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September 13, 2000

Mrs. Blanca S. Bayó
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: 991854-TP (Intermedia Arbitration)

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Response to Intermedia Communications, Inc.'s Motion for Reconsideration and Clarification and Request for Oral Argument, which we ask that you file in the above-captioned matter.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

A. Langley Kitchings

A. Langley Kitchings

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cc: All parties of record
Marshall M. Criser III
R. Douglas Lackey
Nancy B. White

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CERTIFICATE OF SERVICE
Docket No. 991854-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this 13th day of September, 2000 to the following:

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A. Langley Kitchings

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(##) Signed Protective Agreement

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re:	)	
	)	
Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Intermedia Communications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996.	)	Docket No. 991854-TP
	)	Filed: September 13, 2000

BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE TO INTERMEDIA COMMUNICATIONS, INC.'S MOTION FOR RECONSIDERATION AND CLARIFICATION AND REQUEST FOR ORAL ARGUMENT

COMES NOW, BellSouth Telecommunications, Inc. ("BellSouth"), through counsel, and hereby files its Response to Intermedia Communications, Inc.'s ("Intermedia") Motion for Reconsideration and Clarification and Request for Oral Argument ("Motion"). In support thereof, BellSouth states as follows:

On September 6, 2000, Intermedia filed a Motion for Reconsideration and Clarification and, separately, a Request for Oral Argument on its Motion. The standard for review of a motion for reconsideration is well settled. The movant must identify a point of fact or law that the Commission overlooked or failed to consider in reaching its decision. *Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. v. King,* 146 So. 2d 889 (Fla. 1962). It is improper to reargue matters that already have been considered. *Sherwood v. State,* 111 So. 2d 96 (Fla. 3rd DCA 1959).

In its Motion, Intermedia fails to identify any points of law or fact that the Commission overlooked or failed to consider in reaching the decisions set forth in its final order in this matter. Order No. PSC-00-1519-FOF-TP (the "Order"). Indeed, Intermedia merely seeks, through its motion, to reargue issues that were decided after the Commission heard and considered the evidence and briefs of both parties. Accordingly, Intermedia's Motion, as well as its request for oral argument, should be denied.

I. Intermedia Has Failed to Identify Any Point of Law or Fact That Was Overlooked or Not Considered With Respect to Intermedia's Demand to Receive the Tandem Interconnection Rate.

Intermedia's request that the Commission reconsider its decision refusing Intermedia's demand to charge reciprocal compensation at the tandem interconnection rate is merely an attempt to reargue issues that were considered fully by the Commission in reaching its decision. *See* Order at 9-16. Intermedia attempts to manufacture a number of reasons why it believes this portion of the Order should be reversed. *See* Motion at 2-14. Intermedia fails, however, to identify any point of law or fact that the Commission overlooked in reaching its decision.

Intermedia's first purported justification for reconsideration on this issue is its assertion that the Commission improperly based its decision on the portion of the FCC's First Report and Order explaining the meaning of Rule 51.711, rather than on the text of the rule itself. Motion at 3-6. Intermedia's assertion is clearly incorrect.[1] On page 9 of the Order, at the very beginning of the Commission's discussion and analysis of the

[1] Intermedia evidently maintains that paragraph 1090 of the FCC's First Report and Order, in which it explains the meaning and application of Rule 51.711, and Rule 51.711 itself, which was issued by the FCC as part of the same First Report and Order, are in conflict. Motion at 4-6. Intermedia does not cite any

tandem interconnection rate issue, the Commission notes that the issue concerns "the appropriate application of 47 C.F.R. § 51.711 (Rule 51.711)," and the Commission quotes the portion of that rule that Intermedia claims it failed to consider. Order at 9. Intermedia's assertion that the Commission overlooked or failed to consider the text of the Rule, or that it rejected it in favor of allegedly inconsistent language in the First Report and Order is simply without substance.

As BellSouth pointed out in its testimony and brief, there is clear legal authority for the notion that functionality is a factor to be considered when determining whether the tandem switching rate should be awarded to a CLEC.

