State of Florida

Public Service Commission

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DATE: JULY 23, 1998

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF COMMUNICATIONS (MARSH)
DIVISION OF LEGAL SERVICES (BROWN) MCB

RE: DOCKET NO. 971478-TP - COMPLAINT OF WORLD TECHNOLOGIES, INC. AGAINST BELLSOUTH TELECOMMUNICATIONS, INC. FOR BREACH OF TERMS OF FLORIDA PARTIAL INTERCONNECTION AGREEMENT UNDER SECTIONS 251 AND 252 OF THE TELECOMMUNICATIONS ACT OF 1996 AND REQUEST FOR RELIEF.

DOCKET NO. 980184-TP - COMPLAINT OF TELEPORT COMMUNICATIONS GROUP, INC./TCG SOUTH FLORIDA AGAINST BELLSOUTH TELECOMMUNICATIONS, INC., FOR BREACH OF TERMS OF INTERCONNECTION AGREEMENT UNDER SECTION 252 OF THE TELECOMMUNICATIONS ACT OF 1996 AND REQUEST FOR RELIEF.

DOCKET NO. 980495-TP - COMPLAINT OF INTERMEDIA COMMUNICATIONS, INC., AGAINST BELLSOUTH TELECOMMUNICATIONS, INC., FOR BREACH OF TERMS OF FLORIDA PARTIAL INTERCONNECTION AGREEMENT UNDER SECTIONS 251 AND 252 OF THE TELECOMMUNICATIONS ACT OF 1996 AND REQUEST FOR RELIEF.

DOCKET NO. 980499-TP - COMPLAINT OF MCIMETRO ACCESS TRANSMISSION SERVICES, INC., AGAINST BELLSOUTH TELECOMMUNICATIONS, INC., FOR BREACH OF TERMS OF INTERCONNECTION AGREEMENT UNDER SECTION 252 OF THE TELECOMMUNICATIONS ACT OF 1996 AND REQUEST FOR RELIEF.

AGENDA: 08/04/98 - REGULAR AGENDA - POST HEARING DECISION - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

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CASE BACKGROUND

MFS Communications Company, Inc. (MFS), and BellSouth Telecommunications, Inc. (BellSouth), entered into a Partial Florida Interconnection Agreement (Agreement) pursuant to the Telecommunications Act of 1996 (Act) on August 26, 1996. The Commission approved the Agreement in Order No. PSC-96-1508-FOF-TP, issued December 12, 1996, in Docket No. 961053-TP, and an amendment to the Agreement in Order No. PSC-97-0772-FOF-TP, issued July 1, 1997, in Docket No. 970315-TP. On November 12, 1997, WorldCom Technologies, Inc. (WorldCom), filed a Complaint Against BellSouth and Request for Relief, alleging that BellSouth has failed to pay reciprocal compensation for local telephone exchange service traffic transported and terminated by WorldCom's affiliate, MFS, to Internet Service Providers (ISPs). The complaint was assigned Docket No. 971478-TP. BellSouth filed its Answer and Response on December 22, 1997. In Order No. PSC-98-0454-PCO-TP, issued March 31, 1998, the Commission directed that the matter be set for hearing.

Teleport Communications Group, Inc./TCG South Florida (TCG), and BellSouth entered into an Interconnection Agreement pursuant to the Act on July 15, 1996. The Commission approved the Agreement in Order No. PSC-96-1313-FOF-TP, issued October 29, 1996, in Docket No. 960862-TP. On February 4, 1998, TCG filed a Complaint for Enforcement of Section IV.C of its Interconnection Agreement with BellSouth, also alleging that BellSouth has failed to pay reciprocal compensation for local telephone exchange service traffic transported and terminated by TCG to ISPs. Docket No. 980184-TP was opened to handle the complaint. BellSouth filed its Answer and Response on February 25, 1998.

MCImetro Access Transmission Services, Inc. (MCIm), and BellSouth entered into an Interconnection Agreement pursuant to the Act on April 4, 1997. The Commission approved the Agreement in Order Nos. PSC-97-0723-FOF-TP, issued June 19, 1997, and PSC-97-0723A-FOF-TP, issued June 26, 1997, in Docket No. 960846-TP. On February 23, 1998, MCIm filed a Complaint against BellSouth, which was docketed in Docket No. 980281-TP. Among other things, MCIm also alleged in Count 13 that BellSouth has failed to pay reciprocal compensation for local telephone exchange service traffic transported and terminated by MCIm to ISPs. On April 6, 1998, MCIm filed a separate Complaint embodying the complaint set forth in Count 13 of the first Complaint. Accordingly, Docket No. 980499-TP was opened.

Intermedia Communications, Inc. (Intermedia), and BellSouth entered into an interconnection Agreement pursuant to the Act on July 1, 1996. The Commission approved the Agreement in Order No. PSC-96-1236-FOF-TP, issued October 7, 1996, in Docket No. 960769-TP. On February 24, 1997, the companies amended their Agreement. The Commission approved the amended Agreement in Order No. PSC-97-1617-FOF-TP, issued December 30, 1997, in Docket No. 971230-TP. On April 6, 1998, Intermedia filed a Complaint against BellSouth alleging that BellSouth has failed to pay reciprocal compensation for local telephone exchange service traffic transported and terminated by Intermedia to ISPs. Accordingly, Docket No. 980495-TP was opened.

On March 9, 1998, GTE Florida, Inc. (GTEFL) filed a petition to intervene in this proceeding. By Order No. PSC-98-0476-PCO-TP, GTEFL's petition was denied. Subsequently, on May 6, 1998, GTEFL filed a petition to be permitted to file a brief. The matter was heard at the hearing. That petition was also denied.

By Order No. PSC-98-0561-PCO-TP, issued April 21, 1998, the four complaints were consolidated for the purpose of conducting a hearing. The hearing was held on June 11, 1998.

