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May 25, 2001

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Betty Easley Conference Center, Room 110
Tallahassee, Florida 32399-0850

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RECORDS AND REPORTING

Re: Docket No. 001810-TP

Dear Ms. Bayo:

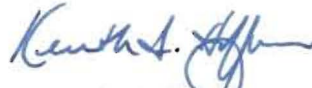
Enclosed herewith for filing in the above-referenced docket on behalf of TCG South Florida and Teleport Communications Group ("TCG") are the following documents:

1. Original and fifteen copies of TCG's Motion for Partial Summary Final Order; and
2. A disk in Word Perfect 6.0 containing a copy of the document.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the copy to me.

Thank you for your assistance with this filing.

Sincerely,


Kenneth A. Hoffman

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Enclosures

cc: All Parties of Record

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06584 MAY 25 2001

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of TCG South Florida and)
Teleport Communications Group for)
Enforcement of Interconnection Agreement)
with BellSouth Telecommunications, Inc.)
_____ /

Docket No. 001810-TP

Filed: May 25, 2001

TCG'S MOTION FOR PARTIAL SUMMARY FINAL ORDER

TCG South Florida and Teleport Communications Group (hereinafter referred to collectively as "TCG"), by and through undersigned counsel, and pursuant to Rule 28-106.204(4), Florida Administrative Code, moves for entry of a partial summary final order in favor of TCG and against BellSouth Communications, Inc. ("BellSouth") for breach of the terms and conditions of the interconnection agreement between TCG and BellSouth on the grounds that: (1) there is no genuine issue as to any material fact and that as a matter of law, the controlling provision in the interconnection agreement at issue has been previously interpreted by this Commission in favor of TCG and against BellSouth; and (2) as a matter of law, BellSouth is collaterally estopped by that prior decision of this Commission from relitigating the issue of whether BellSouth is required to pay reciprocal compensation for calls originated by customers of BellSouth to Information Service Providers ("ISPs") served by TCG.

INTRODUCTION

TCG's Complaint raises three issues:

- (1) Whether BellSouth is required to pay TCG reciprocal compensation for TCG's termination of IPS-bound traffic under the terms and conditions of the Second TCG-BellSouth Agreement at issue in this proceeding.

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(2) If so, whether BellSouth is required to pay TCG reciprocal compensation at the rate of \$0.00325 per minute of use reflected in the Second TCG-BellSouth Agreement.

(3) Whether BellSouth has failed to pay TCG the full amount of intrastate switched access charges for TCG's transport and termination of intraLATA toll minutes.

This Motion for Partial Summary Order relates only to the first issue outlined above. The issue raised by this Motion is whether local seven digit or ten digit dialed calls placed by customers of BellSouth to customers of TCG (and by customers of TCG to ISP customers of BellSouth) constitute local traffic for which reciprocal compensation is due under the parties' Agreement.

Prior to the Second TCG-BellSouth Agreement, TCG and BellSouth entered into the First TCG-BellSouth Interconnection Agreement on July 15, 1996. The First TCG-BellSouth Agreement was approved by the Commission by Order No. PSC-96-1313-FOF-TP issued October 29, 1996. The First TCG-BellSouth Agreement was the subject of an earlier dispute between the parties over whether reciprocal compensation was due for the transport and termination of calls to ISPs. In that case, the Commission was asked to determine whether the definition of "Local Traffic" contained in the First TCG-BellSouth Agreement required BellSouth to pay TCG reciprocal compensation for the delivery of calls to ISP customers served by TCG. On September 15, 1998, the Commission issued Order No. PSC-98-1216-FOF-TP (the "*TCG Order*") interpreting the definition of "Local Traffic" under the First TCG-BellSouth Agreement to include TCG's transport and termination of BellSouth-originated calls to ISPs.

Prior to the issuance of the *TCG Order*, AT&T and BellSouth entered into an interconnection

agreement effective June 10, 1997 which expired on June 10, 2000.¹ The AT&T-BellSouth agreement was approved by the Commission on June 19, 1997 by Order No. PSC-97-0724-FOF-TP.

