

ORIGINAL

BEFORE THE PUBLIC SERVICE COMMISSION OF FLORIDA

Complaint of ITC^DeltaCom Communications, Inc.) Docket No. 991946-TP
Against BellSouth Telecommunications, Inc., for)
Breach of Interconnection Terms, and Request)
for Immediate Relief.)

MOTION FOR SUMMARY FINAL ORDER

ITC^DeltaCom Communications, Inc. ("DeltaCom"), pursuant to Rule 28-106.204(4), Florida Administrative Code, moves for entry of a summary final order in the above-captioned Complaint against BellSouth Telecommunications, Inc. ("BST"), for breach of interconnection terms and conditions of the Interconnection Agreement and Amendments between DeltaCom and BST (collectively, the "Agreement") on the grounds that (1) there is no genuine issue as to any material fact and as a matter of law, the same issues in a prior decision have been answered contrary to BellSouth's position, and (2) that as a matter of law, BST is collaterally estopped by the decision of the Alabama Public Service Commission from re-litigating the issue of whether BellSouth is required to pay reciprocal compensation for calls placed by customers of BST to Information Services Providers ("ISPs") served by ITC^DeltaCom.

Introduction

The issue in this proceeding is whether local, seven-digit calls placed by customers of BST to an ISP customer of DeltaCom constitute local traffic for which reciprocal compensation is due under the parties' Agreement. At the time DeltaCom filed its Complaint, at least twenty-five (25) state commissions had held that ISP traffic is subject to reciprocal compensation.1 In addition, several federal district courts have upheld state commission decisions requiring reciprocal compensation for ISP traffic.2 Additionally, the Federal Communications

1 Attached as Appendix A is a listing of state commission decisions requiring the payment of reciprocal compensation for calls to ISPs.

2 Attached as Appendix B is a listing of those federal district court rulings upholding state commission decisions requiring payment of reciprocal compensation for calls to ISPs.

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FPSC-RECORDS/REPORTING

Commission ("FCC") determined that, in the absence of a federal rule regarding appropriate compensation for such traffic, the decisions of state commissions on this issue have binding effect.³ Recently, the D.C. Circuit Court vacated and remanded the FCC's ruling that ISP-bound calls are jurisdictionally interstate for want of "reasoned decision making."⁴

Five of the states deciding that reciprocal compensation applies to ISP traffic involved proceedings in which BST was a party. Moreover, the Florida Public Service Commission decision in the *Global Naps*⁵ docket reviewed the same language that is contained in the DeltaCom/BellSouth Interconnection Agreement at dispute here. In the *Global Naps* case, the Commission was asked to review contract language regarding the definition of local traffic and the provisions concerning reciprocal compensation to determine whether BST is required to pay for the delivery of calls to ISP customers served by Global Naps. The Commission determined that the *Global Naps* interconnection agreement required BST to pay reciprocal compensation for the delivery of BellSouth originated calls to the *Global Nap's* ISP customers. Because the contract language at issue in this proceeding is the same language at issue in the *Global Naps* proceeding, there is no genuine issue of material fact and as a matter of law, summary judgment is due.

Furthermore, under Florida law, where the parties and issues are identical and the matter has been fully litigated, the prevailing party may preclude the other party from re-litigating an issue decided in a previous action.⁶ This doctrine, known as collateral estoppel, applies to

³ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic*, CC Dockets No. 96-98 & 99-68, FCC No. 99-38, Declaratory Ruling and Notice of Proposed Rulemaking ¶ 24 (rel. February 26, 1999) ("ISP Declaratory Ruling").

⁴ *Bell Atlantic Telephone Company v. Federal Communications Commission*, No. 99-1094, 2000 WL 273383 (D.C. Cir. March 24, 2000) vacating and remanding the FCC's ISP Declaratory Ruling.

⁵ *In re: Complaint and/or Petition for arbitration by Global Naps, Inc. for enforcement of Section VI(B) of its interconnection agreement with BellSouth Telecommunications, Inc., and request for relief*, FPSC, Docket No. 991267-TP (Order No. PSC-00-0802-FOF-TP), (April 24, 2000).

⁶ *McCabe v. Woodland Towers*, Case No. 98-3082, 1999 Fla. Div. Admin. Hear. LEXIS 183.

decisions of administrative agencies.⁷ As discussed more fully below, DeltaCom submits that BST is collaterally estopped from re-litigating the issue of whether the ITC^DeltaCom and BellSouth interconnection agreement, as amended, requires reciprocal compensation for ISP traffic because of the Alabama Public Service Commission's decision which was rendered against BST.

Argument

ISSUE 1: UNDER THE BELLSOUTH AND ITC^DELTACOM INTERCONNECTION AGREEMENT, AS AMENDED, ARE THE PARTIES REQUIRED TO COMPENSATE EACH OTHER FOR DELIVERY OF TRAFFIC TO ISPS? IF SO, WHAT ACTION, IF ANY, SHOULD BE TAKEN?

On March 12, 1997, DeltaCom and BST entered into the Agreement which, as amended, sets forth the terms and conditions governing the interconnection of their respective telecommunications networks. The Agreement, including all pertinent Amendments, was approved by this Commission.⁸ This dispute involves whether under the Agreement DeltaCom is entitled to payment of reciprocal compensation for local seven-digit calls placed by customers of BST to an ISP customer of DeltaCom.

