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November 9, 2000

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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

Re: Docket No. 000084-TP

Dear Ms. Bayo:

Enclosed herewith for filing in the above-referenced docket on behalf of US LEC of Florida Inc. ("US LEC") are the original and fifteen copies of US LEC's Motion to Strike.

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

KAH/rl
Enclosures

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DOCUMENT NUMBER-DATE

14539 NOV-98

FPSC-RECORDS/REPORTING

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Petition by BellSouth Telecommunications, Inc.)
for approval of arbitration of an interconnection)
agreement with US LEC of Florida, Inc. pursuant)
to the Telecommunications Act of 1996.)
_____)

Docket No. 000084-TP

Filed: November 9, 2000

**US LEC OF FLORIDA, INC.'S
MOTION TO STRIKE**

COMES NOW US LEC of Florida, Inc. ("US LEC"), through counsel and pursuant to Rule 28-106.204(1), Florida Administrative Code, and files this Motion to Strike, stating as grounds the following.

1. On October 27, 2000, Cynthia K. Cox, on behalf of BellSouth Telecommunications, Inc. ("BellSouth"), submitted prefiled rebuttal testimony in this proceeding.

2. Ms. Cox testifies concerning the appropriate reciprocal compensation rate to be applied to Internet Service Provider ("ISP")-bound traffic. [Cox Rebuttal Testimony, page 23, line 18 through page 25, line 24, and Exhibit CKC-4.]

3. In its Petition for Arbitration, under Issue 7, BellSouth requested that the Commission accept BellSouth's proposed definition of Local Traffic which would exclude ISP-bound traffic and IP Telephony traffic from the definition of Local Traffic. BellSouth's petition and its proposed language for an interconnection agreement failed to raise any issue regarding an alternative lower reciprocal compensate rate for the transport and termination of ISP-bound calls as now advanced in the rebuttal testimony of Ms. Cox. [See Petition for Arbitration, at pp. 10-15].¹

¹Nor did BellSouth raise the issue of a differential rate for ISP-bound traffic under Issue 6 in its Petition for Arbitration which asks "what are the appropriate rates to be paid by the parties for the transport and termination of local traffic?" [See Petition for Arbitration, at p. 9].

DOCUMENT NUMBER-DATE

14539 NOV-98

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4. US LEC did not raise the issue of a different reciprocal compensation rate for ISP-bound traffic in its Response to BellSouth's Petition for Arbitration.

5. BellSouth did not raise any issue concerning the appropriate the rate for ISP-bound traffic in its Proposed Issues List, submitted August 8, 2000. Rather, BellSouth proposed that Issue 7 be defined as follows: "What is the appropriate definition of local traffic for purposes of the parties' reciprocal compensation obligations under Section 251(b)(5) of the 1996 Act?"

6. The ISP-bound reciprocal compensation rate issue was not addressed in the prefiled direct and rebuttal testimony of any US LEC witness, or in the prefiled direct testimony of BellSouth's only witness, Ms. Cox. Ms. Cox does not even attempt to characterize her testimony as responsive to US LEC's direct testimony. The only positions taken by US LEC and BellSouth on the record in this proceeding prior to the filing of Ms. Cox's rebuttal testimony were US LEC's position that reciprocal compensation should be paid for ISP-bound traffic and BellSouth's position that there should be no payment of reciprocal compensation for ISP-bound traffic pending final resolution of this issue by the Federal Communications Commission.

7. The decision on which Ms. Cox relies as support for BellSouth's position was made at the Commission's August 29, 2000 Agenda Conference in Global NAPs' arbitration with BellSouth and reflected in Order No. PSC-00-1680-FOF-TP issued September 19, 2000, providing Ms. Cox ample opportunity to raise the issue of a different rate for ISP-bound traffic in her direct testimony filed in this docket on September 21, 2000. However, rather than raising the issue in direct testimony and affording US LEC an opportunity to respond in rebuttal testimony, it is only with Ms. Cox's rebuttal testimony that BellSouth attempts for the first time to raise the question of a different reciprocal compensation rate for ISP-bound traffic and to present arguments and

“evidence” relating to such rates.