The subject of the hearing was limited to the contract disputes between the parties. The generic issue of whether ISP traffic should be treated as local or interstate for purposes of reciprocal compensation has been discussed in this recommendation only insofar as necessary to show what the parties might reasonably have intended at the time the contracts were entered into. The generic aspects of the matter will not be decided here.

DISCUSSION OF ISSUES

ISSUE 1: Under their Florida Partial Interconnection Agreement, are WorldCom Technologies, Inc./MFS Communications Company, Inc., and BellSouth Telecommunications, Inc., required to compensate each other for transport and termination of traffic to Internet Service Providers? If so, what action, if any, should be taken?

RECOMMENDATION: Yes. The preponderance of the evidence shows BellSouth should be required to pay WorldCom reciprocal compensation for the transport and termination of telephone exchange service local traffic that is handed off by BellSouth to WorldCom for termination with telephone exchange service end users that are Internet Service Providers or Enhanced Service Providers under the terms of the WorldCom and BellSouth Florida Partial

Interconnection Agreement. Traffic that is terminated on a local dialed basis to Internet Service Providers or Enhanced Service Providers should not be treated differently from other local dialed traffic. The Commission should require BellSouth to compensate WorldCom according to the parties' interconnection agreement, including interest, for the entire period the balance owed is outstanding. (MARSH)

POSITION OF THE PARTIES

WORLDCOM: Yes. The Agreement clearly requires reciprocal compensation for ISP traffic. If found ambiguous, the extrinsic evidence also supports this conclusion. BellSouth should be ordered to pay reciprocal compensation plus interest for all ISP traffic.

TCG, INTERMEDIA, MCIm: No position.

BELLSOUTH: No. BellSouth is only required to compensate WorldCom for transport and termination of local traffic. ISP traffic is interstate traffic. No action need be taken by the Commission.

STAFF ANALYSIS: While there are four complainants in the consolidated case, the arguments made by them contain many common threads. Additionally, BellSouth's position on each issue is the same, and its brief addresses all four together. For the sake of efficiency, staff will address the main themes in Issue 1, and will address the individual Agreements of the companies under their respective issues.

The essence of the case is that BellSouth refuses to pay reciprocal compensation for ISP traffic. In a letter dated August 12, 1997, BellSouth notified the complainants that ISP traffic is jurisdictionally interstate and "enjoys a unique status, especially [as to] call termination." (EXH 2 at PK-2) As stated by TCG in its brief, "This is a contract dispute in which the Commission must decide whose meaning is to be given to the term 'Local Traffic' in the Agreement." (BR p. 3) While some of the generic aspects of the issue of ISP traffic were discussed in the record, and will be addressed below, the recommendations will be limited to the matters necessary to resolve the contract dispute.

Agreement

On August 26, 1996, WorldCom and BellSouth entered into a Partial Interconnection Agreement which was approved by the FPSC in Order No. PSC-96-1508-FOF-TP. (TR 27) WorldCom witness Ball testifies on the pertinent provisions of that Agreement. Section 1.40 of the Agreement, defines local traffic as:

> [C]alls between two or more Telephone Exchange service users where both Telephone Exchange Services bear NPA-NXX designations associated with the same local calling area of the incumbent LEC or other authorized area [such as EAS]. Local traffic includes traffic types that have been traditionally referred to as "local calling" and as "extended area service (EAS)." All other traffic that originates and terminates between end users within the LATA is toll traffic. In no event shall the Local Traffic area for purposes of local call termination billing between the parties be decreased. (TR 27-28)

Section 5.8.1 provides that:

> Reciprocal Compensation applies for transport and termination of Local Traffic (including EAS and EAS-like traffic) billable by BellSouth or MFS which a Telephone Exchange Service Customer originates on BellSouth's or MFS's network for termination on the other Party's network. (TR 28)

Thus, BellSouth and MFS are required 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.

The issue is whether the traffic in question, ISP traffic, is local for purposes of the Agreements in question. In other words, as described by BellSouth, "The core issue raised by the Complaints of WorldCom, Teleport, Intermedia and MCIm is whether the parties agreed through their respective Interconnection Agreements to treat calls through which an end user obtains access to services offered by an Internet Service Provider or other Information Service Providers as local traffic subject to reciprocal compensation." (BR p. 4)

WorldCom witness Ball argues that the language of the Agreement itself makes it clear that the parties owe each other reciprocal compensation for the traffic in question. (TR 28) He explains that "if a BellSouth customer utilizes a BellSouth telephone exchange service that has a local NPA-NXX and they call a WorldCom customer that buys a WorldCom telephone exchange service that has a WorldCom NPA-NXX, that's local traffic." (TR 49-50) Witness Ball continues that this is what happens when a BellSouth local customer calls a WorldCom customer that happens to be an ISP. He points out that there is no exclusion for any type of customer based on what business the customer happens to be in. (TR 50) Witness Ball notes that exceptions were made where needed and included in the Agreement for other types of traffic. (TR 62-64) He states that WorldCom understood ISP traffic to be local, and that if BellSouth wanted to exclude ISP calls, it was BellSouth's obligation to raise the issue. (TR 62-64)

BellSouth witness Hendrix agrees that the contract did not specify whether ISP traffic was included in the definition of local traffic. In fact, it is undisputed in the record that none of the parties broached the subject during negotiations. (Ball TR 42, 62; Kouroupas TR 113, 128; Strow TR 158, 185; Martinez TR 209-210; Hendrix TR 223-227) Each party reached an Agreement with BellSouth on a definition of local traffic to be included in the contract. However, witness Hendrix testifies that it was WorldCom's obligation to raise this as an issue in its Agreement. (TR 300-301)

