norcross problem could be resolved by installing a multiple tandem access trunk between the Buckhead tandem and the Norcross tandem. (Thomas, TR 129-130; Hendrix, TR 185) In response to this BellSouth proposal, Intermedia requested BellSouth's MTA Amendment, in the hope that it would provide an "emergency patch" to restore traffic to end users served out of the Norcross tandem. On June 3, 1998, Intermedia executed an amendment to the Interconnection Agreement that enabled Intermedia to elect multiple tandem access arrangements and set forth applicable rates, terms and conditions. (Gold, TR 71-72; Thomas, TR 129-30) In the meantime, Intermedia had resolved the Norcross problem first by redirecting the blocked traffic on Intermedia's own network, and then by installing a direct trunk from its local switch to the Norcross tandem. (Gold, TR 70; Thomas, TR 129-30) Intermedia's first direct trunk to the Norcross tandem was established on May 1, 1998. (Exh. 20)

On September 15, 1998, the Commission issued Order No. PSC-98-1216-FOF-TP, in which it ruled that BellSouth was liable under the Interconnection Agreement to pay Intermedia reciprocal compensation for ISP-bound traffic. (Exh. 2) On October 14, 1998, BellSouth filed a petition for judicial review of the Commission's order in the U.S. District Court for the Northern District of Florida, seeking declaratory and injunctive relief.

On April 20, 1999, in Order No. PSC-99-0758-FOF-TP, the Commission denied BellSouth's motion for stay of Order No. PSC-98-1216-FOF-TP. (Direct Testimony Gold, TR 21) On June 21, 1999, the District Court denied BellSouth's motion to that court to stay the Commission's order. (Direct Testimony Gold, TR 27) On July 2, 1999, BellSouth sent to Intermedia a check in the approximate amount of $12.7 million, ostensibly in satisfaction of its reciprocal compensation liability. (Direct Testimony Gold, TR 22) At that time, the amount BellSouth owed to Intermedia was approximately $37.7 million. (Direct Testimony Gold, TR 22)

In a letter dated August 27, 1999 – over one year after the MTA Amendment was executed – BellSouth insisted that its payment was correct because the June 3, 1998, Amendment had established elemental rates for reciprocal compensation and that, accordingly, the applicable rates were $0.002 per minute for end office switching and $0.00125 per minute for tandem switching. (Direct Testimony Gold, TR 22; Exh. 2) On October 8, 1999, Intermedia filed this complaint with the Commission, alleging BellSouth to be in breach of the Interconnection Agreement and requesting that the Commission find that the composite rate of $0.01056 (1.056¢) per minute set in the agreement in Attachment B-1 has at all times been applicable to reciprocal compensation.

B. Network Architecture

Because end users of interconnecting carriers and end users of the incumbent local exchange carriers ("ILECs") in the same local calling area will call each other, the carriers exchange local traffic according to reciprocal compensation obligations as specified in federal law and as defined in Interconnection Agreements. (Direct Testimony Thomas, TR 99; Exh. 5) To do this, interconnecting carriers, such as Intermedia, establish transport facilities, called "interconnection trunks" that connect the interconnecting carrier's switch with the ILECs' tandem switch, and sometimes to the ILEC's end office switch as well, in the same local calling area. (TR 99; Exh. 5)

There are two kinds of network architecture that are commonly deployed to establish interconnection with an ILEC's tandem switches. The first of these is called "Single Tandem Access" or "STA." (TR 99-100; Exh. 5) With this architecture, the interconnecting carriers establish direct trunks to each ILEC access tandem within the local calling area. The second of these is called "Multiple Tandem Access" or "MTA." (TR 100; Exh. 5) (It is also sometimes referred to as "Single Point of Interconnection.") With this architecture, interconnecting carriers may establish interconnection with all of the ILEC's access tandems in the LATA – and the end offices subtending them – by trunking to only one ILEC tandem (or, at a minimum, to less than all of the ILEC tandems). (TR 100) Under MTA arrangements, the ILEC hauls the interconnecting carrier's traffic from the Single Point of Interconnection to other ILEC tandem switches throughout the LATA, thereby saving the interconnecting carriers the cost of building trunks to every access tandem. (Direct Testimony Gold, TR 14; Gold, TR 32-33; Direct Testimony Thomas, TR 104; Milner, TR 344, 358; Milner Deposition, Exh. 24 at 30)

C. Intermedia's Florida Network

In Florida, Intermedia is interconnected with BellSouth's networks in Jacksonville, Orlando and Miami. (Direct Testimony Thomas, TR 99-100; Exh. 5) Intermedia turned up its Orlando DMS-100 local switch in January 1997, interconnecting with BellSouth's Magnolia and Colonial tandem switches by means of one-way reciprocal trunks for the exchange of local traffic. In addition, it was interconnected with the Magnolia tandem switch, but not the Colonial tandem switch, by means of a two-way transit trunk. (TR 99-100; Exh. 5) A two-way trunk was installed to the Colonial switch in May 2000. (Exh. 20) Transit trunks are used to carry traffic from carriers other than the interconnecting or incumbent carrier, outbound 800-type traffic not destined for either the interconnecting or incumbent carrier, and wireless traffic. (TR 100; Exh. 20)

Intermedia turned up its DMS-100 switch in Jacksonville in January 1997, interconnecting with BellSouth's Clay Street and San Marco tandem switches by means of one-way reciprocal trunks for the exchange of local traffic and two-way transit groups. Installed in March 1998, a two-way transit group to the San Marco tandem has not carried traffic. (Direct Testimony Thomas, TR 103; Exh. 5; Exh. 20)

Intermedia's Miami switch has complete connectivity with BellSouth's Miami Metro, Fort Lauderdale and West Palm Beach access tandems. (Exh. 5; Exh. 20)

Intermedia deploys no multiple tandem access arrangements in Florida. (Direct Testimony Thomas, TR 105; Thomas, TR 112; Milner, TR 364-65; Milner Deposition, Exh. 24 at 54)

D. Intermedia's Georgia Network

At the time of the MTA Amendment, Intermedia was interconnected with the Buckhead, East Point and Norcross local access tandems by means of one-way outgoing trunk groups. (Exh. 20) It was interconnected with the Buckhead and East Point tandems by means of two-way transit groups as well. (Exh. 20) BellSouth had established a one-way trunk group at the Buckhead tandem to Intermedia's switch. (Exh. 20) In addition, Intermedia had established two-way FGD trunk groups to BellSouth's access tandems at Albany, Athens, Augusta, Buckhead, East Point, Chattanooga, Columbus, Gainesville, Macon, Norcross and Valdosta. (Exh. 20) Today, Intermedia has complete connectivity at the Gainesville, Buckhead, East Point, and Norcross local access tandems. (Exh. 20) It is interconnected with the Athens local access tandem by means of a one-way outgoing trunk and a two-way transit group and with the Buckhead local only access tandem by means of a two-way trunk group. (Exh. 20) Intermedia's interconnections with BellSouth's access tandems remain as they were in May 1998. (Exh. 20)

Intermedia deploys no multiple tandem access arrangements in Georgia. (Thomas, TR 131-33, 157, 159)

SUMMARY OF ARGUMENT

Intermedia's position is that that the MTA Amendment is an integrated document that enables it to elect multiple tandem access arrangements, and establishes reduced, "elemental" reciprocal compensation rates as a quid pro quo when and where this option is implemented. This position is sustained by a reading of the plain language of the Amendment and the application of well-settled principles of contract construction. BellSouth's position that the MTA Amendment is two separate agreements – one of which enables Intermedia to elect such MTA arrangements on request, while the other implemented the reduced elemental rates

immediately upon execution of the Amendment – is wholly unsupported and must be rejected as a post-hoc rationalization with no basis in fact.