The AT&T-BellSouth Agreement contained the same definition of “Local Traffic” reflected in the First TCG-BellSouth Agreement interpreted by the Commission in the *TCG Order* to require BellSouth to pay reciprocal compensation to TCG for termination of ISP calls.

The Second TCG-BellSouth Agreement at issue in this proceeding adopted the AT&T-BellSouth Agreement, with amendments, on July 14, 1999, and was approved by this Commission pursuant to Order No. PSC-99-1877-FOF-TP issued September 21, 1999. Like the adopted AT&T-BellSouth Agreement, the Second TCG-BellSouth Agreement terminated on June 10, 2000. The Second TCG-BellSouth Agreement also contains the same definition of “Local Traffic” set forth in the First TCG-BellSouth Agreement interpreted by the Commission in the *TCG Order*.²

TCG’s legal position is very simple. First, as a matter of law, the definition of Local Traffic in the Second TCG-BellSouth Agreement is not ambiguous because the Commission has previously interpreted it in a prior order. Therefore, the parties are precluded from presenting extrinsic evidence in an attempt to “re-interpret” this same definition of Local Traffic in this proceeding. Accordingly, there are no disputed issues of material fact that require resolution by the Commission regarding the intent of the parties. This Commission’s decision in the *TCG Order* provides the controlling precedent for the disposition of this case. Second, as a matter of law, although this case involves a

¹The interconnection agreement continues in effect until a new agreement is executed.

²See Prefiled Direct Testimony of Richard T. Guepe, Exhibit __ (RTG-1) (Attachment 11, page 6), and Exhibit __ (RTG-3), filed April 26, 2001, and incorporated in this Motion by reference.

different claim for reciprocal compensation because it involves a different interconnection agreement than the one interpreted by the Commission in the *TCG Order*, the controlling issue - - the interpretation of the term “Local Traffic” in the Second TCG-BellSouth Agreement - - is the same as that previously adjudicated by the Commission and, therefore, BellSouth is collaterally estopped from relitigating this same issue in this proceeding.

JURISDICTION

The Federal Communications Commission has determined that, in the absence of a federal rule regarding appropriate compensation for ISP traffic, the decisions of state commissions on this issue have binding effect.³ In March 2000, the D.C. Circuit Court vacated and remanded the FCC’s previous ruling that ISP bound calls are jurisdictionally interstate for want of “reasoned decision-making.”⁴ Pursuant to the D.C. Circuit Court’s remand, the FCC recently concluded that ISP-bound traffic is not subject to the reciprocal compensation obligations of 47 U.S.C. §251(b)(5). In doing so, the FCC expressly stated that its newly established interim reciprocal compensation regime for ISP-bound traffic “does not preempt any state commission decision regarding compensation for ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here.”⁵

³Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Intercarrier Compensation for ISP Bound Traffic, CC Docket Nos. 96-98 and 99-68, FCC No. 99-38, Declaratory Ruling and Notice of Proposed Rulemaking ¶24 (rel. Feb. 26, 1999) (“*ISP Declaratory Ruling*”).

⁴Bell Atlantic Telephone Company v. Federal Communications Commission, No. 99-1094, 2000 W.L. 273383 (D.C. Cir. March 24, 2000) vacating and remanding the FCC’s *ISP Declaratory Ruling*.

⁵Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Intercarrier Compensation for ISP Bound Traffic, CC Docket Nos. 96-98 and 99-68, FCC No. 01-131, Order on Remand and Report and Order (Rel. April 27, 2001), at ¶82; see also

This Commission also has jurisdiction to enforce its Order approving the Second TCG-BellSouth Interconnection Agreement (Order No. PSC-99-1877-FOF-TP). Section 16 of the Second TCG-BellSouth Agreement requires the parties to petition the Commission for a resolution of any disputes that arise as to the interpretation of the Agreement. Moreover, in *Iowa Utilities Board v. FCC*, 120 F.3d 753, 804 (8th Cir. 1997), the court confirmed that state commissions have the authority “... to enforce the provisions of the agreements ... (they) have approved.”