BellSouth states that all the parties assumed that BellSouth agreed to include ISP traffic as local. (BellSouth BR p. 6) BellSouth reduces it to a simple matter of being forced to pay reciprocal compensation just because they did not "affirmatively except ISP traffic from the definition of 'local traffic'" in negotiating the Agreement. (BR p. 10) BellSouth argues that the existing law at the time the contracts were negotiated "reflects that it was unreasonable for the Complainants to blithely assume that BellSouth agreed with their proposed treatment of ISP traffic." (BR p. 6)

But BellSouth equally assumed that the parties knew ISP traffic was interstate in nature, or so it would have one believe. BellSouth points out that "parties to a contract are presumed to enter into their Agreement with full knowledge of the state of the existing law, which in turn is incorporated into and sheds light on the meaning of the parties' Agreement."(BR p. 10) BellSouth witness Hendrix claims that the FCC has made an explicit finding that ISPs provide interstate services; thus, there was no need for BellSouth to believe ISP traffic would be subject to reciprocal compensation. (TR 228-233, 244-245) As a result BellSouth argues in its brief that the parties never had an express meeting of the minds on the scope of the definition of local traffic. (BR p. 10)

On the other hand, WorldCom witness Ball testifies that "the Agreement is entirely clear and unambiguous" on the treatment of ISP traffic as local. Nevertheless, he states that if the FPSC does find an ambiguity in the Agreement, it should be resolved by considering:

> (1) the express language of the Telecommunications Act of 1996, (2) relevant rulings, decisions and orders of this Commission, (3) relevant rulings, decisions and orders of the FCC interpreting the Act, (4) rulings, decisions and orders from other, similarly situated state regulatory agencies, and (5) the custom and usage in the industry. (TR 30-31)

Staff agrees that the Agreement defines local traffic in such a way that ISP traffic clearly fits the definition. If the traffic is local, a priori, reciprocal compensation for termination is required under Section 5.8 of the Agreement. There is no ambiguity, nor are there any exceptions. However, due to BellSouth's allegation that the parties never had a meeting of the minds on this issue, staff will also follow WorldCom's recommended approach to resolve the conflict.

<u>Local vs. Interstate Traffic</u>

The first area to explore is the parties' basis for considering ISP traffic to be jurisdictionally local or interstate. The record contains considerable material in support of both positions.

BellSouth witness Hendrix contends that, for reciprocal compensation to apply, "traffic must be jurisdictionally local." (TR 219) He argues that ISP traffic is not jurisdictionally local, because the FCC "has concluded that enhanced service providers, of which ISPs are a subset, use the local network to provide <u>interstate</u> services." (TR 219) He adds that they do so just as facilities-based interexchange carriers and resellers use the local network to provide interstate services.(TR 232)

He adds that "[t]he FCC stated in Paragraph 12 in an order dated February 14, 1992, in Docket Number 92-18, that:

> Our jurisdiction does not end at the local switch, but continues to the ultimate termination of the call. The key to jurisdiction is the nature of the communication itself, rather than the physical location of the technology. (Hendrix TR 231)

Further, in its April 10, 1998, Report to Congress (CC Docket No. 96-45), "the FCC indicated that it does have jurisdiction to address whether ALECs that serve ISPs are entitled to reciprocal compensation." (Hendrix TR 238) That report is discussed further below.

BellSouth points out in its brief that the "FCC has not held that ISP traffic is local traffic for purposes of the instant dispute before the Commission." Nor has the FCC "held that ISPs are end users for all regulatory purposes." (BR p. 22) Staff agrees. It is clear from BellSouth's brief, as cited above, that the FCC has not made a decision on whether ISP traffic is subject to reciprocal compensation. While the FCC has determined that ISPs provide interstate services, it appears that the FCC may consider these services severable from telecommunications services, as discussed below. No FCC order has been presented that delineates exactly for what purposes the FCC intended ISP traffic to be considered local. By the same token, the FCC has not said that ISP traffic cannot be considered as though local for all regulatory purposes. It appears that the FCC has largely been silent on the issue. This leads staff to believe the FCC intended for the states to exercise jurisdiction over the local service aspects of ISP traffic, unless and until the FCC decided otherwise. Witness Hendrix agreed that the FCC intended ISP traffic to be treated as though local. (EXH 7) He did not expound on what that meant.

BellSouth contends that there is no dispute that an Internet transmission may simultaneously be interstate, international and intrastate. (BR p. 5) BellSouth further argues that the issue should be resolved in pending proceedings before the FCC. (BR p. 7) Those proceedings include one the FCC initiated in response to a June 29, 1997 letter from the Association for Local Telecommunications Services (ALTS). ALTS requested clarification from the FCC that ISP traffic is within the FCC's exclusive jurisdiction. Additionally, ALTS has asked the FCC for a ruling on the treatment of ISP traffic as local. (TR 238)

Staff believes a finding on the part of the Commission that ISP traffic should be treated as local for purposes of the subject interconnection agreement would be consistent with the FCC's treatment of ISP traffic, all jurisdictional issues aside.

Termination

BellSouth places considerable emphasis on the point of termination for a call. (BR p. 2) The basic question is whether or not ISP traffic terminates at the ALEC premises. Witness Hendrix contends that "call termination does not occur when an ALEC, serving as a conduit, places itself between BellSouth and an ISP." (Hendrix TR 218-219) "[I]f an ALEC puts itself in between BellSouth's end office and the Internet service provider, it is acting like an intermediate transport carrier or conduit, not a local exchange provider entitled to reciprocal compensation." (Hendrix TR 230) "Thus, the call from an end user to the ISP only transits through the ISP's local point of presence; it does not terminate there. There is no interruption of the continuous transmission of signals between the end user and the host computers." (Hendrix TR 229) BellSouth states in its brief that "the jurisdictional boundaries of a communication are determined by its beginning and ending points, and the ending point of a call to an ISP is not the ISP switch, but rather is the database or information source to which the ISP provides access." (BR pp. 5-6)