The record shows that the circumstances surrounding the execution of the MTA Amendment are entirely consistent with Intermedia's interpretation of the Amendment's provisions and entirely at variance with BellSouth's interpretation. That Intermedia on its own initiative would have approached BellSouth with a request for an amendment to its Interconnection Agreement enabling the provisioning of multiple tandem access arrangements in exchange for Intermedia's agreement to accept a reduction in reciprocal compensation rates of 60 per cent or more is just inconceivable. First, at the time of the Amendment, Intermedia had built out direct trunks from its switches to each of BellSouth's access tandems in the local calling areas in which Intermedia was providing service. Second, also at that time, Intermedia was aggressively prosecuting a complaint before this Commission against BellSouth, seeking reciprocal compensation payments of more than $7 million that BellSouth had withheld. Intermedia prevailed in that complaint. Moreover, Intermedia has never requested MTA under the MTA Amendment; therefore, the elemental rates in the Amendment have never been effectuated.

Finally, BellSouth conducted itself following the MTA Amendment in ways showing that it continued to acknowledge that the higher, composite rates in the Interconnection Agreement applied to reciprocal compensation for the handling of local traffic. BellSouth filed the MTA Amendment for approval in North Carolina and Georgia with transmittal statements that described the Amendment solely as providing multiple tandem access – not as reducing reciprocal compensation rates. In Georgia, under a federal court order to make deposits into the court's registry of the amounts invoiced by Intermedia for Internet-bound traffic, and disputed by

BellSouth, BellSouth made such deposits from March to June 1999 based on the composite rates in the original Interconnection Agreement. This is clearly at odds with the claim BellSouth now makes that the reduced elemental rates were in effect starting in June 1998. For all these reasons, BellSouth's arguments must be rejected, and the Commission should order BellSouth to pay the full reciprocal compensation amounts invoiced by Intermedia.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE MTA AMENDMENT DEMONSTRATES THAT IT HAS NOT TAKEN EFFECT

As discussed in the previous section, this dispute involves a single issue that requires the Commission to choose between two interpretations of the MTA Amendment:

1. Is the MTA Amendment a unified document, that made MTA available to Interemedia, and stated the rates – a 60% reduction in reciprocal compensation charges – and terms that would apply if Intermedia implemented MTA?

   or

2. Does the MTA Amendment act as two separate amendments, one of which made available MTA trunking to Intermedia, while the other immediately implemented reduced reciprocal compensation rates throughout the 9-state BellSouth territory?

As discussed in this section, an analysis of the plain language of the Amendment, and standard principles of contract interpretation compel the conclusion that the first interpretation is correct, and that the reduced reciprocal compensation rates were the price that Intermedia would pay in return for the network savings it would realize if it implemented MTA trunking.

A. A Contract Must Be Read So That No Provision Is Nonsensical Or Superfluous

An established tenet of contract construction requires that the adjudicator must read all provisions of a contract as a whole, so that no individual provisions are nonsensical or

superfluous. In a recent decision upholding a decision by this Commission, the Supreme Court of Florida stated this rule elegantly: "[C]ourts [are required] to read provisions of a contract harmoniously in order to give effect to all portions thereof."[2] This rule of construction compels adoption of Intermedia's view of the MTA Amendment.

At hearing, Intermedia focused on two provisions of the MTA Amendment. Attachment A of the Amendment begins with the statement that:

> Multiple Tandem Access shall be available according to the following rates for local usage:

Paragraph 1 of the Amendment states that:

> 1. Parties agree that BellSouth will, upon request, provide, and Intermedia will accept and pay for, Multiple Tandem Access . . . .

Intermedia reads these two provisions, in conjunction with the other provisions of the Amendment, to mean that the election of MTA is at Intermedia's discretion, and that, if it is implemented, the lower reciprocal compensation rates reflected in Attachment A to the Amendment will apply. Under this interpretation of the contract, the MTA Amendment provides a single, integrated set of provisions: MTA is made available to Intermedia, who agrees to adopt lower reciprocal compensation rates as a quid pro quo when and where MTA trunking is elected.

In contrast, BellSouth interprets the MTA Amendment as having two completely unrelated functions. First, it makes MTA available to Intermedia if Intermedia requests, accepts and pays for it. Second, immediately upon execution, the Amendment reduced the reciprocal compensation rates from the original Interconnection Agreement by 60 per cent or more,

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[2] *City of Homestead v. Julia L. Johnson*, No. SC91820, __ So.2d ___, 25 Fla. Law W. § 206 (Mar. 16, 2000) (*Homestead vs. Johnson*).

throughout the nine-state BellSouth service region. (Gold, TR 15; Direct Testimony Hendrix at 173, 175; Rebuttal Testimony Hendrix, at 327; Hendrix, TR 178) As discussed below, the plain language of the Amendment and established tenets of contract construction belie BellSouth's interpretation.

First, Mr. Hendrix has admitted on cross-examination that the reduced reciprocal compensation rates are directly linked to the MTA provisions of the Amendment. (Hendrix, TR 180, 192, 201) Indeed, Mr. Hendrix admits that the reductions in reciprocal compensation rates are the price that Intermedia must "pay" for MTA – he makes clear that there are no other rates or charges associated with implementation of MTA. (Hendrix, TR 220) This admission of linkage flatly contradicts BellSouth's assertions that paragraphs 1 and 2 of the Amendment (which describe MTA) and paragraphs 3 and 4 (which reference the reduced reciprocal compensation rates in Attachment A) must be read as completely separate, mutually independent, provisions.

Moreover, BellSouth's interpretation would render nonsensical the two key provisions identified by Intermedia. BellSouth asserts that the reduced reciprocal compensation rates took effect immediately across the nine-state BellSouth region as soon as the Amendment was signed. This reading would render superfluous the Attachment A provision that "Multiple Tandem Access shall be available according to the following rates for local usage" – Intermedia would already be paying the lower rates for all local traffic everywhere in BellSouth territory, whether MTA was available or not.

Similarly, BellSouth's reading of the contract would render Paragraph 1 of the Amendment meaningless. That paragraph calls for BellSouth to "provide," and Intermedia to "request," "accept" and "pay for" MTA. Yet, as Mr. Hendrix testified, acceptance of the reduced

reciprocal compensation rates is the "payment" for MTA. (Hendrix, TR 194, 199, 200) Therefore, if the reduced reciprocal compensation rates were immediately put into effect upon execution of the Amendment, Intermedia would have already "paid" for MTA, whether or not it ever requested and accepted MTA, and regardless of whether BellSouth ever provided it. Because BellSouth's interpretation would render these two provisions of the Amendment meaningless, it must be rejected.