ARGUMENT

A.. The Commission’s Prior Interpretation of the Definition of “Local Traffic” in the TCG Order Requires Payment of Reciprocal Compensation for ISP-Bound Traffic under the Second TCG-BellSouth Agreement

As previously stated, the Commission ordered BellSouth in the *TCG Order* to pay TCG for transport and termination of calls to ISPs based on the Commission’s interpretation of the definition of “Local Traffic” contained in the First TCG-BellSouth Agreement. The Commission’s order was the result of a complaint filed by TCG wherein TCG alleged that BellSouth failed to pay reciprocal compensation for local telephone exchange service traffic that was transported and terminated by TCG to ISPs. In the First TCG-BellSouth Agreement, the dispute focused on the interpretation and application of the term “Local Traffic” which was defined as follows:

Any telephone call that originates and terminates in the same LATA and is billed by the originating party as a local call, including any call terminating in an exchange outside of BellSouth’s area with respect to which BellSouth has a local interconnection agreement with an independent LEC, with which TCG is not directly interconnected.

In interpreting the above “Local Traffic” provisions, the Commission held:

fn. 149.

The preponderance of the evidence shows that BellSouth is required to pay TCG reciprocal compensation for the transport and termination of telephone exchange service local traffic that is handed out by BellSouth to TCG for termination with telephone exchange service end users that are Internet Service Providers or Enhanced Service Providers under the terms of the TCG and BellSouth Florida Partial Interconnection Agreement. Traffic that is terminated on a local dialed basis to Internet Service Providers or an Enhanced Service Provider should not be treated differently from other local dialed traffic. We find that BellSouth must compensate TCG according to the parties' interconnection agreement, including interest, for the entire period the balance owed is outstanding.⁶

The definition of "Local Traffic" in the Second TCG-BellSouth Agreement that is the subject of this Complaint is **exactly the same** as the definition of "Local Traffic" in the First Agreement.

Attachment 11 to the Second Agreement defines Local Traffic as follows:

Local Traffic - means any telephone call that originates and terminates in the same LATA and is billed by the originating Party as a local call, including any call terminating in an exchange outside of BellSouth's service area with respect to which BellSouth has a local interconnection agreement with an independent LEC, with which [TCG] is not directly interconnected.

Despite the fact that the definition of "Local Traffic" is the same in both agreements and has been previously interpreted by the Commission to require payment of reciprocal compensation for ISP-bound calls, BellSouth refuses to make such payments to TCG. BellSouth takes the position that its obligation to pay reciprocal compensation for ISP-bound traffic expired with the First Agreement despite the fact that TCG and BellSouth thereafter adopted an Agreement that was identical to the First Agreement in terms of defining "Local Traffic." BellSouth's refusal to pay reciprocal compensation for local ISP traffic originated by its end users constitutes a material breach

⁶Id. at 22 (*TCG Order*).

of the terms of the Second Agreement as previously interpreted by the Commission in the prior *TCG Order*.

Section 5.1 of Attachment 6 of the Second Agreement requires BellSouth and TCG to pay reciprocal compensation to each other for all Local Traffic that originates on one company's network and terminates on the other's network in accordance with the rates set forth in Part IV, Table I of the Second Agreement. The Reciprocal Compensation provision in the Second Agreement in Attachment 6, Section 5.1, Mutual Compensation, states, in pertinent part:

The Parties shall bill each other reciprocal compensation in accordance with the standards set forth in this Agreement for Local Traffic terminated to the other Party's customer. Such Local Traffic shall be recorded and transmitted to [TCG] and BellSouth in accordance with this Attachment. When a[] [TCG] Customer originates traffic and [TCG] sends it to BellSouth for termination, [TCG] will determine whether the traffic is local or intraLATA toll. When a BellSouth Customer originates traffic and BellSouth sends it to [TCG] for termination, BellSouth will determine whether the traffic is local or intraLATA toll. Each Party will provide the other with information that will allow it to distinguish local from intraLATA toll traffic. At a minimum, each Party shall utilize NXXs in such a way that the other Party shall be able to distinguish local from intraLATA toll traffic.

