

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of WorldCom 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. 971478-TP  
ORDER NO. PSC-98-0454-PCO-TP  
ISSUED: March 31, 1998

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman  
J. TERRY DEASON  
SUSAN F. CLARK  
JOE GARCIA  
E. LEON JACOBS, JR.

ORDER DENYING INTERVENTION, REQUIRING PLACEMENT OF DISPUTED PAYMENTS IN ESCROW AND SETTING DISPUTE FOR HEARING

BY THE COMMISSION:

BACKGROUND

MFS Communications Company, Inc., (MFS) and BellSouth Telecommunications, Inc., (BellSouth) entered into a Partial Florida Interconnection Agreement (Agreement) on August 26, 1996. We approved the Agreement in Order No. 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 Telecommunications, Inc., and Request for Relief, alleging that BellSouth has failed to pay reciprocal compensation for certain telephone exchange service local traffic that is transported and terminated by WorldCom's affiliate, MFS. Specifically, the traffic for which BellSouth

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refuses to pay is the traffic terminated with Internet Service Providers (ISPs).

On December 22, 1997, BellSouth filed its Answer and Response. It asserted that it is not required by the terms of its interconnection agreement with MFS to pay reciprocal compensation because the traffic in question is interstate in nature, not local.

WorldCom asks that the Commission require BellSouth to cease and desist from taking threatened actions; rule that all telephone calls placed within the same calling area from a BellSouth provided telephone exchange service end user to an MFS provided telephone exchange service end user qualify as local traffic within the meaning of Section 1.40 of the Agreement; require BellSouth to compensate MFS for terminating ISP traffic originated by BellSouth customers pursuant to Sections 1.40 and 5.8 of the Agreement; and other appropriate relief.

In the event of a dispute arising under the Agreement, Section 33.0 of the Agreement requires that the parties' vice presidents for regulatory affairs, or equivalent officers, confer to seek a resolution before taking any action before a court or this Commission. In its complaint, WorldCom sets out in detail the events that preceded the complaint. The complaint includes copies of correspondence between Ernest L. Bush, BellSouth's Assistant Vice President, Regulatory Policy and Planning, and Alex J. Harris, MFS's Vice President, Regulatory Affairs, which are testimony to the impasse at which the parties have arrived.

#### INTERVENTION

On December 4, 1997, Intermedia Communications, Inc., (Intermedia) filed a petition for leave to intervene in this proceeding. No one filed a response to Intermedia's petition.

In its petition, Intermedia observes that WorldCom's complaint in this proceeding alleges that BellSouth is in breach of its interconnection agreement with MFS with its refusal to recognize local calls to ISPs as local traffic for purposes of mutual compensation for termination of local calls. Intermedia states

that, while it continues to negotiate a resolution to this same problem with BellSouth, it is in much the same position as WorldCom and therefore entitled to intervene in this proceeding. It asserts that the Commission's decision in this proceeding will be one of first impression and will have a direct effect on its substantial interests. Finally, Intermedia states that its experience with this issue will facilitate a fuller development of the record if it is permitted to participate.

We find that Intermedia's participation in this contract dispute proceeding is inconsistent with the intent of the Telecommunications Act of 1996 (the Act). Section 252(b)(4)(A) of the Act, regarding arbitrations conducted by state commissions, provides that:

The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

Arbitration proceedings under the Act are limited to the issues raised by the immediate parties to the particular negotiations. The outcome of arbitration proceedings is an agreement between those parties that is binding only on them. The Act does not contemplate participation by other entities who are not parties to the negotiations and who will not be parties to the ultimate interconnection agreement that results. Entities not party to the negotiations are not proper parties in arbitration proceedings, even though they may, in some indirect way, be affected by a particular decision. As a matter of logic, this is equally true in the context of contract dispute proceedings arising from interconnection agreements arbitrated under the Act, such as the present one. This conclusion is consistent with the conclusion reached by the Prehearing Officer at page 2 in Order No. PSC-96-0933-PCO-TP, which established procedure in Docket No. 960833-TP<sup>1</sup>:

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<sup>1</sup>Docket No. 960833-TP is the request for arbitration under Section 252 of the Act filed by AT&T Communications of the Southern States, Inc., against BellSouth.