MCIm contends in its brief that BellSouth witness Hendrix' testimony that a call to an ISP terminates not at the local telephone number, but rather at a distant Internet host misunderstands the nature of an Internet call. (BR p. 5) MCIm witness Martinez opines that the ability of Internet users to visit multiple websites at any number of destinations on a single call is a clear indication that the service provided by an ISP is enhanced service, not telecommunications service. (TR 203-204) MCIm further argues that this does not alter the nature of the local call. (BR p. 6) While BellSouth would have one believe that the call involved is not a local call, MCIm points out that in the case of a rural customer using an IXC to connect with an ISP, the call "is suddenly two parts again: a long distance call, for which BellSouth can charge access, followed by an enhanced service." (BR p. 7) (See EXH 7, pp. 106-107)

BellSouth argues in its brief that "in interpreting the language of a contract, words referring to a particular trade will be interpreted by the courts according to their widely accepted trade meaning." (BR p. 11) Yet BellSouth ignores the industry standard definition of the word "termination." The other parties provided several examples of industry definitions on this point.

WorldCom witness Ball states that "[s]tandard industry practice is that a call is terminated essentially when it's answered; when the customer that is buying the telephone exchange service that has the NPA-NXX answers the call by--whether it's a voice grade phone, if it's a fax machine, an answering machine or, in the case of an ISP, a modem." (TR 50-51)

TCG witness Kouroupas testifies that the standard industry definition of "service termination point" is

> Proceeding from a network toward a user terminal, the last point of service rendered by a commercial carrier under applicable tariffs.... In a switched communications system, the point at which common carrier service ends and user-provided service begins, i.e. the interface point between the communications systems equipment and the user terminal equipment, under applicable tariffs. (TR 109)

Witness Kouroupas further explains that "A call placed over the public switched telecommunications network is considered 'terminated' when it is delivered to the telephone exchange bearing the called telephone number." (TR 29) Call termination occurs when a connection is established between the caller and the telephone exchange service to which the dialed telephone number is assigned, answer supervision is returned, and a call record is generated. (TR 31) This is the case whether the call is received by a voice grade phone, a fax machine, an answering machine, or in the case of an ISP, a modem. (TR 51) Witness Kouroupas contends that this is a widely accepted industry definition. (TR 134, 156)

MCIm argues in its brief that

> a "telephone call" placed over the public switched telephone network is "terminated" when it is delivered to the telephone exchange service premise bearing the called telephone number... specifically, in its Local Competition Order (Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, FCC 96-325 (rel. Aug. 8, 1996), ¶1040), the FCC defined terminations "for purposes of section 251(b)(5), as the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises." MCIm terminates telephone calls to Internet Service Providers on its network. As a communications service, a call is

> completed at that point, regardless of the identity or status of the called party. (BR pp. 4-5)

Witness Martinez testifies that "[w]hen a BellSouth customer originates a telephone call by dialing that number, the telephone call terminates at the ISP premises, just as any other telephone call terminates when it reached the premises with the phone number that the end user dialed." (TR 201)

Severability

It appears that recent FCC documents have espoused a two-part, or severability, aspect for Internet traffic. In the May 1997 Universal Service Order at ¶789, the FCC stated:

> When a subscriber obtains a connection to an Internet service provider via voice grade access to the public switched network, that connection is a telecommunications service and is distinguishable from the Internet service provider's offering.(TR at 35-36)

In that Report, the FCC also stated that ISPs "generally do not provide telecommunications." (¶¶ 15, 55) WorldCom argues in its brief that

> The FCC's determination that ISPs do not provide telecommunications was mandated by the 1996 Act's express distinction between telecommunications and information services. "Telecommunications" is "The transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. Section 153(48). By contrast, "information services" is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. Sec. 153(20) (BR p. 13)

WorldCom adds that

> [t]he FCC recognized that the 1996 Act's distinction between telecommunications and information services is crucial. The FCC noted that "Congress intended 'telecommunications service' and 'information service' to refer to separate categories of services" despite the appearance from the end user's perspective that it is a single service because it may involve telecommunications components. (Report to Congress, ¶¶56, 58) (BR pp. 13-14)[Emphasis supplied by WorldCom] (See EXH 1)

BellSouth argues that the complainants misinterpret the FCC's decision. BellSouth points out that this passage is only discussing whether or not ISPs should make universal service contributions. (BR p. 26) Staff agrees. Nevertheless, it is as significant an indication of how the FCC may view ISP traffic as many of the quotes BellSouth has provided, as discussed throughout this recommendation.

In its brief, BellSouth claims that the FCC "specifically repudiated" the two-part theory. (BR p. 13) BellSouth cites the FCC's Report to Congress, CC Docket No., 96-45, April 10, 1998, ¶220. The FCC stated

> We make no determination here on the question of whether competitive LECs that serve Internet service providers (or Internet service providers that have voluntarily become competitive LECs) are entitled to reciprocal compensation for terminating Internet traffic. That issue, which is now before the [FCC], does not turn on the status of the Internet service provider as a telecommunications carrier or information service provider. (BR p. 13) [emphasis supplied by BellSouth]

BellSouth claims that this means the FCC believes the distinction is "meaningless in the context of the FCC's pending reciprocal compensation decision." (BR p. 13) However, the parties point out that it is not totally clear what the FCC means in this passage. It appears to staff that the FCC is talking here about the status of the provider, not on the severability of the telecommunications service from the information service. Indeed, in the same report the FCC brought up the severability notion, as discussed above.