In the instant case, BellSouth defends its position of unilaterally deciding to withhold payment for ISP-bound traffic by stating that it had made its position opposing the payment of reciprocal compensation for ISP calls publicly-known prior to the time TCG adopted the AT&T-BellSouth Agreement. That same defense was raised in the *Global NAPS* proceeding and rejected by the Commission.⁷ In *Global NAPS*, BellSouth maintained that it made its position on ISP traffic

⁷In re: Complaint and/or Petition for Arbitration by Global NAPS, Inc. for Enforcement of Section VI(B) of its Interconnection Agreement with BellSouth Telecommunications, Inc., and Request for Relief, Docket No. 991267-TP, Order No. PSC-0802-FOF-TP issued April 24,

publicly-known prior to the adoption by Global NAPS of a Commission approved agreement between ITC DeltaCom and BellSouth. The Commission rejected that defense in *Global NAPS* noting that BellSouth had never modified the ITC DeltaCom-BellSouth Agreement adopted by Global NAPS to reflect BellSouth's position. The same is true in the instant case. The adoption agreement between TCG and BellSouth incorporated in the Second TCG-BellSouth Agreement does not reflect any language or modification addressing reciprocal compensation for termination of traffic to ISPs.

In *Global NAPS*, this Commission emphasized the importance of consistency in its interpretations of intercarrier agreements:

Although we need not look beyond the plain language in the agreement in this instance, we note that we do not believe that the intent of the parties at the time of the adoption is the relevant intent when interpreting an agreement adopted pursuant to Section 252(i) of the Act. Rather, we believe the intent of the original parties is the determining factor when the agreement language is not clear. Otherwise, original and adopting parties to an agreement could receive differing interpretations of the same agreement, which is not consistent with the purpose of the Section 252(i) of the Act.⁸

Support for the granting of a (partial) summary final order under a parallel set of facts is found in the Commission's contract enforcement decision brought by ITC DeltaCom Communications, Inc. against BellSouth ("*DeltaCom*").⁹ In *DeltaCom*, the Commission framed the

2000 (*Global NAPS*).

⁸Id. at 8.

⁹In re: Request for arbitration concerning complaint of ITC DeltaCom Communications, Inc. against BellSouth Telecommunications, Inc. for breach of interconnection terms, and Request for Immediate Relief, Docket No. 991946-TP, Order No. PSC-00-1540-FOF-TP issued August 24, 2000 ("*DeltaCom*").

controlling issue as one of contract interpretation. In granting DeltaCom's motion for summary final order, the Commission concluded that the language in the agreement at issue did not segregate traffic to ISPs from other "local traffic" nor was the issue of traffic delivered to ISPs addressed elsewhere in the agreement. Based on its finding that the controlling provisions in the DeltaCom-BellSouth agreement were clear and unambiguous, the Commission properly interpreted the agreement as a matter of law and granted a summary final order finding BellSouth responsible for payment of reciprocal compensation for ISP-bound traffic. The Commission held:

In this case, we agree with DeltaCom that the plain language of the agreement calls for the payment of reciprocal compensation for all local traffic, including traffic bound for ISPs. We further agree with DeltaCom that unless the Agreement between DeltaCom and BellSouth is unclear, the issue of reciprocal compensation for ISP traffic must be determined as a matter of law based on the face of the Agreement, without any reference to testimony or other evidence. Therefore, we find it is not necessary to look beyond the written agreement to the actions of the parties at the time the agreement was executed or to the subsequent actions of the parties to determine their intent.¹⁰

In the instant case, as in *DeltaCom*, the Second TCG-BellSouth Agreement does not segregate ISP-bound traffic nor is the issue of ISP-bound traffic addressed anywhere else in the Second Agreement. Moreover, this Commission has previously interpreted the controlling language in the Second Agreement -- the definition of "Local Traffic" -- after a formal evidentiary hearing between these same two parties. As a matter of law, this Commission's decision in the *TCG Order* reflects the governing and controlling law at the time the parties entered into the Second TCG-

¹⁰*DeltaCom*, at 11-12.