As discussed at hearing, there is also a common-sense element to this analysis. Acceptance of BellSouth's characterization of the Amendment would require the conclusion that, in the Amendment, Paragraphs 1 and 2 are interrelated, 3 and 4 are interrelated, 5 and 6 are interrelated with 1, 2, 3 and 4, but that 1 and 2 are completely unrelated to 3 and 4. (Hendrix, TR 202-03, 210-11) Such a tortured interpretation of the Amendment would prevent reading the document as an integrated whole, and cannot be endorsed.

To summarize, adoption of BellSouth's interpretation of the MTA Amendment would lead to the following results:

- The sentence "Multiple Tandem Access shall be available according to the following rates for local usage" in Attachment A would have no meaning, because all of Intermedia's traffic would already be subject to those rates, whether MTA is available or not.

- The clause "BellSouth will, upon request, provide, and Intermedia will accept and pay for Multiple Tandem Access" would have no meaning because Intermedia will have "paid" for MTA throughout the nine-state BellSouth territory even if it never requested or accepted, and BellSouth never provided, MTA.

- Paragraphs 3 and 4 would be read as independent provisions, rather than as part of an integrated document.

In contrast, under Intermedia's interpretation – that the reduced reciprocal compensation rates in Attachment A are the payment that Intermedia will make if, when and where it

implements MTA – the contract reads as an integrated whole, there are no "orphan" provisions, and no nonsensical terms. This interpretation of the contract is therefore compelled by the tenets of contract construction, and by the Supreme Court's decision in *Homestead v. Johnson.*

B. The Doctrine Of "*Expressio Unius Est Exclusio Alterius*" Means That Specific Terms Must Be Given Their Literal Reading

The doctrine of *expressio unius est exclusio alterius,* "the expression of one term implies the exclusion of other terms not mentioned" holds that, if a contract contains a term with a specific meaning, it is limited to that meaning, and a broader interpretation of the contract is excluded. This doctrine has recently been applied by the Supreme Court of Florida in the *Homestead v. Johnson* decision. There, the Court considered a contract that used a specific term, "city-owned facility." The Court rejected an interpretation of the contract that would have included land owned by the City, but not used to provide municipal services, on the grounds that the term "city owned facility" meant "facility" only, and excluded non-facility elements, such as land: "Had the City also intended [to address] city-owned land not associated with the provision of municipal-type services . . . it could have easily so stated by using the term city-owned property."

This doctrine directly applies to the interpretation of the MTA contract. Attachment A of the Amendment states that "Multiple Tandem Access" shall be available according to the following rates or local usage:" Intermedia reads this to mean that the rates listed in Attachment A will only apply to traffic routed over MTA arrangements, and this interpretation is required under the doctrine of *expressio unius est exclusio alterius.* BellSouth witness Hendrix admitted at hearing that local traffic carried over MTA arrangements is a narrow subcategory of all local traffic. (Hendrix, TR 199-200) Therefore, if the MTA Amendment were intended to

immediately effect the low reciprocal compensation rates listed in Attachment A in every state and every LATA, whether or not MTA was implemented, it could easily have so stated by simply stating that "All Local Traffic throughout the BellSouth states shall be available according to the following rates." By instead stating that multiple tandem access will be available at those rates, the plain language of the contract limits the applicability of the reduced reciprocal compensation rates only to MTA traffic – that is, traffic provided in those geographic areas where Intermedia has implemented MTA trunking. Indeed, the Amendment speaks only of "local traffic," never "all local traffic."

Therefore, under the doctrine of *expressio unius est exclusio alterius*, the express reference to multiple tandem access does not permit an interpretation in which the reduced reciprocal compensation rates apply ubiquitously to all local traffic. Based on this doctrine, the Commission should reject BellSouth's interpretation, and find that the reduced reciprocal compensation rates are conditioned on the implementation of MTA, and apply only to those states and LATAs in which Intermedia has employed MTA trunking.

C. Ambiguity In A Contract Must Be Resolved Against The Drafting Party

Intermedia believes that the MTA Amendment is clear on its face, and that its plain language, interpreted through the standards of contract construction, compel the adoption of Intermedia's view. Nevertheless, should this Commission find that the Amendment is ambiguous, established tenets of contract construction, and recent Florida case law, mandate that any ambiguity be construed against the drafter of the Amendment, and in favor of the non-drafting party.

The record in this proceeding contains extensive evidence that BellSouth was the sole drafter of the MTA Amendment, and that Intermedia had no input into the construction of the

document. (Rebuttal Testimony Gold, TR 282-83, 289; Gold, TR 309) If the contract is ambiguous, it is because BellSouth drafted it so, and BellSouth should not be allowed to benefit from such actions. When questioned on this issue of contract construction at hearing, BellSouth witness Hendrix did not endorse this rule, and objected to its application in the instant case. (Hendrix, TR 239) Irrespective of this testimony, however, construction of ambiguous contract provisions against the drafter is required as a matter of law in Florida. As the Supreme Court of Florida recently stated, "[a]n ambiguous term in a contract is to be construed against the drafter."[3] To the extent the Commission may find the Amendment ambiguous, that ambiguity must be resolved in favor of Intermedia.

II. THE CIRCUMSTANCES SURROUNDING THE EXECUTION OF THE MTA AMENDMENT MAKE CLEAR THAT MTA WAS NOT INTENDED TO IMMEDIATELY TAKE EFFECT

As discussed in the previous section, Intermedia believes that the MTA Amendment is clear on its face, and that a reading of the plain language of the Amendment, interpreted via established tenets of contract construction, compels adoption of Intermedia's interpretation. Nevertheless, to the extent that the Commission may find it helpful to look at external factors in reaching its decision, Intermedia provides the following examination of the circumstances surrounding the MTA Amendment.

A. BellSouth's Attempt To Buttress Its Interpretation Of The MTA Amendment By Citing External Factors Is Refuted By The Record In This Proceeding

BellSouth attempts to support its interpretation of the MTA Amendment by citing to external factors that purportedly existed at the time the Amendment was executed. Specifically,

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[3] *Homestead vs. Johnson*, at 11 (citing with approval *Planck v. Traders Diversified, Inc.*, 387 So.2d 440 (Fla. 4th DCA 1980).

BellSouth witness Hendrix testified at hearing that the MTA Amendment was never promoted by BellSouth, but was from its inception an Intermedia initiative (Direct Testimony Hendrix, TR 174; Hendrix, TR 182, 217, 227-28); that Intermedia desired MTA because it wanted to save the costs of establishing its own trunks to BellSouth access tandems (Hendrix, TR at 182); and that Intermedia fully intended that by executing the MTA Amendment, it automatically cut the reciprocal compensation charges it collected from BellSouth by 60 per cent or more across all nine BellSouth states. (Hendrix , TR 178, 182) BellSouth adduces no evidence to support these assertions, but relies exclusively on the testimony of Mr. Hendrix.