Several federal district court and state commission decisions plainly hold that the functions performed by another carrier's switch should be considered in determining whether that carrier is entitled to receive compensation for end-office, tandem, and transport elements in transporting terminating traffic. *See, e.g., U.S. West Communications, Inc. v. Minnesota Public Utilities Commission,* 55 F. Supp. 2d at 977; *U.S. West Communications, Inc. v. Public Service Commission of Utah,* 1999 U.S. Dist. LEXIS 18148, *12 (D. Utah, Nov. 23, 1999) (affirming commission requirement that U.S. West compensate Western Wireless at the tandem switching rate after concluding that Western Wireless's "switches perform comparable functions and serve a larger geographic area"); *MCI Telecommunications Corp. v. Illinois Bell Telephone Company d/b/a Ameritech Illinois, Inc., Id.* (In deciding whether MCI was entitled to the tandem interconnection rate, the commission correctly applied the FCC's test to determine

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authority for the proposition that the Commission's reading of Rule 51.711 is incorrect, or for its assertion that the FCC's explanation of Rule 51.711 is contrary to the plain text of that Rule.

whether MCI's switch "performed functions similar to, and served a geographical area comparable with, an Ameritech tandem switch").

More importantly, the Commission did not reach the legal issue that Intermedia asserts it decided in error. Intermedia claims that the plain text of Rule 51.711 requires only that a carrier prove that its switches serve a comparable geographic area as the ILEC tandem in order for the tandem interconnection rate to apply. Order at 10, Motion at 5. Intermedia claims that the Commission improperly required Intermedia to prove that its switches perform the same function as a tandem switch in addition to geographic comparability. Motion at 5-6, 7-8. In its Order, however, the Commission merely found that, as a matter of fact, Intermedia failed to prove *either* that its switches performed tandem functions[2] *or* that its switches served areas comparable to those served by BellSouth's tandem switches. Order at 13-15. Having determined that Intermedia failed to prove it was entitled to reciprocal compensation at the tandem interconnection rate under even the interpretation of Rule 51.711 urged by Intermedia, the Commission declined to reach the legal issue of whether Intermedia's interpretation of the Rule was correct.

Intermedia also claims that the Commission's decision on the tandem interconnection rate should be reconsidered because it asserts that the Commission based its finding that Intermedia's switches do not perform tandem functions on the observation that it has only one local switch in each local calling area. Motion at 9-10. This is an interesting approach for two reasons. First, Intermedia apparently does not

[2] Intermedia does not challenge the Commission's conclusion that it failed to prove that its switches perform tandem functions.

contend that the Commission was wrong, as a matter of fact, to conclude that its switches do not perform tandem functions, only that the Commission should not have done so based solely upon the fact that Intermedia has only one switch per local calling area. Indeed, nowhere in its Motion does Intermedia point to any evidence that would indicate that its switches provide tandem functions. Apparently Intermedia believes the Commission should reconsider in this instance because it reached the right result for the wrong reason.

Second, Intermedia's assertion that the Commission's finding was based solely on the observation that Intermedia had only one switch per local calling area, is plainly incorrect. The Commission noted, in its Order, that Intermedia has more than one switch in the Orlando area, for example. Order at 13. The Commission's decision was not based on the number of switches Intermedia has in any one area, it was based on the finding that Intermedia provided "no evidence that [any] of these switches functions as a local tandem." *Id.* As demonstrated above, lack of evidence on the question of functionality is a fatal defect to a CLEC attempting to prove its right to reciprocal compensation at the tandem rate. BellSouth contends that the Commission reached the right result in this instance for the right reasons—a failure of proof by Intermedia.

Similarly, Intermedia claims that the Commission failed to consider, or overlooked, Mr. Jackson's statements at the hearing regarding the areas served by Intermedia's switches. Motion at 10-14. In particular, Intermedia argues that it was improper for the Commission to have decided that Intermedia provided "insufficient" proof to allow the Commission to "reasonably determine if Intermedia is actually serving the areas they have designated as local calling areas." Order at 14. Intermedia produced maps with

shading to indicate the areas its switches were capable of serving, but provided no documentary evidence to substantiate Mr. Jackson's statements on the stand that Intermedia served customers within the shaded areas. In its Motion, Intermedia glosses over the fact that, apart from Mr. Jackson's unsubstantiated and general assurances, it produced no evidence regarding the number or location of its customers, asserting incorrectly that Mr. Jackson's assurances were "uncontroverted." Motion at 10-14.