8. BellSouth’s attempt to raise for the first time, at this stage of the proceeding, the issue of the appropriate ISP-bound reciprocal compensation rate through Ms. Cox’s rebuttal testimony or in any other way is entirely inappropriate and should be stricken. Section 252(b)(4)(C) of the Communications Act of 1934, as amended (the “Act”), limits the Commission’s jurisdiction in this matter to resolving issues raised in the arbitration petition and response. Because the issue of a lower rate for ISP-bound traffic was not raised in US LEC’s Petition for Arbitration or in BellSouth’s Response, it is not properly before the Commission.

9. Even if the Commission determines that BellSouth may somehow add an issue after it has submitted its Response, BellSouth’s arguments and “evidence” – if they belong in this docket at all – should have been raised in BellSouth’s issue identification, or, at the very least, Ms. Cox’s direct testimony. The shift in position by BellSouth and the introduction of new “evidence” at the eleventh hour create both a new issue of law (whether ISP-bound traffic should be compensated at a lower rate than other local traffic) and a new issue of fact (whether ISP-bound traffic should be compensated at the rate suggested by BellSouth) to which US LEC has had no opportunity to respond by submitting *contrary evidence* and no opportunity to explore through appropriate discovery. Permitting BellSouth to introduce new “evidence” at this stage of the proceeding prejudices US LEC’s ability to rebut BellSouth’s eleventh hour proposal with record evidence.

10. The Commission has established a docket open to all interested parties in which BellSouth may argue its new position and that forum is the appropriate place to resolve this question. Both US LEC and BellSouth are parties in Docket No. 000075-TP, *Investigation into appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the*

Telecommunications Act of 1996. This proceeding, which includes numerous industry participants that will be affected by the compensation mechanism the Commission establishes for ISP-bound calls, is the appropriate forum to address BellSouth's claim that the compensation rate for ISP-bound traffic should be less than the rate for all other local traffic. A review of the issues identified for consideration in Docket No. 000075-TP makes clear that the arguments and "evidence" BellSouth attempts to introduce for the first time in this proceeding are precisely the issues that are to be considered in the industry-wide proceeding. See, July 25, 2000 Memorandum in Docket No. 000075-TP, attached hereto as Exhibit A.

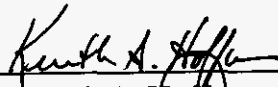
11. In the alternative, should the Commission not strike the portions of Ms. Cox's rebuttal testimony described above, it must give US LEC an opportunity to probe the factual predicate for BellSouth's new position through appropriate discovery and a concomitant opportunity to respond in surrebuttal testimony to BellSouth's untimely argument in rebuttal testimony that the reciprocal compensation rate for ISP-bound traffic should be less than the rate for all other local traffic. Due process requires that US LEC be afforded the opportunity to respond to this new issue in the event the Prehearing Officer denies this Motion to Strike. Moreover, if the Motion to Strike is denied, the Commission will benefit from the input of both parties on this new issue.

WHEREFORE, for the reasons above, US LEC respectfully urges the Prehearing Officer in this proceeding to grant its Motion to Strike, and strike the rebuttal testimony of BellSouth witness, Cynthia K. Cox, from page 23, line 18, through page 25, line 24, including Exhibit CKC-4. Alternatively, should the Prehearing Officer decline to strike the rebuttal testimony, US LEC respectfully urges the Prehearing Officer to continue the scheduled hearing for a minimum of thirty (30) days to permit US LEC to propound discovery to BellSouth on the factual predicate for its

newly stated position.

Respectfully submitted this 9th day of November, 2000.

Respectfully submitted,



Kenneth A. Hoffman, Esq.

