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RECORDS AND
REPORTING

November 30, 2000

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

Re: Docket No. 000636-TP (Sprint Complaint)

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Brief of the Evidence, which we ask that you file in the captioned docket.

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,
Michael P. Goggin
Michael P. Goggin
(25)

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey
Nancy B. White

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**CERTIFICATE OF SERVICE
Docket No. 000636-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via

U.S. Mail this 30th day of November, 2000 to the following:

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Michael P. Goggin
(2)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Complaint of Sprint Communications Company) Docket No. 000636-TP
Limited Partnership against BellSouth)
Telecommunications, Inc. for [an alleged] failure)
To Comply with Its Interconnection Agreement)
_____) Filed: November 30, 2000

**BELLSOUTH TELECOMMUNICATIONS, INC.
BRIEF OF LAW AND THE EVIDENCE**

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STATEMENT OF THE CASE

Section 251(b)(5) of the Telecommunications Act of 1996 (the “Act”) imposes upon local exchange carriers (“LECs”) the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications. Shortly after passage of the act, the FCC made clear in its August 8, 1996 Local Competition Order and applicable rules that the reciprocal compensation obligation imposed on LECs by Section 251(b)(5) only applies to *local* traffic. *First Report and Order*, CC Docket No. 96-98 (Aug. 8, 1996), ¶¶ 1033-1040. In particular, the FCC stated that the reciprocal compensation provisions in Section 251(b)(5):

should apply only to traffic that originates and terminates within a local area . . . [R]eciprocal compensation for transport and termination is intended for a situation in which two carriers collaborate to complete a local call . . .

Id. at ¶¶1034-1035. Section 51.703(a) of the FCC rules requires LECs to “establish reciprocal compensation arrangements for the transport and termination of local telecommunications traffic with any requesting telecommunications carrier.” Section 51.701(e) defines a reciprocal compensation arrangement as:

one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier’s network facilities of local telecommunications traffic that originates on the network facilities of the other carrier.

For purposes of reciprocal compensation, “local telecommunications traffic” means traffic “that originates *and terminates* within a local service area established by the state commission.” 47 C.F.R. § 51.701(b)(emphasis added).

On July 1, 1997, Sprint Communications Company, LP (“Sprint”) and BellSouth Telecommunications, Inc. (“BellSouth”) entered into an interconnection agreement (the

"Agreement"). Like the FCC's rules, the Agreement provides that reciprocal compensation shall be exchanged for the transport and termination of local traffic, which is defined as traffic that originates and terminates in the same local calling area. The Agreement does not include any provision regarding intercarrier compensation for the shared provision of access services to enhanced services providers ("ESPs"), such as Internet Service Providers ("ISPs"). In addition, ISP-bound traffic, which, as the FCC has repeatedly stated, does not terminate locally and is interstate access traffic, is not expressly included in the definition of "local traffic" in the Agreement.

On May 24, 2000, Sprint filed a complaint against BellSouth in which it alleged that BellSouth had breached the reciprocal compensation provisions of the Agreement. Sprint alleged that, contrary to the plain language of the Agreement, the parties intended to include ISP-bound traffic in the definition of "local traffic" for purposes of the Agreement, and that BellSouth had failed to pay reciprocal compensation for such traffic. The formal hearing of this matter took place on November 9, 2000. BellSouth submitted the direct testimony of Jerry Hendrix and David Scollard and the rebuttal testimony of Jerry Hendrix and Richard McIntire.

This Brief of the Evidence is submitted in accordance with the post hearing procedures of Rule 25-22.056, Florida Administrative Code. A summary of BellSouth's positions on each of the issues to be resolved in this docket is delineated in the following pages and marked with an asterisk.

STATEMENT OF BASIC POSITION

BellSouth respectfully requests that the Commission deny the relief sought by Sprint in its Complaint. The plain language of the Agreement clearly states that the reciprocal compensation obligations apply only to local traffic. This mirrors the requirements of Section 251(b)(5) of the Act and the applicable FCC rules. Local traffic is defined in the Agreement to include only traffic that originates and terminates in the same local calling area, in conformance with the FCC's rules. The Agreement's reciprocal compensation provisions are in all respects, coextensive with the parties' obligations to one another under Section 251 (b)(5) of the Act. Because ISP traffic is interstate access traffic, not local, neither party had an obligation to pay reciprocal compensation under either Section 251(b)(5) or the virtually identical requirements of the Agreement.

