

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for arbitration concerning complaint of Intermedia Communications, Inc. against GTE Florida Incorporated 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. 980986-TP
ORDER NO. PSC-99-0291-PHO-TP
ISSUED: February 12, 1999

PREHEARING ORDER

I. CONDUCT OF PROCEEDINGS

Pursuant to Rule 28-106.211, Florida Administrative Code, this Order is issued to prevent delay and to promote the just, speedy, and inexpensive determination of all aspects of this case. This order sets forth the issues and positions of the parties, identifies witnesses and exhibits, and sets forth post-hearing procedures. A prehearing was not conducted in this proceeding as the parties agreed to the issues and other matters set forth below.

II. CASE BACKGROUND

On August 3, 1998, Intermedia Communications, Inc. (Intermedia) filed a complaint against GTE Florida Incorporated (GTE) for breach of the parties' interconnection agreement. Based on the initial complaint and GTE's response, this matter was set for hearing.

III. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

A. Any information provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the Commission and the parties as confidential. The information shall be exempt from Section 119.07(1), Florida Statutes, pending a formal ruling on such request by the Commission, or upon the return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been used

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in the proceeding, it shall be returned expeditiously to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of the proceeding, it shall be returned to the person providing the information within the time periods set forth in Section 364.183, Florida Statutes.

B. It is the policy of the Florida Public Service Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 364.183, Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding.

In the event it becomes necessary to use confidential information during the hearing, the following procedures will be observed:

- 1) Any party wishing to use any proprietary confidential business information, as that term is defined in Section 364.183, Florida Statutes, shall notify the Prehearing Officer and all parties of record by the time of the Prehearing Conference, or if not known at that time, no later than seven (7) days prior to the beginning of the hearing. The notice shall include a procedure to assure that the confidential nature of the information is preserved as required by statute.
- 2) Failure of any party to comply with 1) above shall be grounds to deny the party the opportunity to present evidence which is proprietary confidential business information.
- 3) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the Court Reporter, in envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.

- 4) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise the confidential information. Therefore, confidential information should be presented by written exhibit when reasonably possible to do so.
- 5) At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the Court Reporter shall be retained in the Division of Records and Reporting's confidential files.

IV. POST-HEARING PROCEDURES

Each party shall file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. If a party fails to file a post-hearing statement, that party shall have waived all issues and may be dismissed from the proceeding.

A party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 40 pages, and shall be filed at the same time.

V. PREFILED TESTIMONY AND EXHIBITS; WITNESSES

Testimony of all witnesses to be sponsored by the parties (and Staff) has been prefiled. All testimony which has been prefiled in this case will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and associated exhibits. All testimony remains subject to appropriate objections. Each witness will have the opportunity to orally summarize his or her testimony at the time he or she takes the stand. Upon insertion of a witness' testimony, exhibits appended thereto may be marked for identification. After all parties and Staff have had the opportunity to object and cross-examine, the exhibit may be moved into the record. All other

exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

Witnesses are reminded that, on cross-examination, responses to questions calling for a simple yes or no answer shall be so answered first, after which the witness may explain his or her answer.

The Commission frequently administers the testimonial oath to more than one witness at a time. Therefore, when a witness takes the stand to testify, the attorney calling the witness is directed to ask the witness to affirm whether he or she has been sworn.

VI. ORDER OF WITNESSES

<u>Witness</u>	<u>Proffered By</u>	<u>Issues #</u>
<u>Direct</u>		
Julia O. Strow	Intermedia	1
Steven J. Pitterle	GTE	1
Howard Lee Jones	GTE	1
<u>Rebuttal</u>		
Julia O. Strow	Intermedia	1
Steven J. Pitterle	GTE	1

VII. BASIC POSITIONS

INTERMEDIA: GTE Florida Incorporated's (GTEFL) refusal to provide reciprocal compensation for local Internet service Providers traffic originated by GTEFL's end users that terminates on Intermedia's network constitutes a material and willful breach of the terms of the parties' Interconnection Agreement.

GTE: ISP traffic is functionally and jurisdictionally interstate. The interstate nature of ISP traffic is confirmed by decades of FCC and Court precedent, including the FCC's recent decision in GTE's federal ADSL tariff case. GTEFL correctly understood applicable precedent at the time it

executed the contract with Intermedia Communications, Inc. (ICI), so there would have been no reason for GTEFL to except ISP traffic from the reciprocal compensation provisions when GTEFL did not consider the traffic to be local.