BellSouth also argues that the severability theory is contradicted by the FCC's description of Internet service in its Non-Accounting Safeguards Order (Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications

Act of 1934, As Amended, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-149 (released Dec. 24, 1996), note 291), where the FCC states:

> The Internet is an interconnected global network of thousands of interoperable packet-switched networks that use a standard protocol...to enable information exchange. An end user may obtain access to the Internet from an Internet service provider, by using dial-up or dedicated access to connect to the Internet service provider's processor. The Internet service provider, in turn, connects the end user to an Internet backbone provider that carries traffic to and from other Internet host sites. (BR p. 15)

BellSouth claims that the significance of this is that calls to ISPs only transit through the ISP's local point of presence. Thus, the call does not terminate there. (BR p. 15) (See TR 231, 267-268) Intermedia argues in its brief that "[u]nder this view, the [ALEC] is not a carrier but rather a 'conduit' between BellSouth and the interexchange world (TR 231), and this Commission has no jurisdiction over the use of the local network to place these calls to the ISP." (TR 267-268). In support of this conclusion, BellSouth mentions several other services, such as Asynchronous Transfer Mode (ATM) technology, that use packet switching. (TR 120) BellSouth makes the point that the jurisdictional nature of a call is not changed through the conversion from circuit switching to packet switching, to which TCG witness Kouroupas agreed. (TR 119)

BellSouth also discussed a case where the end-user made a long-distance call to access voice mail. In that case, it appears that the call was interstate, and that the FCC found it did not lose that interstate character upon being forwarded to voice mail. (BR p. 18) Staff does not comprehend BellSouth's point. By applying this logic, if a local call is used to access an information service, it follows that the entire transmission would be local. In yet another case cited by BellSouth, the FCC found that interstate foreign exchange service was interstate service, and thus came under the FCC's jurisdiction. Once again, it is difficult to discern BellSouth's point. None of the cases cited by BellSouth is on point.

BellSouth further argues that "[t]he FCC has long held that the jurisdiction of a call is determined not by the physical location of the communications facilities or the type of facilities used, but by the nature of the traffic that flows over those facilities." (BR p. 16) This is an interesting argument in view of the fact that it is BellSouth claiming that the distant location of the host accessed over the Internet makes ISP traffic interstate (BR pp. 5-6), and that the nature of ISP traffic as either telecommunications or information service is irrelevant. (BR p. 13)

However, witness Hendrix admits that the FCC intended for ISP traffic to be "treated" as local, regardless of jurisdiction." He emphasizes the word treated, and explains that the FCC "did not say that the traffic was local but that the traffic would be treated as local." (EXH 7, p. 21)

FPSC Treatment

BellSouth dismisses the FPSC's Order No. 21815, issued September 5, 1989, in Docket No. 880423-TP, Investigation into the Statewide Offering of Access to the Local Network for the Purpose of Providing Information Services, as an interim order. In that order, the FPSC found that end user access to information service providers, which include Internet service providers, is by local service. In that proceeding, BellSouth's witness testified that:

> [C]onnections to the local exchange network for the purpose of providing an information service should be treated like any other local exchange service. (Order, p. 25)

The FPSC agreed with BellSouth's witness. In that order, the FPSC also found that calls to ISPs should be viewed as jurisdictionally intrastate local exchange calls terminating at an ISP's location in Florida. BellSouth's position as stated in the order was that

> calls should continue to be viewed as local exchange traffic terminating at the ESP's [Enhanced Service Provider's] location. Connectivity to a point out of state through an ESP should not contaminate the local exchange. (Order, p. 24)

ISPs are a subset of ESPs.

Witness Hendrix claims that this order was only an interim order that has now been overruled. (TR 265-55, 269, 272, 330-331) However, witness Hendrix could not identify any order containing a different policy, nor could he specify the FCC order that supposedly overrules the FPSC's order. (EXH 7, pp. 81-82)

BellSouth admitted that this definition had not been changed at the time it entered into its Agreement with TCG. (EXH 7 at 81-82)

It is clear that the treatment of ISP traffic was an issue long before the parties' Agreement was executed. The FPSC found, in Order No. 21815, as discussed above, that such traffic should be treated as local in nature. Both WorldCom and BellSouth clearly were aware of this decision, and should have considered it when entering into the Agreement.

Intent of Parties

In determining what most likely was the parties' intent when a contract is entered into, one may look to the subsequent actions of the parties. WorldCom argues in its brief that "the intent of the parties is revealed not just by what is said, but by an analysis of all the facts and circumstances surrounding the disputed issue." (BR p. 10)

Staff furthermore believes that contract construction principles require the result urged by WorldCom. In James v. Gulf Life Insur. Co., 66 So.2d 62, 63 (Fla. 1953) the Florida Supreme Court cited with favor Contracts, 12 Am.Jur. § 250, pages 791-93, as a general proposition concerning contract construction in pertinent part as follows:

> Agreements must receive a reasonable interpretation, according to the intention of the parties at the time of executing them, if that intention can be ascertained from their language ... Where the language of an agreement is contradictory, obscure, or ambiguous, or where its meaning is doubtful, so that it is susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes a rational and probable agreement must be preferred ... An interpretation which is just to both parties will be preferred to one which is unjust.

In the construction of a contract, the circumstances surrounding the parties, at the time the contract was made, should be considered in ascertaining their intention. Triple E Development Co. v. Floridagold Citrus Corp., 51 So.2d 435, 438, rhg. den. (Fla.

1951). In construing a contract, what a party did or omitted to do after the contract was made may be properly considered. Vans Agnew v. Fort Myers Drainage Dist., 69 F.2d 244, 246, rhg. den., (5th Cir.). Courts may look to the subsequent action of the parties to determine the interpretation that they themselves place on the contractual language. Brown v. Financial Service Corp., Intl., 489 F.2d 144, 151 (5th Cir.) citing LaLow v. Codomo, 101 So.2d 390 (Fla. 1958).