Moreover, Intermedia conveniently ignores several answers Mr. Jackson gave on cross examination and in response to questioning by Commissioner Jaber which exposed Intermedia's lack of proof on the question of geographic comparability. For example:

> Q: . . . your answer would be the same to my question on each of these blue delineated areas, you don't know if you have a customer in each of those areas, do you?
>
> A: No, but I have thousands of access lines throughout those areas, I just don't know where they are located specifically.
>
> (Tr. pp. 319-320).
>
> Q: COMMISSIONER JABER: Right. But I would be correct in stating that in some of these areas you have designated that you are serving you have the infrastructure and you might have facilities in place, but you may not necessarily have a customer?
>
> A: THE WITNESS: For probably a small number of those, that would be correct. In most of these areas, since South Florida, in particular, is so densely populated, it is likely I'm serving someone throughout there from my guess. I just don't know specifically from my knowledge.
>
> (Tr. pp. 321-322).

Thus, it is clear from the Commission's order that Mr. Jackson's inadequate assertions regarding the areas served by Intermedia's switches were neither overlooked

nor uncontroverted. The Commission noted Mr. Jackson's unsubstantiated claims that its switches actually serve customers in the all the areas shaded on their maps, Order at 12, but went on to note that Mr. Varner testified that they do not. Order at 14. Accordingly, Mr. Jackson's assertions, as well as Mr. Varner's, which were in direct opposition to Mr. Jackson's, were taken into account by the Commission in deciding this issue of fact. In the absence of any satisfactory documentary evidence of Intermedia customers in the areas it claims to serve, evidence that, if it exists, is within Intermedia's possession and could easily have been produced, the Commission simply chose not to accept Mr. Jackson's disputed assertions as true. *Id.* Intermedia had the burden of proof on this issue. The Commission simply concluded that it failed to carry it. There is nothing improper about this conclusion, nor is there any point of fact or law that was overlooked or not considered.

Intermedia's claims that the Commission should reconsider its decision with regard to the tandem interconnection rate issue are without merit. In some cases, such as the proper interpretation of Rule 51.711, Intermedia claims that legal rulings that were not made are incorrect. In others, such as the Commission's findings of fact that Intermedia's switches do not perform tandem functions or serve comparable areas, Intermedia asserts that the Commission reached the right result for the wrong reason or failed to consider "uncontroverted" assertions. In every instance, however, the Commission's decision is based on review and analysis of the relevant facts and law. In no instance has Intermedia demonstrated that the Commission overlooked or failed to consider any point of law or fact. The fact of the matter is that Intermedia failed to prove its case on this issue.

II. The Commission Did Not Overlook Nor Fail to Consider Any Point of Law or Fact in Deciding to Include Phone to Phone IP Telephony in the Definition of Switched Access Traffic.

Intermedia argues that the Commission should reconsider its decision with regard to whether long distance voice traffic that utilizes internet protocol technology should be included in the definition of switched access traffic. Intermedia's arguments fail, however, to demonstrate that the Commission overlooked or failed to consider any point of law or fact that would merit reconsideration.

First, the issue being addressed by the Commission is: How should "Switched Access Traffic" be defined? Nowhere in BellSouth's testimony nor in Intermedia's testimony is the term "VOIP" ever used. Neither is the term "VOIP" ever used in the Commission's discussion on ordering clause. Specifically, and accurately, the Commission stated that the issue addressed whether or not the definition of switched access traffic should include phone-to-phone Internet Protocol (IP) telephony.

Intermedia uses the term "VOIP" to refer to computer-to-computer calls. Those calls are not at issue here. What is at issue, and what the Commission accurately identified, is phone-to-phone calls that are long distance telecommunications using Internet Protocol for a portion of the transmission.