As Intermedia discusses in the following sections, this testimony is soundly repudiated by Intermedia's own testimony, and by objective evidence in the record of this proceeding. First, at the time the Amendment was executed, Intermedia was suing BellSouth in Florida for payment of reciprocal compensation payments, showing that Intermedia did not agree to a unilateral reduction of reciprocal compensation rates. Second, the record demonstrates that Intermedia never requested MTA in Florida. In fact, Intermedia only submitted a request for MTA in one tandem office in Georgia, did so at BellSouth's insistence, and withdrew the application before MTA was ever implemented. Third, at the time the MTA Amendment was signed, Intermedia had established direct trunks to every BellSouth access tandem in the Florida and Georgia LATAs where Intermedia did business, showing that Intermedia received no benefit from MTA. Finally, Intermedia presents evidence that directly refutes BellSouth's assertions that Intermedia has implemented MTA in Georgia. For all these reasons, the Commission should find that the circumstances surrounding the execution of the MTA Amendment fully support Intermedia's interpretation of the contract.

B. The Record Shows That Intermedia Was Aggressively Suing BellSouth For Full Payment Of Reciprocal Compensation At The Time The Amendment Was Executed And Contains No Evidence Whatsoever That The Parties Agreed To An Immediate Reduction In Reciprocal Compensation Rate Levels

BellSouth Witness Hendrix testified at hearing that Intermedia requested the MTA Amendment out of its concern to reduce network trunking costs, and that Intermedia had full knowledge that, by signing the MTA Amendment, it was agreeing to an immediate reduction of 60 per cent or more in its reciprocal compensation rates in all nine BellSouth states. (Hendrix, TR 178, 182, 226) This assertion is not supported by any documentary evidence – BellSouth has adduced no letters, e-mails, or notes that support this allegation, but relies exclusively on the testimony of Mr. Hendrix, which appears to be beleaguered by faulty memory. (Hendrix, TR 227-28)

BellSouth's argument has no credibility in light of the state of litigation that existed between the parties at the time the MTA Amendment was signed. On April 6, 1998 – two months before the MTA Amendment was signed – Intermedia filed a complaint before this Commission, arguing that BellSouth was withholding payment of reciprocal compensation payments, in violation of the Interconnection Agreement. This complaint was filed in response to BellSouth's position that it was not obligated under the Interconnection Agreement to pay Intermedia reciprocal compensation for dial-up modem traffic directed to Internet service providers located on Intermedia's network. The complaint demanded payment of approximately $7 million that was owed for traffic generated in Florida. (Gold, TR 17, 40) This Commission set hearing for the complaint for June 11, 1998 – eight days after the MTA Amendment was signed.

As Intermedia witness Gold testified at hearing, it is simply inconceivable that Intermedia would unilaterally agree to a reduction of 60 per cent or more in the reciprocal compensation

rates it collected from BellSouth without some settlement of the pending complaint. (Gold, TR 17) Indeed, Ms. Gold has testified that, based on her knowledge of Intermedia and her direct discussions with Julia Strow and Jim Geiger – two former Intermedia employees that were involved in signing the MTA Amendment – Intermedia would not have agreed to such unilateral reduction in rates without settlement of the pending complaint. (Gold, TR 17, 32, 284)

In light of the record of this proceeding, and plain common sense, BellSouth's assertion that Intermedia knowingly agreed to a region-wide reduction of 60 per cent or more in reciprocal compensation rates in return for nothing, and without any documented reference to the pending litigation, is simply incredible. Absent any objective evidence to support this view, the Commission should reject the BellSouth argument.

C. The Record Shows That The MTA Amendment Was A BellSouth Initiative, That Intermedia Never Requested MTA In Florida, And "Requested" MTA In Georgia Only At BellSouth's Insistence

BellSouth asserts that Intermedia requested the MTA Amendment from BellSouth. It also introduced into the record a copy of an access service request ("ASR") submitted by Intermedia, which requested that MTA trunking be implemented for one BellSouth central office in the Atlanta LATA in Georgia.

The significance of this line of argument is not clear – it is BellSouth's argument that the reduced reciprocal compensation rates listed in the MTA Amendment were immediately put into effect upon execution of the document, and did not require any action by Intermedia to trigger their effectiveness. (Rebuttal Testimony Hendrix, TR 327) Nevertheless, BellSouth also seems to believe that, if Intermedia did in fact request MTA, or submit an ASR for its implementation, such actions would support BellSouth's case. In fact, the record in this proceeding makes clear that it was BellSouth – not Intermedia – that requested the MTA Amendment, that Intermedia

never submitted an ASR for MTA in Florida, and that the ASR that Intermedia did submit in Georgia – at BellSouth's insistence – was withdrawn without implementation. (Thomas, TR 116, 119)

On the issue of who requested the MTA Amendment, BellSouth offers two e-mails from BellSouth employee Stuart Hudnall to then-Intermedia employee Julia Strow in purported support of this assertion. It is true that the e-mails contain the phrase "here is the MTA Amendment you requested," but these do not reflect that the Amendment was an Intermedia initiative. In fact, the testimony of the Intermedia witnesses confirms the contrary. As Ms. Gold and Mr. Thomas stated during their summary statements and in response to cross-examination and re-direct questions, Intermedia asked BellSouth for the MTA Amendment because BellSouth instructed Intermedia to do so. (Gold, TR 15-16, 70-72; Thomas, TR 119)

The first mention of the MTA Amendment arose in discussions between Intermedia personnel and BellSouth personnel over blockage of Intermedia's traffic that was being routed through the Norcross tandem in Atlanta, Georgia early in 1998. At that time, BellSouth blocked live Intermedia traffic that was routed through the tandem office, apparently after finding that Intermedia did not have direct trunking to that office, and that this violated BellSouth policy. When Intermedia network personnel asked what they could do to stop the blocking, they were informed by BellSouth personnel that they could implement MTA trunking. (Gold, TR 70-71) To do that, Intermedia personnel were informed that they would need to execute the MTA Amendment, and were instructed to ask BellSouth for a copy of it. It is this process that led to Julia Strow's request to Stuart Hudnall for a copy of the MTA Amendment, and occasioned Mr. Hudnall's responsive e-mail. This course of events is laid out in the Statement of Facts above,

and is documented in the testimony of Mr. Thomas. (Thomas TR 116-120) Mr. Hendrix also concedes that this course of events may have happened. (Hendrix, TR 228-29)

As to whether Intermedia ever requested MTA in Florida, BellSouth witness Milner confirms that Intermedia did not. (Rebuttal Testimony Milner, TR 338, Milner, TR 364-65; Milner Deposition, Exh. 24 at 54; Gold, TR 71-72) Indeed, Mr. Milner confirms that Intermedia had direct trunking arrangements in place in both Jacksonville and Orlando, Florida, at the time the MTA Amendment was signed, and so did not require an MTA arrangement. (Rebuttal Testimony Milner, TR 337)

As to whether Intermedia requested MTA in Georgia, the record in this proceeding confirms that MTA was neither requested nor implemented. The record does show that Intermedia submitted an access service request for MTA in Georgia. (Exh. 7) As Intermedia witness Thomas testified, however, BellSouth instructed Intermedia to submit the ASR so that BellSouth could "update its records." (Thomas, TR 120) The record also shows that the ASR was not accepted or processed by BellSouth, but was returned to Intermedia because BellSouth required additional information. (Exh. 7) The record also shows that Intermedia ultimately withdrew the ASR, and so informed BellSouth. (Exh. 10) Thus, the record in this proceeding demonstrates that an ASR for MTA was never completed in Georgia.