As noted above, Section 1.40 of the Agreement defines local traffic. The definition appears to be carefully drawn. Local traffic is said to be calls between two or more service users bearing NPA-NXX designations within the local calling area of the incumbent LEC. It is explained that local traffic includes traffic traditionally referred to as "local calling" and as "EAS." No mention is made of ISP traffic. Therefore, nothing in Section 1.40 sets ISP traffic apart from local traffic. It is further explained that all other traffic that originates and terminates between end users within the LATA is toll traffic.

As evidence of its intent, BellSouth argues that the interpretation of a contract must be one consistent with reason, probability, and the practical aspect of the transaction between the parties. (BR p. 11) BellSouth contends that it was "economically irrational for it to have agreed to subject ISP traffic to payment of reciprocal compensation." (BR p. 12; see also TR 235-237) BellSouth claims it "had no rational economic reason to have agreed to pay reciprocal compensation for the ISP traffic, because...such assent would have likely guaranteed that BellSouth would lose money on every customer it serves who subscribed to an ISP served by a complainant." (BR p. 7)

In an example provided by BellSouth, a BellSouth residential customer subscribes to an ISP that is served by an ALEC. The customer uses the Internet for two hours per day. (TR 236). This usage would generate a reciprocal compensation payment to the ALEC of $36.00 per month, assuming a 1 cent per minute reciprocal compensation rate. A Miami BellSouth customer pays $10.65 per month for residential service. Thus, BellSouth would pay $25.35 per month more to the ALEC than it receives from its customer. (BR p. 28) BellSouth claims that this unreasonable result is proof that it never intended to include ISP traffic as local for reciprocal compensation purposes. (BR pp. 28-29)

However, not all parties receive reciprocal compensation of 1 cent per minute. The MCIm Agreement specifies a rate of $0.002 per minute, not $0.01. (EXH 7, p. 108) (See Attachment I, Table 1-2) In this case, using BellSouth's example, the total reciprocal compensation would be $7.20. MCIm points out in its brief that the contract containing the $0.01 rate is one that BellSouth agreed to. They argue that "[w]hether BellSouth agreed to this rate because they mistakenly thought that a rate five times higher than cost would give it some competitive advantage or whether BellSouth agreed to it without thinking at all, it is not the Commission's role to protect BellSouth from itself." (BR p. 10)

In support of its position that ISP traffic was intended to be treated as local in the Agreement, WorldCom points out that BellSouth charges its own ISP customers local business line rates for local telephone exchange service that enables the ISP's customers within the local calling area to connect with the ISP by means of a local call. Such calls are rated and billed as local, not toll. (Ball TR 32)

MCIm also points out that BellSouth treats calls to ISPs that are its customers as local calls. BellSouth also offers its ISP customers service out of its local exchange tariffs. MCIm asserts that while its own customers are treated one way, BellSouth would have ISP customers of the ALECs treated differently. (MCIm BR p. 11)

Going beyond BellSouth's treatment of its own ISP customers' traffic, is the practical aspect of how to measure the traffic. As TCG points out in its brief, BellSouth failed to take any steps to develop a tracking system to separately account for ISP traffic. The TCG contract was entered into in July 1996, but BellSouth did not attempt to identify ISP traffic until May or June of 1997. (TCG BR p. 3; TR 114-115, 298-301, 308-309) It would be necessary to develop a tracking system. (TR 114-115, 123-124, 128, 183-185) It appears that the tracking system currently used by BellSouth is based on identifying the seven-digit number associated with an ISP. Absent that, BellSouth must rely on estimates. (TR 105, 294-295)

Intermedia also points out in its brief that:

> If ISP traffic is not local as BellSouth contends, it would have been imperative for the parties to develop a system to identify and measure ISP traffic, because there is no ready mechanism in place for tracking local calls to ISPs. (TR 68, 124, 154-155) The calls at issue are commingled with all other local traffic and are indistinguishable from other local calls. If BellSouth intended to exclude traffic terminated to ISPs from other local traffic, it would have needed to develop a way to measure traffic that distinguishes such calls from all

> other types of local calls with long holding times, such as calls to airlines and hotel reservations, and banks. (TR 154-155, 184) In fact, there is no such agreed-upon system in place today. (TR 184-189)(BR pp. 14-15)[Cites provided by Intermedia]

This is perhaps the most telling aspect of the case. BellSouth made no effort to separate out ISP traffic from its own bills until the May-June 1997 time frame. (Hendrix TR 305) WorldCom argues in its brief that BellSouth's "lack of action is especially glaring given Mr. Hendrix's acknowledgment that there are transport and termination costs associated with calls terminating at an ISP." (TR 320) Prior to that time, BellSouth may have paid some reciprocal compensation for ISP traffic. Witness Hendrix admitted, "We may have paid some, I will not sit here and say that we did not pay any." (TR 309) The other parties made no effort to separate out ISP traffic, and based on their position that the traffic should be treated as local, this is as one would expect. In some cases the contracts were entered into more than a year before this time period. It appears from the record that there was little, if any, billing of reciprocal compensation by the ALECs until just before BellSouth began to investigate the matter. (EXH 3, p. 144)

Staff wonders what would have happened if the complainants <u>had</u> separated out ISP traffic before sending bills to BellSouth? It was the receipt of the bills for considerable amounts of reciprocal compensation that triggered BellSouth's investigation of the matter, and its decision to begin removing ISP traffic from its own bills. (TR 308-309) If these large bills were never received, would BellSouth have continued to bill the ALECs for reciprocal compensation on ISP traffic? There would have been no reason for BellSouth to investigate, and therefore no reason for them to start separating their own traffic. No one would have been the wiser. Under the circumstances, one has difficulty concluding that the parties all knew that ISP traffic was interstate, and should be separated out before billing for reciprocal compensation on local traffic, as BellSouth contends.