Sprint does not claim that the plain language of the Agreement includes an express provision to treat ISP traffic as local traffic or to require the parties to pay reciprocal compensation for such traffic. The Interconnection Agreement provides, in relevant part, that local traffic means "any telephone call that originates and terminates in the same LATA and is billed by the originating Party as a local call . . ." See Agreement at Attachment 11, page 5. Despite agreeing with BellSouth that the parties' reciprocal compensation obligations are limited to local traffic, however, Sprint claims that BellSouth was obligated to pay reciprocal compensation on ISP traffic. Sprint apparently bases this assertion on an unsupported supposition that BellSouth *intended to treat it as local* for purposes of the Agreement. This theory is without any basis.

It is important to note what Sprint does not allege. Sprint does not claim that ISP traffic is *local*, as a matter of fact or as a matter of law. It could hardly have done so. Starting with the FCC's original access order in 1983, it has been held consistently that ESPs (including ISPs) use interstate access service to serve their customers. In particular, the FCC has consistently held that ISP traffic does not terminate at the ISP but continues on to the internet and is, therefore, not local. This precedent is consistent with any common sense understanding of the service that ISP's provide. No one would pay \$19.99 every month to AOL for internet access if his communications were terminated at AOL's local server.

Sprint's suggestion that the parties intended to include non-local ISP traffic within the definition of ISP traffic for purposes of the Agreement is equally untenable. BellSouth had publicly stated, prior to entering into the 1997 Agreement with Sprint, that it agreed with the FCC that ISP traffic was interstate access traffic, and that BellSouth opposed the idea that this non-local traffic should be made subject to reciprocal compensation. In other words, Sprint had no reason to believe, when the parties entered into the Agreement, that BellSouth "intended" to consider ISP traffic to be local for purposes of the Agreement. Indeed, Sprint likely knew, given BellSouth's position before the FCC, that BellSouth would vehemently oppose adding any such provision in the Agreement.

ISP traffic is not "local traffic" for purposes of Section 251(b)(5) of the Act, or the plain language of the Agreement, which is coextensive with the requirements of Section 251(b)(5) of the Act. Sprint has provided no evidence to suggest that the Commission should depart from the plain language of the Agreement or the federal precedent

holding that ISP traffic is interstate access traffic. Moreover, Sprint cannot demonstrate that BellSouth and Sprint mutually intended to treat ISP traffic as though it *were* local for purposes of the Agreement. For all of these reasons, the Commission should rule in favor of BellSouth and deny Sprint's claims.

STATEMENT OF POSITION ON THE ISSUES

Issue 1: Under their Florida Interconnection Agreement, are Sprint Communications Company Limited Partnership and BellSouth Telecommunications, Inc. required to compensate each other for delivery of traffic to Internet Service Providers (ISPs)? If so, what actions, if any, should be taken?

****Position:** No. The Agreement's plain language limits reciprocal compensation obligations to the delivery of local traffic. ISP traffic is interstate access traffic, not local traffic. Sprint cannot demonstrate any mutual intent to include ISP traffic in the definition of local traffic for purposes of the Agreement.

A. The Agreement's Reciprocal Compensation Requirement, Like the Reciprocal Compensation Provision of the Act, Only Applies to Local Traffic.

It is well settled that the plain meaning of a contract is controlling in the absence of ambiguity. *See, e.g. Green v. Life & Health of Am.*, 704 So. 2d 1386, 1391 (Fla. 1998); *Vernon, v. Resolution Trust Corp.*, 907 F2d 1101, 1109 (11th Cir. 1990). This fundamental legal rule is dispositive in this case. There is no disagreement between the parties as to whether the language of the Agreement is plain and unambiguous. Each agrees that it is. *See, e.g. Sprint's Prehearing Statement* (Oct. 12, 2000) at 2 ("the meaning of local traffic as defined in the Interconnection Agreement is unambiguous"); *Prehearing Statement of BellSouth Telecommunications, Inc.* (Oct. 12, 2000) at 2 ("The plain language of the contract clearly states that reciprocal

compensation will only apply to local traffic"). Likewise, there is agreement that the reciprocal compensation obligations in the Agreement are limited to local traffic, and that local traffic is clearly defined in the agreement to include only traffic that originates and terminates in the same local calling area. Complaint at ¶17. Thus, the reciprocal compensation obligations of the parties under the agreement are precisely coextensive with their reciprocal compensation obligations under the Act—reciprocal compensation only applies to local traffic.