D. The Record Shows That Intermedia Had Established Direct Trunking Arrangements To All BellSouth Access Tandems In The Florida And Georgia Local Calling Areas Where Intermedia Did Business And So Had No Need Of MTA

BellSouth contends that the MTA Amendment was Intermedia's idea, and that Intermedia actively requested MTA because it wanted to avoid the costs of establishing direct trunks out to every tandem office in BellSouth LATAs where Intermedia did business. This assertion is supported solely by the testimony of Mr. Hendrix. (Direct Testimony Hendrix, TR 174;

Hendrix, TR 182, 217, 227-28) BellSouth, despite repeated requests by Intermedia, has failed to produce any e-mails, paper correspondence, written notes, or other evidence to support its assertion. (Hendrix, TR 227-28)

BellSouth's position is refuted by both testimony and evidence that Intermedia has placed in the record of the proceeding. The testimony of Intermedia witnesses Gold and Thomas make clear that Intermedia neither needed nor wanted MTA, and that Intermedia has long been committed to a network architecture in which it builds or purchases direct trunks to all of BellSouth's access tandems in the LATAs served by Intermedia. (Rebuttal Testimony Gold, TR 289-90; Gold, TR 70, 284; Direct Testimony Thomas, TR 100, 103-05; Thomas, TR 92-93, 115, 131, 159; Exh. 20)

In addition, Intermedia has demonstrated that it had already established direct trunks to every BellSouth access tandem in the LATAs where it did business well before the MTA Amendment was signed, that such trunking was in place at the time the Amendment was executed, and that such trunking remains in place today. (Direct Testimony Thomas, TR 102-05; TR 92-93, Exh. 20) In addition, the way Intermedia has "homed" its NXX codes to BellSouth tandem offices makes clear that MTA has not been implemented. (Thomas, TR 92) The documented existence of such trunking supports Mr. Thomas' testimony that Intermedia prefers establishing direct trunks to access tandems as a matter of engineering and network design, and that the cost savings that could be derived from MTA do not supersede this engineering preference.

By this evidence, Intermedia demonstrates that prior to, during, and after the time the MTA Amendment was executed, Intermedia had in operation direct trunks to every BellSouth access tandem in the local calling areas served by Intermedia. As a result, there were no

trunking costs to save, and MTA offered no value to Intermedia. Indeed, as Intermedia discusses in the next section, the only reason Intermedia signed the MTA Amendment in the first place was because BellSouth advised Intermedia that MTA trunking was necessary to stop BellSouth from blocking Intermedia's traffic in Georgia.

Nevertheless, BellSouth maintains its assertion that Intermedia knowingly signed an Amendment that would have cost Intermedia millions of dollars in revenues from reciprocal compensation, in exchange for a network option that offered no benefit. As Ms. Gold testified, BellSouth's position is simply not plausible in light of the facts on record. (Rebuttal Testimony Gold, TR 290-93; Gold, TR 284)

E. The Record Shows That Intermedia Has Never Implemented MTA Trunking In Georgia Or Anywhere Within The BellSouth Region, Either Before Or After The Amendment Was Signed

BellSouth argues that a review of Intermedia's trunking arrangements in place today shows that Intermedia is not trunked to every access tandem in Georgia, and leads to the conclusion that Intermedia has implemented MTA in that state. (Rebuttal Testimony Milner, TR 359, 365-66, 367) BellSouth then proceeds to argue that this fact somehow means that the reduced reciprocal compensation rates have been triggered in every LATA in every state throughout the BellSouth region. The record in this proceeding, however, shows that BellSouth is wrong, both as a matter of fact and as a matter of law.

At hearing, BellSouth witness Milner testified that a review of BellSouth data showed that Intermedia did not have a direct trunking arrangement to Access Tandem CLMBGAMT01T in Columbus, Georgia. (Milner, TR 366) In addition, during the cross-examination of Intermedia witness Thomas, BellSouth introduced Exhibit 9, identified as information derived

from BellSouth's "Data Warehouse." The exhibit purports to list the BellSouth tandem offices in Georgia to which Intermedia has deployed dedicated trunks for the transport of its traffic, and does not show Intermedia trunked to every access tandem in the Atlanta LATA.

During the cross-examination, Intermedia witness Thomas noted that the BellSouth data were incomplete, and did not fully show Intermedia's interconnection arrangements with BellSouth – in particular, the trunking arrangements to a tandem office in Columbus, Georgia. (Thomas, TR 141) In fact, Mr. Thomas was confusingly and misleadingly directed by BellSouth counsel to look at a particular trunk group listing that he represented to be a Columbus trunk group, but what was actually a Chamblee trunk group. Accordingly, Commissioner Deason authorized Intermedia to submit a post-hearing exhibit as evidence to clarify Intermedia's trunking arrangements. (TR 299-300) Intermedia submitted a post-hearing exhibit, which identifies all of the BellSouth tandem offices to which Intermedia has direct trunking arrangements, for the states of Florida and Georgia – the two states that were discussed extensively during hearing. (Exh. 20)

Exhibit 20 provides spreadsheets listing each tandem office to which Intermedia is trunked. The tandems are identified by the tandem's Common Language Location Identifier ("CLLI") code,[4] as well as city and state. In addition, the spreadsheet lists the date on which trunks to the various tandems were placed in service. Intermedia also provides a graphic representation of its tandem trunking arrangements, identifying the tandems by name and CLLI code, and illustrating one-way inbound and outbound trunks, two-way transit trunks, and two-

[4] Intermedia adds its own designation to the standard CLLI codes that BellSouth employs. Specifically, Intermedia appends the designation "2W" to the end of the CLLI code to indicate that the trunk in place is a "two way" trunk. As a result, a tandem office listed by BellSouth as "CLMBGAMT01T" is shown on Intermedia's spreadsheet as "CLMBGAMT01T2W."

way Feature Group D ("FGD") trunks. Finally, for the trunking arrangements in the Atlanta LATA – which were the subject of extensive discussion at hearing, Intermedia illustrates the trunking arrangements that existed one month prior to the execution of the MTA Amendment, and the trunking arrangements that are in place today. Intermedia also illustrates the trunking arrangements in place in Florida one month before the MTA Amendment and today.

As Exhibit 20 makes clear, Intermedia is direct-trunked to every access tandem in every LATA in Florida and Georgia in which Intermedia provides service. Moreover, consistent with the testimony of Intermedia's witnesses, Intermedia was direct-trunked to every access tandem in the Atlanta LATA at the time the MTA Amendment was executed, including to the Columbus tandem, CLMBGAMT01T, where Intermedia began service in April 1997. (Thomas, TR 131-33; Gold, TR 298)

Frankly, Intermedia is at a loss to explain why the materials submitted by BellSouth to Mr. Thomas failed to show existing trunking arrangements. Of course, because each of these arrangements is cooperatively ordered, deployed and tested by Intermedia and BellSouth, BellSouth certainly had access to the correct information at all relevant times. One possible answer may be that BellSouth failed to query its database with the full set of information that would identify Intermedia's trunks. Intermedia understands that the BellSouth Data Warehouse lists trunks according to Access Customer Name Abbreviation ("ACNA") codes that identify the carrier. The materials provided by BellSouth list "ICF" which is indeed an ACNA designating Intermedia. However, none of the BellSouth materials list the ACNA "ESF," which also designates Intermedia. If, as it appears, BellSouth failed to run its query using both the ICF and ESF ACNAs, its query would fail to identify a substantial number of trunks that Intermedia has in service.