BellSouth Agreement.¹¹ The Commission's decision in the *TCG Order* renders the definition of local traffic under the Second TCG-BellSouth Agreement clear and unambiguous and precludes the consideration of extrinsic evidence outside the four corners of the Second TCG-BellSouth Agreement.¹²

Where there is no genuine issue of material fact, and the same issue of law has been resolved in a prior decision, either expressly or impliedly, contrary to the position of the defendant, summary judgment is proper.¹³ A summary final order is appropriate in the instant case as there are no material issues of law or fact. As a matter of law, and under the doctrine of *stare decisis*, TCG's Motion for a Partial Summary Final Order requiring BellSouth to pay TCG reciprocal compensation for termination of ISP-bound traffic should be granted.

B. BellSouth is Collaterally Estopped from Relitigating the Definition of "Local Traffic" Under the Second TCG-BellSouth Agreement

The doctrine of collateral estoppel has been most recently summarized by a Florida appellate court as follows:

"Collateral estoppel, also known as estoppel by judgment, serves as a bar to relitigation of an issue which has already been

¹¹*See, e.g., TCG Order*, at 14, 19-20 (Commission determined that parties were aware that the Commission had previously determined that ISP traffic should be treated as local in Order No. 21815 at the time the parties entered into agreement at issue); *Northbrook Property and Casualty Insur. Co. V. R&J Crane Service, Inc.*, 765 So.2d 836, 839 (Fla. 4th DCA 2000); *Florida Beverage Corporation v. Division of Alcoholic Beverages and Tobacco*, 503 So.2d 396, 398 (Fla. 1st DCA 1987).

¹²*See, e.g., McCarty v. Dade Division of American Hospital Supply*, 360 So.2d 436 (Fla. 3rd DCA 1978).

¹³*Forte Towers, Inc. v. City of Miami Beach*, 360 So.2d 81 (Fla. 3^d DCA 1978).

determined by a valid judgment.” ... “The essential elements of collateral estoppel are that the parties and issues be identical, and that the particular matter be fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction.” ... Furthermore collateral estoppel applies to bar relitigation of issues raised in a first suit by way of a defense.

Weiss v. Courshon, 768 So.2d 2, 4 (Fla. 3rd DCA 2000) (citations in quote omitted). The doctrine of collateral estoppel applies to decision of administrative agencies.¹⁴

Here, the same parties - - TCG and BellSouth - - litigated the interpretation and application of the same definition of “Local Traffic” to ISP calls resulting in the Commission’s determination in the *TCG Order*. Under the doctrine of collateral estoppel, BellSouth is barred from relitigating that issue in the instant case. Accordingly, the Commission’s prior interpretation of this same definition of “Local Traffic” in the *TCG Order* governs the disposition of the instant case and requires BellSouth to pay TCG reciprocal compensation for termination of ISP-bound traffic under the Second TCG-BellSouth Agreement.

C. The Affirmative Defenses Raised by BellSouth Are Without Merit

BellSouth raises the affirmative defenses of the statute of limitations and laches. These defenses are specious.

The statute of limitations on contracts is contained in Section 95.11(2)(b), Florida Statutes, and requires that a legal or equitable action on a contract, obligation or liability founded on a written instrument be commenced within five years. As the parties did not adopt the Second Agreement that is the subject of this Complaint until July 14, 1999, the civil statute of limitations, to the extent it

¹⁴*Akins v. Hudson Pulp and Paper Company, Inc.*, 330 So.2d 757 (Fla. 1st DCA 1976); *United States Fidelity & Guaranty v. Odoms*, 444 So.2d 78 (Fla. 5th DCA 1984).

would even apply in a Commission proceeding (an issue the Commission need not reach), would not preclude a complaint filed for breach of this Agreement until July 14, 2004. TCG's complaint was filed January 9, 2001.