Sprint nevertheless asserts that the parties are obligated, under the Agreement, to pay reciprocal compensation for ISP traffic, which, according to federal precedent stretching back more than 15 years, is interstate access traffic, not local traffic. Sprint's Prehearing Statement at 6-7. *But see In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, CC Dkt. No. 96-98 (FCC Feb. 26, 1999)(the "Declaratory Order") at ¶ 5 (citing FCC orders dating back to 1983 for the proposition that ESPs, including ISPs, use interstate access services).¹ Sprint bases this assertion on a claim that the parties, notwithstanding the plain contract language to the contrary, implicitly agreed to define non-local ISP traffic as "local traffic" for purposes of their agreement. This is clearly incorrect.

¹ The FCC's Declaratory Order is reported at 14 FCC Rcd 3689. Although Declaratory Order was vacated by a federal appeals court, that vacatur alters neither the nature of ISP traffic nor the state of the law. The vacatur of the Declaratory Order, was not based on a disagreement with the FCC's findings, but rather on the fact that, in the court's view, the FCC had not sufficiently explained them. The vacatur of the Declaratory Order does not disturb the long line of precedent holding that enhanced service providers, including ISP's, use access services, not local exchange services. Moreover, the FCC's rulings, before and after the Declaratory Order, that ISP traffic does not terminate at the ISP and is largely interstate, still are good law. See, e.g. *Memorandum Opinion and Order, GTE Operating Cos.*, CC Dkt. No. 98-79 (Oct. 30, 1998) at ¶ 19¹.

B. ISP Traffic is Not Local Traffic.

As Sprint and the Commission are aware, the FCC has consistently found that ESPs, including ISPs, use interstate access service, not local exchange service. See *Declaratory Order* at ¶ 16 (“That the [FCC] exempted ESPs from access charges indicates its understanding that ESPs in fact use interstate access service; otherwise, the exemption would not be necessary.”). See also, *id.* at ¶ 5 (citing authority dating back to 1983 for the proposition that ESPs use interstate access service). The Commission has noted that, for certain limited purposes, including the price that incumbent local exchange providers (“ILECs”) may charge ESPs for this interstate access service, the FCC has decided to treat ESP traffic as if it were local, *id.*, but such limited regulatory anomalies do not “transform the nature of traffic routed to ESPs.” *Id.* at ¶ 16.

It is no doubt true that the FCC, despite the interstate nature of ISP traffic, has decided to treat it as if it were not interstate for certain limited regulatory purposes.² But in the only sense that matters here, the FCC has refused to treat this traffic as anything other than what it is—interstate access traffic. In its *Declaratory Order*, the FCC unequivocally stated that the reciprocal compensation provisions in the Act and the FCC's rules do not apply to ISP traffic *because it is not local traffic*. *Declaratory Order*

² It should be noted that there are only two FCC rules that require BellSouth to treat ISPs differently from other users of interstate access services. The access exemption requires BellSouth to provide interstate access to ISPs at the same price as it charges end users in its intrastate business tariffs. *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, CC Dkt. No. 87-215, Order, 3 FCC Rcd 2631 (1988) (ESP Exemption Order). BellSouth also is required to count ISP revenue as intrastate for separations purposes. *Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, CC Dkt. No. 89-79, Notice of Proposed Rulemaking, 4 FCC Rcd. 3983 (1989). Because neither of these requirements apply to Sprint, which is not an ILEC, Sprint has never been required to treat non-local ISP traffic as local for even these limited purposes.

at ¶ 26, fn. 87 (“ISP-bound traffic is non-local interstate traffic. Thus, the reciprocal compensation requirements of section 251(b)(5) of the Act and Section 51, Subpart H (Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic) of the [FCC’s] rules do not govern inter-carrier compensation for this traffic.”). Thus, there is no basis for any contention that ISP traffic is, as a matter of law, local, or that the Telecommunications Act makes ISP traffic subject to reciprocal compensation. Sprint does not make any such contention.