BellSouth witness Milner's testimony in this area is even more puzzling. Mr. Milner three times testifies that Intermedia had no trunk groups to either BellSouth's access tandem or local tandem at Columbus. Specifically, Mr. Milner states that:

> So I know for sure that Intermedia does not have trunk groups to the Columbus tandem, the access tandem in Columbus. Also, there is a local tandem in Columbus, and there is not a trunk group to that tandem either. That traffic is being completed. I can only conclude from that that it's BellSouth that's transporting that traffic through the Columbus access tandem to the end office for completion. (TR 359)

And later Mr. Milner, when asked where BellSouth alleges that Intermedia has put MTA in play, states "In Georgia, in the Atlanta area," and then goes on to state that:

> During the course of the deposition that I gave in this case, Mr. Pellegrini asked me if my understanding was whether Intermedia had requested and provided MTA anywhere. I responded that my understanding was that Intermedia had requested it in Georgia. Subsequently, I asked my team to pull significant information out of what we call the network information warehouse that shows what trunk groups have been established between BellSouth's network and Intermedia's network ... And it is clear to me there's not a single trunk group between Intermedia's two switches in Georgia and either the access tandem or the local tandem in Columbus, Georgia, which is part of the Atlanta LATA ... the result I see in the inventory of the trunk groups that have been provisioned leads me to the conclusion that BellSouth provided MTA on behalf of Intermedia, and it is doing so today. (TR 365-66)

On redirect examination, Mr. Milner states that "I've represented that there is not a trunk group that I have been able to find, at least through our search of our own records, that shows that Intermedia has a connection to the access tandem in Columbus. So therefore, the call cannot be completed except via an MTA arrangement." (TR 367)

Plainly, Mr. Milner is wrong. One can only suppose that the information he examined as the basis for these statements was not everything that ought to have been examined. As Intermedia shows in Exhibit 20, it has a two-way FGD trunk group to BellSouth's Columbus

access tandem. As such, it has not implemented MTA in the Atlanta LATA.[5] Beyond that single instance, Mr. Milner acknowledged that Intermedia was direct-trunked to all other access tandems in the Atlanta LATA. (Milner, TR 366) The record therefore demonstrates that Intermedia at no time implemented MTA in Florida, Georgia, or anywhere else.

For all of the reasons discussed above, the circumstances surrounding the signing of the MTA Amendment demonstrates that neither Intermedia nor BellSouth ever intended that the reciprocal compensation rates listed in the MTA Amendment would take effect immediately upon execution of the Amendment. The above review of contemporaneous actions by the parties clearly compels adoption of Intermedia's interpretation of the MTA Amendment.

III. THE ACTIONS OF THE PARTIES FOLLOWING THE SIGNING OF THE AMENDMENT MAKE IT CLEAR THAT THE MTA AMENDMENT DID NOT TAKE EFFECT

The heart of BellSouth's case is Mr. Hendrix's assertions that he is the only person in this proceeding who understands both BellSouth's and Intermedia's intentions regarding the MTA Amendment, that these two companies both knowingly entered into this agreement for two distinct purposes, and that the second of these two purposes was "to replace the billing structure and the rates for the compensation of all local traffic." (Hendrix, TR 178, 238) As already shown, this interpretation of the Amendment violates the plain meaning of its language, the

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[5] Mr. Milner also stated that Intermedia failed to direct trunk out to another tandem, designated with the CLLI code CLMBGAMT12T. This statement is in error for two reasons. First, that tandem is located in the same building, and occupies the same street address and references the same vertical and horizontal coordinates as the office with CLLI code CLMBGAMT01T. Therefore, Intermedia is trunked to that location. Second, the CLMBGAMT12T offfice is a local tandem. By the express terms of MTA and BellSouth's common practice, Intermedia is only required to direct trunk to *access* tandems. Thus, whether Intermedia is trunked to a *local* tandem or not is irrelevant to an analysis of whether MTA has been implemented. The Columbus, Georgia, office designated CLMBGAMT01T – to which Intermedia is trunked – is the tandem office at that location.

established rules of contract construction, and common sense. Moreover, BellSouth's distorted view of the Amendment is not supported by the post-amendment conduct of either Intermedia or BellSouth.

More specifically, BellSouth's conduct since the Amendment belies its current arguments in at least three ways. First, BellSouth characterized the Amendment in filings before two state regulatory agencies as offering MTA, but not as reducing reciprocal compensation rates. Second, for months after the MTA Amendment was executed, Intermedia continued to bill and BellSouth continued to pay based on the composite rates set out in the original Interconnection Agreement. And third, BellSouth did not communicate to Intermedia its position that "elemental rates" were in effect until some nine months after the Amendment was signed.

A. BellSouth Noted In Filings With Two State Commissions That The Effect Of The Amendment Was To Make MTA Available To Intermedia Upon Request – Not To Effect An Immediate Reduction In Reciprocal Compensation Rates

Under the Act, state utility regulatory commissions are charged with the responsibility of approving negotiated Interconnection Agreements and their amendments. Thus, when a previously approved interconnection agreement is amended, the parties are required to file the amendment with the state utility commissions for approval. It is common practice for BellSouth to make these filings as it did with the MTA Amendment. (Hendrix, TR 211) BellSouth's Amendment filings in two states, Georgia and North Carolina, are particularly damaging to BellSouth's "two-amendments-in-one" theory.

In Georgia, the filing of an amendment for approval is accompanied by a synopsis prepared by BellSouth. The BellSouth synopsis of the MTA Amendment quotes the key operative language of paragraph 1 and reads as follows:

> This Amendment reflects that BellSouth will, upon request, provide, and Intermedia Communications, Inc. will accept and pay

> for Multiple Tandem Access, otherwise referred to as Single Point of Access. (Exh. 14)

Similarly, in North Carolina, the transmittal memorandum simply describes the attached amendment as one "that provides for Multiple Tandem Access." (Exh. 13) The omission of any reference to replacing reciprocal compensation rates is telling. After all, according to Mr. Hendrix replacing reciprocal compensation rates is what BellSouth got in the bargain for making MTA available to Intermedia. (Hendrix, TR 188)

Exhibits 14 and 13 demonstrate that the MTA Amendment was presented to the Georgia and North Carolina Commissions as a single-purpose amendment – one that made MTA available at the reduced reciprocal compensation rates, not one that made MTA available and independently reduced reciprocal compensation rates. This, of course, is not the understanding of the Amendment BellSouth would have this Commission accept. Again, Mr. Hendrix argues against Intermedia's single-purpose view of the MTA Amendment, and contends that, when BellSouth filed the transmittal statements with the Georgia and North Carolina commissions, it simply neglected to mention that the Amendment completely recast and dramatically reduced reciprocal compensation rates. When asked how two BellSouth regulatory attorneys separately could have each gone so awry in characterizing the purpose of the Amendment, the best Mr. Hendrix could muster was that these attorneys did not work for him or in his department, and obviously misunderstood the intent of the parties, as he now recalls it. (Hendrix, TR 214-16) Like the rest of BellSouth's case, this explanation has no credibility.