There is no room for ICI's claim that this Commission can carve out jurisdiction over a segment of this traffic for purposes of applying reciprocal compensation obligations to it. In addition, subjecting ISP traffic to reciprocal compensation would be ill-advised from a policy standpoint, as it would undermine local competition.

STAFF: Staff's positions are preliminary and based on materials filed by the parties and on discovery. The preliminary positions are offered to assist the parties in preparing for the hearing. Staff's final positions will be based upon all the evidence in the record and may differ from the preliminary positions.

VIII. ISSUES AND POSITIONS

ISSUE 1: Under their Interconnection Agreement, are Intermedia Communications, Inc. and GTE Florida Incorporated required to compensate each other for transport and termination of traffic to Internet Service Providers?

If so, what action, if any, should be taken?

POSITIONS

INTERMEDIA: Yes. The term "local traffic" as used in the Agreement and as construed consistently by numerous regulatory bodies contemplates calls from end users to Internet Service Providers both originating and terminating within GTEFL's local serving area. The Commission should issue an Order finding GTEFL to be in willful and material breach of the parties' Agreement and requiring GTEFL to pay Intermedia for terminating such local traffic under the reciprocal compensation provisions of the Agreement.

Intermedia believes Issue 1 is infused with factual, legal, and policy considerations.

GTE: No. The ISP traffic at issue is jurisdictionally interstate, so there is no basis for subjecting it to reciprocal compensation obligations under a local interconnection agreement. The Commission should take no action, other than to confirm that ISP traffic is interstate.

STAFF: No position at this time.

IX. EXHIBIT LIST

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
			<u>Direct</u>
Julia O. Strow	Intermedia	_____ (JOS-1)	Parties' inter-connection agreement (relevant portions)
Julia O. Strow	Intermedia	_____ (JOS-2)	Letter dated 12/16/97 from Ms. Tagg, GTEFL, to Mr. Champion, Intermedia
Julia O. Strow	Intermedia	_____ (JOS-3)	Letter dated 1/7/98 from Ms. Strow, Intermedia, to Ms. Tagg, GTEFL
Julia O. Strow	Intermedia	_____ (JOS-4)	Letter and attachment dated 2/5/98 from Ms. Lowery, GTEFL, to Ms. Strow, Intermedia

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
Julia O. Strow	Intermedia	_____ (JOS-5)	Two (2) letters dated 2/17/98 and 3/2/98, respectively, from Ms. Tagg, GTEFL, to Ms. Strow, Intermedia
Julia O. Strow	Intermedia	_____ (JOS-6)	Facsimile cover sheet attached memo dated 3/2/98 from Ms. Strow, Intermedia to Ms. Tagg, GTEFL
Julia O. Strow	Intermedia	_____ (JOS-7)	Letter dated 6/15/98 from Ms. Strow, Intermedia, to Ms. Tagg, GTEFL
Julia O. Strow	Intermedia	_____ (JOS-8)	Copies of three (3) cases: (1) <u>Illinois Bell</u> ; (2) <u>South-western Bell</u> ; and (3) <u>U S West</u>
Julia O. Strow	Intermedia	_____ (JOS-9)	List of other State Commission Decisions on ISP
Steven J. Pitterle	GTE	_____ (SJP-1)	FCC 98-292 Memorandum opinion and order
Howard Lee Jones	GTE	_____ (HLJ-1)	Diagram Internet call
Howard Lee Jones	GTE	_____ (HLJ-2)	Diagram POTS call

Parties and Staff reserve the right to identify additional exhibits for the purpose of cross-examination.

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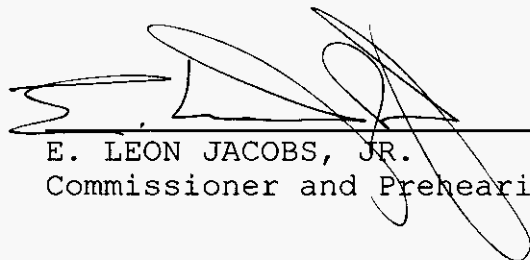
X. RULINGS

The Motion to Accept Late Filing of Prehearing Statement filed by Intermedia on February 3, 1999, is granted. The Prehearing Statements filed by Intermedia and Staff are hereby deemed to be timely filed.

It is therefore,

ORDERED by Commissioner E. Leon Jacobs, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

By ORDER of Commissioner E. Leon Jacobs, Jr. as Prehearing Officer, this 12th day of February, 1999.



E. LEON JACOBS, JR.
Commissioner and Prehearing Officer

(S E A L)

CB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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 this order, which is preliminary, procedural or intermediate in nature, 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

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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.

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