Similarly, any suggestion that, as a matter of fact, ISP traffic is local in nature also would be clearly incorrect. While the FCC, in its orders, and BellSouth’s witnesses, in their testimony, provide ample explanations regarding the manner in which the internet works, *see e.g.* Direct Testimony of Jerry Hendrix (Hendrix Dir.) at 4-7, one need go no further than the name behind the ISP acronym—“Internet Service Provider.” Millions of people pay companies like Earthlink and AOL around \$19.99 per month for *internet access*, not local exchange service. It would be difficult to imagine why anyone would pay for internet service if all communications were terminated at the local ISP server. It would defeat the purpose of *internet service*. An ISP’s customer buys internet service in order to gain access to what is beyond the ISP’s server—a worldwide network of networks with website destinations in various countries and states. To attempt to equate internet access to a local call would be laughable.

Sprint apparently does not contend that ISP traffic, is, as a matter of fact, local. Sprint presents no evidence on the issue of whether ISP traffic originates and terminates in the same LATA, and never attempts to refute BellSouth’s testimony that ISP traffic does not terminate at the ISP. Indeed, upon a close examination of the

testimony, it appears that Sprint does not disagree with BellSouth or the FCC with regard to the non-local nature of ISP traffic, nor does it disagree that the Telecommunications Act's reciprocal compensation provisions do not apply to such traffic.

The Commission need go no further than this in its analysis. Both parties agree that the Agreement's language with respect to reciprocal compensation is clear and unambiguous. Both agree that the Agreement's reciprocal compensation obligations are limited to local traffic. Both apparently agree that, as a matter of fact and as a matter of law, ISP traffic is not local. Accordingly, by the plain terms of the Agreement, reciprocal compensation simply does not apply to this traffic.

Sprint, however, suggests that the Commission read the Agreement's definition of local traffic in a manner that gets around both the law and the facts surrounding ISP traffic. It suggests that, under the agreement, traffic is local (and subject to reciprocal compensation) if the originating party bills it as local. Rebuttal Testimony of Melissa L. Cloz at 3-4. One problem with this interpretation is, first, that it ignores the requirement that the traffic originate and terminate in the same LATA. As stated above, Sprint offers no evidence on this point, and did not even attempt to rebut BellSouth's testimony which demonstrates that ISP traffic does not terminate locally. Moreover, even if Sprint's interpretation made sense, it offers no evidence, apart from Ms. Cloz' unsubstantiated and incorrect assertion, that BellSouth bills ISP traffic as local. Mr. Scollard's and Mr. McIntire's testimony make it abundantly clear that BellSouth does not bill ISP traffic the way it bills local. See Direct Testimony of David

Scollard; Rebuttal Testimony of Richard McIntire. Unlike local traffic, BellSouth does not charge reciprocal compensation on ISP traffic.

C. The Parties Did Not Intend to Include Non-Local ISP Traffic in the Definition of Local Traffic for Purposes of the Agreement.

In this case, the intent of the parties is clear from the plain language of the Agreement. The reciprocal compensation provisions, like those in the Act, are limited to local traffic. Thus, as under the Act, the reciprocal compensation provisions of the Agreement clearly were not intended to apply to non-local ISP traffic. Because the language of the Agreement is not ambiguous or unclear, the Commission need not consider any factual issues surrounding the negotiation of the Agreement or what the parties did or omitted to do after the contract was signed. Nevertheless, an examination of such issues would merely reinforce the conclusion that the Agreement does not include non-local ISP traffic within the definition of local traffic for purposes of reciprocal compensation or for any other purpose.

In its prior orders construing reciprocal compensation provisions, the Commission has considered such factors as the circumstances in existence at the time the contract was signed, or the behavior of the parties after the contract was made. *See e.g. Order No. PSC-99-0658-FOF-TP (April 6, 1999) at 6-7.* An evaluation of such factors clearly indicates that the Agreement means what it clearly says—reciprocal compensation is limited to local traffic, and ISP traffic is not local.

The first factor to be considered is the negotiation of the Agreement. As Mr. Hendrix made clear in his testimony, the parties intended only to fulfill their duties under the Telecommunications Act, not to expand their duties with regard to reciprocal

compensation. Hendrix Dir. at 3-4. It was public knowledge before the Agreement with Sprint was signed that BellSouth agreed with the FCC that ISP traffic was interstate access traffic and that because the Telecommunications Act's reciprocal compensation obligations extended only to local traffic, reciprocal compensation did not apply in the case of non-local ISP traffic. Hendrix Dir. at 9. Indeed, BellSouth made its position clear months before the Agreement was signed in comments filed with the FCC. *Id.* at Exh. JDH-1. Given BellSouth's publicly stated views on the subject, it would have been unreasonable for Sprint to assume, in the absence of an express provision, that BellSouth would agree to treat ISP traffic as local for purposes of reciprocal compensation. Similarly, given BellSouth's prior public opposition to the suggestion that ISP traffic should be made subject to reciprocal compensation, it is unthinkable that BellSouth would have agreed to such an express provision, much less that BellSouth tacitly intended to include ISP traffic in the definition of local traffic.³