The most charitable characterization of BellSouth's view is that when read as a document intended to recast reciprocal compensation rates for all local traffic, the MTA Amendment is ambiguous. Were it not so, BellSouth's attorneys would not have missed this alleged second purpose, which, according to Mr. Hendrix, is so obvious as to be beyond dispute. It is "crystal

clear," he says. (Hendrix, TR 178, 180, 182) And as discussed above, because BellSouth drafted the document, any ambiguity suggested by the alleged misreading of the Amendment by the BellSouth attorneys must be interpreted in favor of Intermedia and against BellSouth.

There is, however, a straightforward explanation to the conflict between Mr. Hendrix's view of the Amendment and that contained in the transmittal statements. No matter how impassioned, Mr. Hendrix's view is simply not supported by the language of the documents. Rather, the Amendment does not in its language or structure effect or even signal the intent to effect a total recasting of rates for reciprocal compensation. Mr. Hendrix appears to take some comfort in the disclaimer that accompanies the Georgia synopsis. (Hendrix, TR 249) But that misses the point that the synopsis, which the Georgia commission requested, is BellSouth's statement of the purpose of the Amendment. No one would be expected to read the synopsis as a redrafting of the Amendment. Mr. Hendrix is right: the Amendment speaks for itself. (Hendrix, TR 215) It has only the one purpose, as the synopsis states. It is to allow Intermedia to elect MTA and it states the rates and terms that apply if Intermedia does.

B. BellSouth Did Not Implement The "Elemental Rates" Of The Amendment For Months Following Execution Of The Amendment; Rather, BellSouth Continued To Recognize That The "Composite" Rates From The Interconnection Agreement Remained In Effect

As the Commission is aware from the ISP reciprocal compensation dispute, BellSouth began withholding payment for local traffic to ISPs but continued to pay for traffic it estimated to be "non-ISP" traffic – that is local traffic terminated to customers other than ISPs or ESPs. (Exh. 1, Order No. PSC-98-1216-FOF-TP) BellSouth was paying reciprocal compensation on only about ten percent of local traffic. The payments BellSouth both made and withheld, of course, were based on Intermedia's invoice amounts. (Exh. 15 at 9-19)

For months following the Amendment, BellSouth acknowledged that the composite rates in Attachment B-1 of the Interconnection Agreement applied to reciprocal compensation. On January 25, 1999, the Georgia Commission ruled in Docket No. 9920-U, Intermedia's ISP complaint in that jurisdiction, that local calls terminated to ISPs were subject to reciprocal compensation. (Exh. 15, Order Deciding Complaint) In its order, the Georgia Commission established a procedure for specifying the amounts in dispute. Intermedia was given 30 days to present to BellSouth and file with the Commission documentation showing the amount it believed due for reciprocal compensation under the Interconnection Agreement. BellSouth and Intermedia were allowed 45 days to identify and resolve any disagreements with respect to the amount due. If they could not resolve their differences, they were obligated to bring the matter to the Commission for expedited resolution.

On February 19, 1999, Intermedia's counsel sent a letter to BellSouth's counsel summarizing the amounts due for the months August 1997 through January 1999. (Exh. 15 at 20) The total amount was $1,846,338.47. In a letter dated March 10, 1999, BellSouth's counsel reported to the Georgia Commission that after backing out the amount due for January 1999 (which was in the process of being billed to BellSouth), BellSouth computed the disputed amount to be $1,312,436.37. The net difference in Intermedia's and BellSouth's calculations was only $41,798.37. This difference was so small that there was no need to pursue it further with the Commission. (Exh. 15 at 22)

The significance of this virtual agreement in March 1999 -- nine months after the Amendment -- is that both BellSouth and Intermedia computed the amount in dispute using the composite rate in Attachment B-1 of the Interconnection Agreement. BellSouth continued for another three months to acknowledge the applicability of the composite rate.

BellSouth appealed the Georgia Commission's order to the U. S. District Court for the Northern District of Georgia and quickly filed an emergency motion to pay money into the court rather than to Intermedia. On April 30, 1999, the District Court issued its written order directing BellSouth to pay into the registry of the Court (rather than to Intermedia) disputed amounts of reciprocal compensation. (Exh. 15, Order) Under the Court's order, BellSouth had until May 4, 1999, to pay into the registry the disputed reciprocal compensation as of February 28, 1999, and until May 11, 1999, to pay into the registry disputed reciprocal compensation that would be due since March 1, 1999. After these two initial payments, BellSouth was to pay into the Court's registry the disputed reciprocal compensation within 30 days of Intermedia's bill.

On March 11, 1999, BellSouth deposited into the Court's registry $1,312,436.37, the amount it had reported to the Georgia Commission as being in dispute -- and the amount it had determined using the composite rate. BellSouth made subsequent deposits into the Court's registry on May 4, May 10, and June 10, 1999, that were consistent with the amounts Intermedia had invoiced. (Exh. 15 at 23-34) On May 12, 1999, Intermedia's counsel called BellSouth's attention to an apparent discrepancy between BellSouth's deposits following its May 10th deposit and the amounts Intermedia had invoiced. On May 28, 1999, BellSouth's counsel acknowledged the discrepancy and stated that it would include the discrepant amount in its June deposit. (Exh. 15 at 35, 36)

Despite BellSouth's argument here that the elemental rates in the MTA Amendment became immediately effective throughout its region for reciprocal compensation, BellSouth acknowledged the applicability of the composite rates for approximately a year after the Amendment and made registry deposits in that time of more than $3 million that were in accordance.

C. BellSouth's Own Evidence Shows That BellSouth Did Not Take The Position That MTA Rates Were In Effect Until Early 1999 – Fully Nine Months After The MTA Amendment Was Signed

At hearing, Mr. Hendrix emphasized that converting ALECs such as Intermedia to elemental rates was important to BellSouth. (Hendrix, TR 180) Yet nothing in BellSouth's conduct reflects this importance. Indeed, the record reflects that the first communication of Mr. Hendrix's view of the Amendment is in two letters to Intermedia from BellSouth personnel, nine and ten months after the Agreement. (Exh. 4; Gold, TR 61)

In Attachment A to the MTA Amendment, the end office switching rate for Florida is incorrectly stated as $0.0175 (1.75¢) per minute of use rather than 0.2¢. (Exh. 1) Thus, when the Amendment was executed on June 3, 1998, and when it was later filed with this Commission for approval, it contained a significant error -- it overstated the elemental rate for end-office switching by a factor of more than eight.

As reflected in Exhibit 4, an unsigned letter dated March 3, 1999, noting that mistake was sent to Ms. Strow. The letter was apparently authored by Mr. Stuart Hudnall, BellSouth Manager for Interconnection Services. In addition to noting the incorrect rate, the author announces that the 0.2¢ rate will be applied retroactively to June 3, 1998. He then offers a cryptic reference to a query at the time of the Amendment from Intermedia about the rate, stating that "he was told the rate was okay" but has since "discovered that the rate was in error."