In Florida, the equitable doctrine of laches has been codified by a statutory provision that states that laches will bar an action unless the action is commenced within the time period provided for legal actions concerning the same subject matter. Section 95.11(6), Florida Statutes, is Florida's statutory provision regarding laches and states as follows:

- (6) LACHES. -- Laches shall bar any action unless it is commenced within the time provided for legal actions concerning the same subject matter regardless of lack of knowledge by the person said to be held liable that the person alleging liability would assert his or her rights and whether the person sought to be held liable is injured or prejudiced by the delay. This subsection shall not affect application of laches at an earlier time in accordance with law.

While there is certainly a legal question as to whether the Commission even has the statutory authority to grant equitable relief in the form of the laches defense, the Commission need not reach that issue in this proceeding. The statutory laches provision quoted above would bar any equitable claim that is not commenced within the period set forth in the statute of limitations governing legal actions concerning the same subject matter - - in this case, five years. Hence, even assuming arguendo Commission authority to consider the doctrine of laches as a defense, laches does not bar TCG's complaint.

The legislative intent in enacting the statutory laches provision was to eliminate the potential inconsistency of a particular action being subject to different limitation standards depending upon whether it was filed as a legal claim for relief or as an equitable claim for relief. See Corinthian

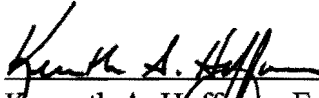
Investments, Inc. v. Reeder, 555 So.2d 871, 874 (Fla. 2nd DCA 1990). Additionally, one of the fundamental elements of the defense of laches is the lack of knowledge on the part of the defendant that the plaintiff will assert the right upon which suit is based. Van Meter v. Kelsey, 91 So.2d. 327 (Fla. 1956). Under the facts of the instant case, any assertion by BellSouth that it did not have knowledge that TCG would bring this complaint in the event BellSouth breached the Second Agreement is patently absurd. TCG and BellSouth have previously litigated the same issue. This complaint is for a breach of the Second TCG-BellSouth Agreement. The Commission has previously held that BellSouth was in breach of the materially identical First TCG-BellSouth Agreement by engaging in the exact same conduct that BellSouth has chosen to engage in here: unilaterally withholding payment of reciprocal compensation for the termination of calls to ISPs, despite the unambiguous language in the agreement calling for such payment.

CONCLUSION

This case is a simple matter of contract interpretation. The admission of extrinsic evidence to interpret a contract is improper unless the language of the instrument is ambiguous. The Second TCG-BellSouth Agreement is not ambiguous. BellSouth and TCG have previously litigated the instant definition of “Local Traffic” in a prior proceeding. In the *TCG Order*, the Commission held that this definition of “Local Traffic”, particularly where there is no other provision in the agreement addressing compensation for ISP-bound calls, requires the payment of reciprocal compensation for ISP-bound traffic. Accordingly, as a matter of law, the Commission’s decision in the *TCG Order*, governs its interpretation of the definition of “Local Traffic” in the Second TCG-BellSouth Agreement. Further, BellSouth is precluded under the doctrine of collateral estoppel from relitigating this issue. Based on the *TCG Order*, BellSouth is in breach of the Second TCG-

BellSouth Agreement for its failure to compensate TCG for the termination of local ISP-bound traffic. For these reasons, TCG respectfully requests that the Commission grant this Motion for Partial Summary Final Order.

Respectfully submitted,



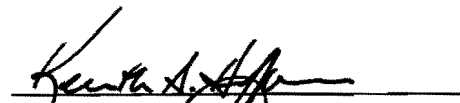
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by Hand Delivery this 25th day of May, 2001 to the following:

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