Similarly, BellSouth's conduct after the Agreement was formed shows that BellSouth did not intend to treat ISP traffic as local. BellSouth has never knowingly charged reciprocal compensation for ISP traffic, Scollard Dir. at 4, and, except when ordered to do so, BellSouth has never knowingly paid reciprocal compensation for this non-local traffic. Indeed, BellSouth devised the means to measure and segregate ISP traffic for billing purposes. Scollard Dir. at 2-5. Accordingly, these factors demonstrate that BellSouth had no intent to depart from the plain language of the Agreement by including non-local ISP traffic as local for purposes of reciprocal compensation.

³ Sprint does not directly address the fact that it should have known prior to entering into the 1997 Agreement that BellSouth would not agree to subject non-local ISP traffic to reciprocal compensation.

Another factor that may be considered is whether the carriers would be compensated for aggregating ISP traffic if reciprocal compensation were not imposed on ISP traffic. Of course, the LEC who serves the ISP will always have an opportunity to be compensated by charging the ISP for providing the access services used by the ISP. The LEC who serves the ISP's customer will only be compensated if it also serves the ISP, or the carriers agree to share the revenues received from the ISP in exchange for the interstate access services it uses. Indeed, because the access charge exemption only applies to BellSouth, Sprint is constrained only by market forces in deciding how much to charge for the interstate access services it provides.

When these factors are considered, they confirm that BellSouth had no intention of including ISP traffic within the definition of local traffic for purposes of the Agreement, and Sprint had reason to know it. When one considers BellSouth's actions prior to and after the Agreement was formed, it would be impossible to assume that the parties mutually intended to pay reciprocal compensation on ISP traffic. Accordingly, even if it were not clear, from the plain language of the Agreement, that ISP traffic is not subject to reciprocal compensation under the Agreement, after these factors were taken into account, it certainly would be.

Sprint argues that, because the Commission has held, in the context of interconnection agreements between BellSouth and other carriers, such as e.spire, that

Instead, Sprint merely claims that public statements made by BellSouth after the Agreement was signed are not a reliable indicator of Pre-Agreement intent. Closz Reb. at 2-3.

the parties intended to include ISP traffic in the definition of local traffic for purposes of reciprocal compensation, it must conclude that BellSouth and Sprint have done so in this case. See Complaint at ¶¶ 19-22. Sprint is wrong. Sprint was not a party to the agreements in the cases it cites. The decisions in those cases apply only to the parties to those agreements. See, e.g. *Order No. PSC-99-2526-PCO-TP (Dec. 23, 1999) at 5* (a Commission decision regarding the terms of an interconnection agreement will only bind the parties to that agreement and “will have no precedential value for any other case involving the same terms and conditions of an agreement between different parties.”)

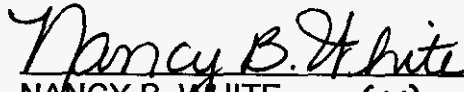
In short, contrary to Sprint’s assertions, other Commission decisions about other Agreements are not controlling. The unambiguous plain language is. ISP traffic is not local traffic. Under the Agreement, as under the Act, reciprocal compensation only applies to local traffic. Accordingly, the Commission should reject Sprint’s attempts to rewrite the Agreement to include ISP traffic within the definition of local traffic.

CONCLUSION

The Commission should enforce the plain meaning of the Agreement and determine that the parties did not intend, contrary to the plain meaning of the Agreement, to require the payment of reciprocal compensation for ISP traffic. For the foregoing reasons, BellSouth requests that Sprint’s claims be denied and that its Complaint be dismissed.

Respectfully submitted this 30th day of November, 2000.

BELLSOUTH TELECOMMUNICATIONS, INC.



NANCY B. WHITE

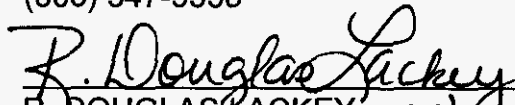
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