<u>Impact on Competition</u>

The potential impact of BellSouth's actions on local competition is perhaps the most egregious aspect of the case. The Telecommunications Act of 1996 "established a reciprocal compensation mechanism to <u>encourage local competition</u>." (Hendrix TR 235) BellSouth witness Hendrix argues that "The payment of reciprocal compensation for ISP traffic would impede local competition." (TR 235) Yet, BellSouth seems oblivious to the potential effect that BellSouth's refusal to pay reciprocal compensation could have on competition. As argued by TCG witness Kouroupas,

> As competition grows, the smaller, leaner ALECs may well win other market segments from ILECs. If each time this occurs the ILEC, with its greater resources overall, is able to fabricate a dispute with ALECs out of whole cloth and thus invoke costly regulatory processes, local competition could be stymied for many years. (TR 100)

Staff agrees.

Conclusion

It appears to staff that the matter of whether ISP traffic is local or interstate can be argued both ways. While there is evidence that the FCC may believe Internet usage is an interstate service, it also appears that it is not a telecommunications service. The FCC itself seems to be leaning toward the notion of severability of the information service portion of an Internet call from the telecommunications portion, which is often a local call. Further, the FCC has allowed ISPs to purchase local service for provision of Internet services, without ever ruling on the extent to which the "local" characterization should apply. Indeed, as recently as April 1998, the FCC itself indicated that a decision has not been made as to whether or not reciprocal compensation should apply. However, while there is some room for interpretation, staff believes the evidence of record appears to weigh in favor of treating the traffic as local, regardless of jurisdiction, for purposes of the Interconnection Agreement.

Staff believes it is reasonable, therefore, to conclude on the basis of the language of the Agreement and of the effective law that the parties intended at the time of the Agreement that calls originated by an end user of one and terminated to an ISP of the other would be rated and billed as local calls; else one would expect the definition of local calls in the Agreement to set out an explicit exception.

Nevertheless, if the parties' agreement concerning reciprocal compensation can be said to be ambiguous or susceptible of different meanings, then it is proper to look to their subsequent conduct in order to divine their intent. BellSouth concedes that it rates the traffic of its ISP customers as local traffic. It would hardly be just for BellSouth to conduct itself in this way while treating WorldCom differently. Moreover, BellSouth made no attempt to separate out ISP traffic from its bills to the ALECs until it decided it did not want to pay reciprocal compensation for ISP traffic. (EXH 2 at PK-2; TR 305) Staff believes that BellSouth's conduct subsequent to the Agreement was for a long time consistent with the interpretation of Section 1.40 urged by WorldCom. Staff believes that a party to a contract cannot be permitted to impose unilaterally a different meaning than the one shared by the parties at the time of contracting when it later becomes enlightened or discovers an unintended consequence.

BellSouth states in its brief that "the Commission must consider the extant FCC orders, case law, and trade usage at the time the parties negotiated and executed the Agreements." (BR 12) Staff agrees. The above discussion considers all of these elements in addition to the subsequent action of the parties. By its own standards, BellSouth is found wanting.

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

ISSUE 2: Under their Interconnection Agreement, are Teleport Communications Group, Inc./TCG South Florida and BellSouth Telecommunications, Inc., required to compensate each other for transport and termination of traffic to Internet Service Providers? If so, what action, if any, should be taken?

RECOMMENDATION: Yes. BellSouth should be required to pay TCG reciprocal compensation for the transport and termination of telephone exchange service local traffic that is handed off 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 Enhanced Service Providers should not be treated differently from other local dialed traffic. The Commission should require BellSouth to compensate TCG according to the parties' interconnection agreement, including interest, for the entire period the balance owed is outstanding. (MARSH)

POSITION OF THE PARTIES

WORLDCOM, INTERMEDIA, MCIm: No position.

TCG: Yes. Under the BellSouth-TCG Interconnection Agreement, TCG and BellSouth are required to compensate each other for transport and termination of traffic to Internet Service Providers. The Commission should order BellSouth to immediately remit to TCG all funds unlawfully withheld by BellSouth, with interest.

BELLSOUTH: No. BellSouth is only required to compensate Teleport for transport and termination of local traffic. ISP traffic is interstate traffic. No action need be taken by the Commission.

STAFF ANALYSIS: Local traffic is defined in Section 1.D. of the Agreement between BellSouth and TCG as:

> 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 arrangement with an independent LEC, with which TCG is not directly interconnected.

This Agreement was entered into by the parties on July 15, 1996, and was subsequently approved by the FPSC in Docket No.

960862-TP. Under TCG's prior Agreement with BellSouth, ISP traffic was treated as local. (TR 126-127)

The TCG Agreement states in Section IV.B and part of I.C:

> The delivery of local traffic between parties shall be reciprocal and compensation will be mutual according to the provisions of this Agreement.
>
> Each party will pay the other for terminating its local traffic on the other's network the local interconnection rates as set forth in Attachment B-1, incorporated herein by this reference. (Hendrix TR 222)

As discussed in Issue 1, no exceptions have been made to the definition of local traffic to exclude ISP traffic. The facts in this issue are essentially the same as in Issue 1.

Therefore, staff recommends that BellSouth should be required to pay TCG reciprocal compensation for the transport and termination of telephone exchange service local traffic that is handed off 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 Enhanced Service Providers should not be treated differently from other local dialed traffic. The Commission should require BellSouth to compensate TCG according to the parties' interconnection agreement, including interest, for the entire period the balance owed is outstanding.

ISSUE 3: Under their Interconnection Agreement, are MCImetro Access Transmission Services, Inc., and BellSouth Telecommunications, Inc., required to compensate each other for transport and termination of traffic to Internet Service Providers? If so, what action, if any, should be taken?