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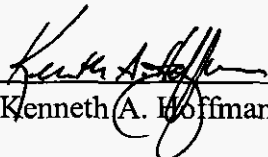
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by hand delivery(*), telecopier(**) or U. S. Mail to the following this 9th day of November, 2000:

Earl Edenfield, Esq.(**)
Douglas Lackey, Esq.(**)
BellSouth Telecommunications, Inc.
675 West Peachtree Street, N.E.
Suite 4300, BellSouth Center
Atlanta, GA 30375

Earl Edenfield, Esq.(*)
Douglas Lackey, Esq.(*)
c/o Nancy H. Sims
150 South Monroe Street
Suite 400
Tallahassee, Florida 32301-1556

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Tallahassee, FL 32399-0850



Kenneth A. Hoffman, Esq.

USLEC/strike.1

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State of Florida

-M-E-M-O-R-A-N-D-U-M-

DATE: July 25, 2000

TO: All Parties and Interested Persons

FROM: Diana W. Caldwell, Staff Counsel

RE: Docket No. 000075-TP - Investigation into appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the Telecommunications Act of 1996

A second issue identification conference is scheduled for the following time and place:

Time and Date: 9:30 a.m., Thursday, August 3, 2000
Place: Room 152, Betty Easley Conference Center
4075 Esplanade Way, Tallahassee, FL

A call in number has also been obtained for those persons who cannot attend the conference. A limited number of ports has been obtained, therefore, staff requests that any party calling in be prompt. The number to call in is (850) 410-0966 or Suncom (850) 210-0966.

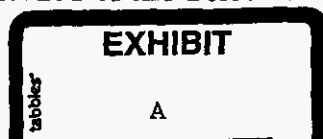
Attached is the list of issues agreed upon at the July 13, 2000, issue identification conference. Those issues are 1, 2, 3, 5, 6, and 9. Staff has also included the remaining issues (numbers 4, 7, and 8) to be discussed at the next issue identification conference in the order they believe is most appropriate for consideration.

Please note also that Chairman Deason has moved the hearing dates from January 17 - 19, 2001, to March 7 - 9, 2001.

If you have any questions about this meeting, please call me at (850) 413-6175 or Anne Marsh at (850) 413-6554.

DWC
Attachment
c: Division of Records and Reporting
Division of Competitive Services (Marsh)

Docket No. 000075-TP - Investigation into appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the Telecommunications Act of 1996



The following is a list of the issues (issues 1, 2, 3, 5, 6, and 9) as agreed to in the July 13, 2000, issue identification meeting/teleconference. In addition, issues numbered 4, 7, and 8 are to be discussed at the next issue identification meeting on August 3, 2000. Staff has included those issues (numbered 4, 7, and 8 and designated with a "**") in the order it believes is appropriate.

1. (a) Does the Commission have the jurisdiction to adopt an intercarrier compensation mechanism for delivery of ISP-bound traffic?
(b) If so, does the Commission have the jurisdiction to adopt such an intercarrier compensation mechanism through a generic proceeding?
2. Is delivery of ISP-bound traffic subject to compensation under Section 251 of the Telecommunications Act of 1996?
3. What actions should the Commission take, if any, with respect to establishing an appropriate compensation mechanism for ISP-bound traffic in light of current decisions and activities of the courts and the FCC?
- 4.* What policy considerations should inform the Commission's decision in this docket? (Including, for example, how the compensation mechanism will affect ALECs' competitive entry decisions; cost recovery issues and implications; economically efficient cost recovery solutions in the short term and in the long term.)
5. Is the Commission required to set a cost-based mechanism for delivery of ISP-bound traffic?
6. What factors should the Commission consider in setting the compensation mechanisms for delivery of ISP-bound traffic?
- 7.* Should intercarrier compensation for delivery of ISP-bound traffic be limited to carrier and ISP arrangements involving circuit-switched technologies?
- 8.* How can ISP-bound traffic be separated from non-ISP bound traffic for purposes of addressing any reciprocal compensation payments?
9. Should the Commission establish compensation mechanisms for delivery of ISP-bound traffic to be used in the absence of the parties reaching an agreement or negotiating a compensation mechanism? If so, what should be the mechanism?

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