The second letter is dated April 2, 1999, and is also from Mr. Hudnall to Ms. Strow. (Exh. 4) It once again states BellSouth's position that the elemental rates in the MTA amendment had become immediately effective for reciprocal compensation. It states further that BellSouth will bill back to June 3, 1998, using the end office switching rate of 0.2¢. It is uncertain from these letters what billing back to that date was to accomplish. The record does

not show what, if anything, BellSouth had billed Intermedia in that period of time. (Gold, TR 57-58) All that is clear from these letters is that BellSouth eventually came to recognize that the end office switching rate for Florida was erroneously stated in the MTA Amendment and it was opening discussions with Intermedia to correct the error. (Gold, TR 62-63) They offer no support for BellSouth's position that elemental rates became effective with the Amendment on a region-wide basis.

Ms. Strow responded to Mr. Hudnall on March 25, 1999. (Exh. 4) While she indicates Intermedia's willingness to correct the erroneous rate, she expresses her concern about BellSouth's stated intention to bill back using the corrected elemental rate because Intermedia had never requested MTA arrangements under the Amendment. (Gold, TR 55-56) Ms. Strow signifies Intermedia's understanding at that time that composite rates remained applicable to reciprocal compensation.

IV. BELLSOUTH'S CONSISTENT BEHAVIOR OVER THE PAST FOUR YEARS DEMONSTRATES THAT THE CURRENT DISPUTE IS YET ANOTHER STEP IN BELLSOUTH'S SUSTAINED CAMPAIGN TO EVADE ITS OBLIGATION TO PAY RECIPROCAL COMPENSATION TO INTERMEDIA

As Intermedia demonstrates throughout the Brief, BellSouth's position in interpreting the MTA Amendment does not reflect a reasonable interpretation of the plain language of the contract, the facts contemporaneous with and subsequent to the execution of the Amendment, or the law. Rather, it is merely the latest in a sustained campaign by BellSouth to violate the terms of the Interconnection Agreement it negotiated with Intermedia, and evade its obligation to pay reciprocal compensation. As the following chronology shows, this campaign has now gone on for almost four years:

- July 1, 1996: BellSouth signs negotiated Interconnection Agreement with Intermedia, and incurs obligation to pay

reciprocal compensation

- August 22, 1997: Intermedia sends first reciprocal compensation invoice to BellSouth

- September 22, 1997: BellSouth declares 90% of Intermedia's invoices to be illegitimate; begins paying 10¢ on the dollar invoiced, on the theory that ISP- bound traffic is not compensable

- September 15, 1998: The Commission rejects BellSouth's arguments concerning ISP- bound traffic; orders BellSouth to pay full amounts invoiced by Intermedia

- June 21, 1999: The Florida District Court rejects BellSouth petition to stay the Commission order

- July 2, 1999: BellSouth pays Intermedia for ISP-bound traffic, but pays only one-third of amounts invoiced, this time asserting that Intermedia incorrectly billed at the Interconnection Agreement rate, not the MTA rate

- June 27, 2000: BellSouth has evaded its contractual obligation to Intermedia for three years and three months

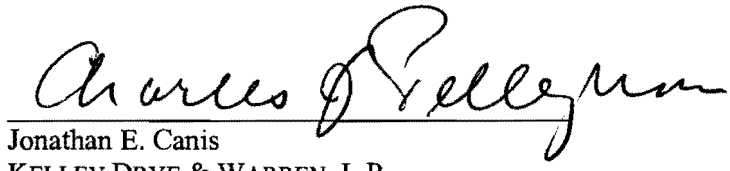
Due to regulatory uncertainty, for some time after the Act, both ILECs and ALECs aired legitimate differences over the rules governing reciprocal compensation before regulators and courts. That time is past, however -- this Commission has ordered BellSouth to pay Intermedia, and its decision has been upheld by a federal District Court. BellSouth's continued refusal to make its required payments can no longer be excused as a legitimate legal position. Indeed, the unsupported and patently meritless position BellSouth has assumed in the instant proceeding demonstrates that BellSouth is simply pursuing a crude and bad faith campaign to disadvantage a competitor. It is time for this Commission to finally put this campaign to an end by forcefully and expeditiously rejecting BellSouth's arguments.

V. CONCLUSION

The behavior of both Intermedia and BellSouth after execution of the Amendment repudiates BellSouth's claim that the Amendment is anything more than the simple, single purpose of making MTA available to Intermedia. One will not find in the record any credible evidence that either BellSouth or Intermedia intended the Amendment to immediately replace the previously negotiated composite rates with substantially reduced elemental rates. Yet BellSouth proclaims that it and Intermedia intended to monumentally alter the reciprocal compensation rates they had previously negotiated as part of an overall effort of BellSouth to implement elemental rates region-wide. The lack of evidence for such a claim is shocking.

If the MTA Amendment is interpreted as a single purpose Amendment – one that makes MTA available to Intermedia, and sets rates, terms and conditions that apply when and where it is implemented, all of the pieces fit together perfectly. When seen as a single purpose Amendment, there is nothing incongruent in the language of the Amendment or in the subsequent behavior of the parties. In sum, there is no puzzle here. All that is before the Commission is yet another attempt by BellSouth to evade its obligation under the Interconnection Agreement it negotiated with Intermedia to pay reciprocal compensation at mutually agreed rates. Unlike its past efforts to evade this obligation, however, BellSouth's current efforts are completely devoid of any support, and cannot even assume the appearance of a credible argument. Intermedia urges the Commission to summarily dismiss this transparent and patently meritless tactic by BellSouth, and to order it to immediately pay the full amounts of reciprocal compensation invoiced by Intermedia, plus interest.

Respectfully submitted this 27th day of June 2000.



Jonathan E. Canis
KELLEY DRYE & WARREN, L.P.
1200 19th Street, N.W., Fifth Floor
Washington, D.C. 20036
202 955 9600
202 955 9792 (facsimile)

Patrick K. Wiggins
Charles J. Pellegrini
WIGGINS & VILLACORTA, P.A.
2145 Delta Boulevard
Suite 200
P.O. Box 1657
Tallahassee, Florida 32302
850 385 6007
850 385 6008 (facsimile)

Scott A. Sapperstein
INTERMEDIA COMMUNICATIONS INC.
3625 Queen Palm Drive
Tampa, Florida 33619-13209
813 829 4093
813 829 4923 (facsimile)

Attorneys for Complainant INTERMEDIA COMMUNICATIONS INC.

CERTIFICATE OF SERVICE

Docket No. 991534-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by hand delivery* or by Federal Express for overnight delivery** this 27th day of June, 2000, upon the following:

Marlene Stern*
Staff Counsel
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Nancy B. White
Michael P. Goggin
c/o Nancy H. Sims*
BellSouth Telecommunications, Inc.
150 So. Monroe Street, Suite 400
Tallahassee, FL 32301

R. Douglas Lackey**
Bennett L. Ross**
BellSouth Telecommunications, Inc.
Suite 4300
675 W. Peachtree St., NE
Atlanta, GA 30375

Charles J. Pellegrini