RECOMMENDATION: Yes. BellSouth should be required to pay MCIm reciprocal compensation for the transport and termination of telephone exchange service local traffic that is handed off by BellSouth to MCIm for termination with telephone exchange service end users that are Internet Service Providers or Enhanced Service Providers under the terms of the MCIm and BellSouth Florida Partial Interconnection Agreement. Traffic that is terminated on a local dialed basis to Internet Service Providers or Enhanced Service Providers should not be treated differently from other local dialed traffic. The Commission should require BellSouth to compensate MCIm according to the parties' interconnection agreement, including interest, for the entire period the balance owed is outstanding. (MARSH)

POSITION OF THE PARTIES

WORLDCOM, TCG, INTERMEDIA: No position.

MCIm: Yes. BellSouth and MCIm must pay each other reciprocal compensation for the termination of telephone calls to ISPs. The definition of Local Traffic makes no exception for such calls. Had such an exception been intended, it would have been expressly included by the parties. BellSouth should be ordered to pay reciprocal compensation for such traffic.

BELLSOUTH: No. BellSouth is only required to compensate MCIm for transport and termination of local traffic. ISP traffic is interstate traffic. No action need be taken by the Commission.

STAFF ANALYSIS: The Agreement between MCIm and BellSouth defines local traffic in Attachment IV, Subsection 2.2.1. That subsection reads as follows:

> The parties shall bill each other reciprocal compensation at the rates set forth for Local Interconnection in this Agreement and the Order of the FPSC. Local Traffic is defined as any telephone call that originates in one exchange and terminates in either the same exchange, or a corresponding Extended Area (EAS) exchange. The terms Exchange and EAS exchanges are defined and specified in Section A3 of BellSouth's General Subscriber Service Tariff. (EXH 5, p. 8)

MCIm witness Martinez testified that no exception to the definition of local traffic was suggested by BellSouth. (TR 205) MCIm argues in its brief that "[i]f BellSouth wanted a particular exception to the general definition of local traffic, it had an obligation to raise it." (BR p. 7)

As discussed in Issue 1, no exceptions have been made to the definition of local traffic to exclude ISP traffic. The facts in this issue are essentially the same as in Issue 1.

Therefore, staff recommends that BellSouth should be required to pay MCIm reciprocal compensation for the transport and termination of telephone exchange service local traffic that is handed off by BellSouth to MCIm for termination with telephone exchange service end users that are Internet Service Providers or Enhanced Service Providers under the terms of the MCIm and BellSouth Florida Partial Interconnection Agreement. Traffic that is terminated on a local dialed basis to Internet Service Providers or Enhanced Service Providers should not be treated differently from other local dialed traffic. The Commission should require BellSouth to compensate MCIm according to the parties' interconnection agreement, including interest, for the entire period the balance owed is outstanding.

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

RECOMMENDATION: Yes. BellSouth should be required to pay Intermedia reciprocal compensation for the transport and termination of telephone exchange service local traffic that is handed off by BellSouth to Intermedia for termination with telephone exchange service end users that are Internet Service Providers or Enhanced Service Providers under the terms of the Intermedia and BellSouth Florida Partial Interconnection Agreement. Traffic that is terminated on a local dialed basis to Internet Service Providers or Enhanced Service Providers should not be treated differently from other local dialed traffic. The Commission should require BellSouth to compensate Intermedia according to the parties' interconnection agreement, including interest, for the entire period the balance owed is outstanding. (MARSH)

POSITION OF THE PARTIES

WORLDCOM, TCG, MCIm: No position.

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

BELLSOUTH: No. BellSouth is only required to compensate Intermedia for transport and termination of local traffic. ISP traffic is interstate traffic. No action need be taken by the Commission.

STAFF ANALYSIS: The Agreement with Intermedia defines Local Traffic in Section 1(D) as:

> any telephone call that originates in one exchange and terminates in either the same exchange, or a corresponding Extended Area Service (EAS) exchange. The terms Exchange, and EAS exchanges are defined and specified in Section A3 of BellSouth's General Subscriber Service Tariff. (TR 142-143)

The portion regarding reciprocal compensation, Section IV(A) states:

> The delivery of local traffic between the parties shall be reciprocal and compensation will be mutual according to the provisions of this Agreement. (TR 143)

Section IV(B) states:

> Each party will pay the other party for terminating its local traffic on the other's network the local interconnection rates as set forth in Attachment B-1, by this reference incorporated herein.(TR 143-144)

Intermedia points out in its brief that "the Agreement contemplates subcategories of local traffic, with some categories being eligible for reciprocal compensation and at least one subcategory not. There is, however, not one word in the Agreement that suggests such an approach. Moreover, nothing in the Agreement creates a distinction for calls placed to telephone exchange end-users that happen to be ISPs." (TR 144) (BR p. 14; cites provided by Intermedia)

Witness Hendrix complains that "[n]o Intermedia representative ever indicated to BellSouth that Intermedia assumed the traditional local calling area definition in Section A3 to include ISP traffic. If that was Intermedia's intent, that intent should have been made unmistakingly [sic] clear." (Hendrix TR 221)

As discussed in Issue 1, no exceptions have been made to the definition of local traffic to exclude ISP traffic. The facts in this issue are essentially the same as in Issue 1.

Therefore, staff recommends that BellSouth should be required to pay Intermedia reciprocal compensation for the transport and termination of telephone exchange service local traffic that is handed off by BellSouth to Intermedia for termination with telephone exchange service end users that are Internet Service Providers or Enhanced Service Providers under the terms of the Intermedia and BellSouth Florida Partial Interconnection Agreement. Traffic that is terminated on a local dialed basis to Internet Service Providers or Enhanced Service Providers should not be treated differently from other local dialed traffic. The Commission should require BellSouth to compensate Intermedia according to the parties' interconnection agreement, including interest, for the entire period the balance owed is outstanding.

ISSUE 5: Should this docket be closed?

RECOMMENDATION: Yes. (BROWN)

STAFF ANALYSIS: Upon approval of the issues, there is no further action to be taken in this docket. Therefore, the docket should be closed.