Upon review of the Act, I find that intervention with full party status is not appropriate for purposes of the Commission conducting arbitration in this docket. Section 252 contemplates that only the party requesting interconnection and the incumbent local exchange company shall be parties to the arbitration proceeding. For example, Section 252(b)(1) of the Act states that the "carrier or any other party to the negotiation" may request arbitration. (emphasis added) Similarly Section 252(b)(3) says "a non-petitioning party to a negotiation may respond to the other party's petition" within 25 days. (emphasis added) Section 252(b)(4) requires this Commission to limit its consideration to the issues raised by the petition and the response. None of these statutory provisions provides for intervenor participation.

This proceeding is one in which WorldCom petitions the Commission to resolve its dispute with BellSouth concerning the interpretation of a compensation provision in the parties' interconnection agreement. The presence, therefore, of Intermedia, or anyone else who would petition to intervene in this proceeding, is at odds with the Act. The only proper parties are WorldCom and BellSouth.

We would note that we announced at a very early point in the arbitration proceedings that came before us that we would limit participation in these kinds of proceedings to the requesting carrier and the incumbent local exchange company. We recently affirmed this position in denying reconsideration of Order No. PSC-98-0008-PCO-TP, in which the Prehearing Officer denied the petitions of several carriers to intervene in consolidated Docket Nos. 960833-TP, 960846-TP and 960757-TP.<sup>2</sup>

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<sup>2</sup>See Order Nos. PSC-98-0226-FOF-TP and PSC-98-0227-FOF-TP denying intervention of American Communications Services, Inc., and American Communications Services of Jacksonville, Inc., and Sprint Communications, L.P. See also further Commission decision January 26, 1998, at hearing in Docket Nos. 960833-TP, 960846-TP and 960757-TP, denying intervention of Time Warner

We acknowledge Intermedia's argument that our resolution of the present dispute between WorldCom and BellSouth may have an effect on Intermedia. In the new competitive paradigm, however, that argument cannot be joined to sustain intervention in arbitration and contract dispute proceedings. It is hardly surprising that business relationships and commercial terms to which certain market players agree influence, sometimes strongly, the nature of subsequent relationships and terms sought by others. This is not justification to return to the old regulatory routine where all interested persons could participate in matters involving regulated utility providers. Under the Act, the rules of the road are different. This is a contract dispute between the parties to the specific contract, and only those parties may participate in this case.

#### DISPUTE

##### Agreement

Section 5.8 of the Agreement requires BellSouth and MFS 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. Section 5.8.1 provides that:

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

Section 5.8.2 provides further that:

The Parties shall compensate each other for such transport and termination of Local Traffic (local call termination) at a single identical, reciprocal, and equal rate provided in Exhibit 7.0.

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Exhibit 7.0 provides that the reciprocal local call termination rate shall be \$0.009 per minute of use.

In Section 1.40 of the Agreement, local traffic is defined 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.

#### WorldCom

In its Complaint, WorldCom states that both MFS and BellSouth provide tariffed local exchange services over their respective networks to end user customers, including some business customers operating as ISPs. Subscribers to MFS's local exchange service can place calls to ISPs served by BellSouth and subscribers to BellSouth's local exchange service can place calls to ISPs served by MFS.

According to WorldCom, on August 12, 1997, BellSouth notified MFS that the reciprocal compensation requirement of the Act does not apply to traffic terminated to an ISP. BellSouth stated that it would not make payment for calls terminated to ISPs. The companies exchanged several more letters and telephone calls before determining that they were at an impasse.

WorldCom observes that Section 251(a)(5) of the Act states that each telecommunications carrier has "[t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." The question then to be answered is whether traffic terminated to an ISP under the

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agreement is local or toll. In support of its position that such traffic is local, 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.

WorldCom points out that, in Order No. 21815, in Docket No. 880423-TP, issued September 5, 1989, we 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.

We agreed with BellSouth's witness. Id.

At our Agenda Conference on March 10, 1998, WorldCom argued that our jurisdiction over ISP traffic has not been preempted; that we have already decided the issue of whether ISP traffic was to be treated as though local in WorldCom's favor; and that our task in this proceeding is one of construing contract language that is clear on its face.