Intermedia's assertion that this issue is within the exclusive jurisdiction of the FCC, Motion at 14-16, was made by Intermedia at the hearing and noted by the Commission in its decision. Order at 56-57. Indeed, Intermedia does not even attempt to show that there is any point of law or fact allegedly overlooked by the Commission in making this determination. Instead, Intermedia simply reargues the issue, and demands reconsideration because the Commission allegedly decided the issue incorrectly.

Intermedia is free to reargue the matter before a reviewing court if it so chooses, but it has not demonstrated that the standard for reconsideration by this Commission has been met.

The Florida Commission has a legal obligation to determine the regulations for local telecommunications traffic, as well as intrastate, intraLATA and intrastate interLATA. Intermedia is incorrect in implying that the Florida Commission has no jurisdiction over intrastate telecommunications just because internet protocol is used in a portion of the intrastate telecommunications. The Florida Commission has a legal obligation to arbitration interconnection contract disputes, not the FCC. Thus, the FPSC was well within its jurisdictional bounds in determining this issue as it did.

Intermedia also asserts that reconsideration should be granted because BellSouth agreed to slightly different wording with respect to this issue in a recent agreement with e.spire. Intermedia claims that BellSouth "denied" such language to Intermedia and that this is grounds for reconsideration. Intermedia fails to note that it was Intermedia, not BellSouth, that sought arbitration of this issue (which Intermedia, having failed to persuade the Commission of its view, now considers to have been "a consummate waste of resources," Motion at 17). Moreover, as Intermedia is well aware, it is entitled, under the Telecommunications Act to adopt the relevant term from the e.spire agreement if it finds such language preferable to the language this Commission has determined to be appropriate. Once again, however, there is nothing in Intermedia's brief that would justify reconsideration of the Commission's decision on this issue.

III. Intermedia's Request for "Clarification" Is Procedurally Improper

Intermedia requests "clarification" of the Commission's determination that the parties should assign numbers from a given NPA/NXX within the exchange or rate center with which the NPA/NXX is associated. Motion at 18-21. Order at 39-43. BellSouth is aware of no law or Commission rule providing for such a motion, nor does Intermedia state any authority for its request for "clarification." Moreover, if the request for clarification is intended to be treated as a request for reconsideration, Intermedia does not identify any point of fact or law overlooked or not considered. Accordingly, BellSouth believes that Intermedia's motion is procedurally improper.

If that were not enough, however, Intermedia's request for "clarification" is actually an attempt to collaterally challenge BellSouth's Foreign Exchange Service tariff. Motion at 18-21. Indeed, the thrust of Intermedia's argument in this portion of its Motion is not that the Commission should reconsider any issue that was decided in the arbitration, but that the Commission should consider an issue that was never part of the arbitration—whether BellSouth should be permitted to offer Foreign Exchange Service at all. *Id.* at 19-21. It would have been improper for Intermedia to attempt to add new issues to the arbitration at the prehearing stage. It is blatantly improper for it to attempt to do so now.

The service at issue here is not Foreign Exchange ("FX") Service. With FX Service, a telephone number is assigned within the local calling area, and dedicated facilities connect the serving central office and the end user's premises. The service that is at issue here does not involve any dedicated facilities to the end user, and the telephone number is actually assigned outside the local calling area.

In any event, the Florida Commission's Order does not say that Intermedia can never assign numbers outside the areas to which they are traditionally associated.

Rather, the Order specifies that when "information necessary for the proper rating of calls" can be provided, then Intermedia can assign the numbers however it chooses. Indeed, the appropriate rating of FX Service was never raised as an issue during the arbitration.

IV. Intermedia's Request for Oral Argument Should Be Denied.

Oral argument on a motion for reconsideration is within the sole discretion of the Commission. Rule 25-22.060(f), Fla. Admin. Code. Intermedia has failed, with respect to each issue raised in its Motion, to identify any point of fact or law that was overlooked or not considered by the Commission in reaching the decisions made in its Order. In view of the absence of any justification for granting a motion for reconsideration, there is no justification for granting Intermedia's request for oral argument. It should be denied.

For all of the foregoing reasons, Intermedia's Motion for Reconsideration and Clarification and its Request for Oral Argument should be denied.

Respectfully submitted, this 13th day of September, 2000.

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