#### BellSouth

The essence of BellSouth's position with respect to WorldCom's Complaint is expressed in ¶25 of its Response as follows:

[C]alls to the Internet through ISPs that originate on BellSouth's network do not "terminate" on WorldCom's network, as would be required for reciprocal compensation under BellSouth's interconnection agreement with WorldCom. Such calls traverse WorldCom's facilities to the ISP and the Internet and communicate with multiple destinations, often simultaneously, that may cross state and



national boundaries; thus ISP traffic cannot be considered "local" as a legal matter.

BellSouth argues that such traffic is instead interstate, the FCC's continuing exemption from payment of switched access charges notwithstanding. BellSouth alleges that the exemption from payment of access charges does not in and of itself make such traffic local.

At our Agenda Conference, BellSouth argued that we should find that ISP traffic is not local traffic subject to the parties' reciprocal compensation obligation under the Agreement; that ISP traffic is jurisdictionally interstate; and that we should not act upon WorldCom's complaint until the FCC concludes present proceedings<sup>3</sup> before it that ask it to address the nature and treatment of ISP traffic.

### Decision

#### Hearing

We find that the issue that WorldCom's Complaint presents to us should be set directly for hearing. At the same time, we recognize that what is before us is a complaint arising from a disputed interpretation of a provision in the interconnection agreement of WorldCom and BellSouth. We will not impose prior restraints on the admissibility of evidence; but we will limit participation in the hearing to WorldCom and BellSouth. Moreover, we believe that we must resolve the dispute between the parties by determining the state of the law concerning the jurisdictional nature of ISP traffic at the time the parties executed their agreement and by applying principles of contract construction.

#### Treatment of Disputed Amounts

In a letter dated September 11, 1997, BellSouth advised MFS that BellSouth had no obligation to pay reciprocal compensation for ISP traffic and that MFS could have no reasonable expectation to receive compensation for such traffic. On September 29, 1997,

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<sup>3</sup>CC Docket 96-262 and File No. CCB/CPD 97-30.



BellSouth again wrote MFS, advising that it had determined that 94% of the traffic originated by BellSouth customers and terminated by BellSouth to WorldCom was ISP traffic, based on a study performed in Georgia. It proposed to pay WorldCom 10% of the amount invoiced for terminating local traffic. In its Complaint, WorldCom alleges that as of November 12, 1997, MFS invoiced BellSouth more than \$125,000 for termination of local traffic originated by BellSouth customers that has gone unpaid.<sup>4</sup>

Section 30 of the parties' interconnection agreement provides a process for treating disputed amounts. The nonpaying party is required to pay all undisputed amounts to the billing party when due and to pay the disputed amounts into an interest-bearing escrow account with a third party escrow agent. We direct, therefore, that the provisions of Section 30 of the parties' interconnection agreement shall be activated in order to escrow all the funds necessary to protect the full amount in dispute, including interest from the origination of the dispute. We direct BellSouth to act expeditiously to establish the escrow account.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that the petition of Intermedia Communications, Inc., to intervene in this proceeding is denied. It is further

ORDERED that the complaint of WorldCom Technologies, Inc., against BellSouth Telecommunications, Inc., shall be set for hearing as specified in the body of this Order. It is further

ORDERED that BellSouth Telecommunications, Inc., shall expeditiously establish a sufficient escrow account as described in the body of this Order pursuant to the provision in its

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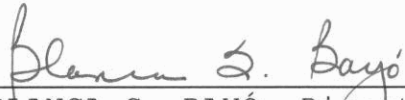
<sup>4</sup>In response to an inquiry, WorldCom represented to our staff that through January 1998, MFS billed BellSouth in the amount of \$1.278 million for ISP traffic originated by BellSouth customers and terminated on MFS's network and that BellSouth paid only \$32,000 to date. Also in response to an inquiry, BellSouth represented to our staff that it made payments for such traffic, but unknowingly and only up to the time that it was able to identify the nature of this traffic.

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interconnection agreement with WorldCom Technologies, Inc., controlling the treatment of disputed amounts. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission, this 31st day of March, 1998.

  
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BLANCA S. BAYÓ, Director  
Division of Records and Reporting

( S E A L )

CJP

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this order may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This

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filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.

Any party adversely affected by the procedural part of this order may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; 2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or 3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.