A. Findings by the FCC and State Commissions on ISP Traffic

At the time DeltaCom filed its Complaint with this Commission, at least twenty-five state commissions had concluded that ISP traffic is subject to reciprocal compensation.⁹ In addition, on February 26, 1999, the FCC issued its long-awaited decision concerning whether a local

⁷ See *Akins v. Hudson Pulp & Paper Co., Inc.*, 330 So.2d 757 (Fla. 1st DCA 1976); *United States Fidelity & Guaranty Co. V. Odoms*, 444 So. 2d 78 (Fla. 5th DCA 1984).

⁸ DeltaCom Complaint, ¶ 6; BST Answer, ¶ 6. By citing to BST's Answer in this motion, DeltaCom does not waive any objection to the content of that pleading. DeltaCom reserves the right to challenge any allegations or argument deemed improper, by way of a motion to strike or otherwise, at the appropriate time.

⁹ DeltaCom Complaint, ¶20 ; BST Answer, ¶ 20 .

exchange carrier is entitled to reciprocal compensation for traffic it delivers to an ISP.¹⁰ In this ISP Declaratory Ruling, the FCC decided the following:

(1) ISP traffic is “jurisdictionally mixed and appears to be largely interstate.”¹¹

(2) The FCC’s adoption of a rule “regarding inter-carrier compensation for ISP traffic ... to govern *prospective* compensation would serve the public interest.”¹² Because of an inadequate record, the FCC seeks comments on alternative proposals for such a rule.¹³

(3) Since the FCC has not heretofore adopted a rule governing inter-carrier compensation for ISP traffic, there is “no reason [for the FCC] to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic, pending adoption of [such a rule].”¹⁴ The FCC’s ISP Declaratory Ruling is not to “be construed to question any determination a state commission has made, or may make in the future, that parties have agreed to treat ISP-bound traffic as local traffic under existing interconnection agreements.”¹⁵ Moreover, “state commissions ... may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic.”¹⁶ Indeed, although the FCC “has not adopted a specific rule governing the matter, ... [its] policy of treating ISP-bound traffic as local for purposes of interstate access charges would,

¹⁰ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic*, CC Dockets No. 96-98 & 99-68, FCC No. 99-38, Declaratory Ruling and Notice of Proposed Rulemaking (rel. February 26, 1999).

¹¹ *Id.* at 1; *see also id.* at 8 (“After reviewing the record, we conclude that, although some Internet traffic is intrastate, a substantial portion of Internet traffic involves accessing interstate or foreign websites.”).

¹² *Id.* at 28 (emphasis added).

¹³ *Id.* at 28; *see also id.* at 29-36.

¹⁴ *Id.* at 21; *see also id.* at 1 (“In the absence, to date, of a federal rule regarding the appropriate inter-carrier compensation for this traffic, we therefore conclude that parties should be bound by their existing interconnection agreements, as interpreted by state commissions.”).

¹⁵ *Id.* at 24; *see also id.* at 28 (“Until adoption of a final rule, state commissions will continue to determine whether reciprocal compensation is due for this [ISP-bound] traffic. As discussed above, the Commission’s holding that parties’ agreements, as interpreted by state commissions, should be binding also applies to those state commissions that have not yet addressed the issue.”).

¹⁶ *Id.* at 25.

if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic.”¹⁷

From the foregoing, it is clear that the FCC will not interfere with any state commission decision – previously made or to be made in the future – requiring payment of reciprocal compensation for ISP traffic, at least until the FCC promulgates a rule on the matter. The FCC also clearly recognized that the state commissions have jurisdiction under sections 251 and 252 of the Telecommunications Act of 1996¹⁸ to decide whether reciprocal compensation applies to ISP traffic under interconnection agreements approved by those commissions.¹⁹ Recently, the portion of the FCC’s ISP Declaratory Ruling that establishes calls to ISPs are jurisdictionally mixed and largely interstate has been remanded back to the FCC by the D.C. Circuit Court for want of “reasoned decision making.”²⁰ For the reasons discussed below, DeltaCom submits that this Commission should exercise its jurisdiction to resolve this dispute concerning reciprocal compensation for ISP traffic and, in doing so, should determine as a matter of law that it has already concluded that reciprocal compensation is due under this agreement, or, in the alternative, apply collateral estoppel to preclude BST from re-litigating the issue already decided against BST by the Alabama Public Service Commission.

Five state commissions have addressed this same issue in proceedings in which BST was a party: Alabama, Florida, Georgia, North Carolina, and Tennessee.²¹ In each of these proceedings, the state commissions interpreted interconnection agreements between BST and various CLECs as providing for payment of reciprocal compensation on ISP traffic. In fact, the

¹⁷ *Id.* at 25

¹⁸ 47 U.S.C. §§ 251 & 252. *See* DeltaCom Complaint at 5.

¹⁹ *See also* ISP Declaratory Ruling at 25 (“As we observed in the *Local Competition Order*, state commission authority over interconnection agreements pursuant to section 252 extends to both interstate and intrastate matters. Thus, the mere fact that ISP-bound traffic is largely interstate does not necessarily remove it from the section 251/252 negotiation and arbitration process.”)(footnote omitted).

²⁰ *Bell Atlantic Telephone Company v. Federal Communications Commission*, No. 99-1094, 2000 WL 273383 at 2 (D.C. Cir. March 24, 2000) vacating and remanding the FCC’s ISP Declaratory Ruling.

²¹ *See* Appendix A for listing of state commission decisions.

Alabama Public Service Commission's decision and this Commission's decision in the *Global Naps* case interpreted the very same Agreement at issue in this proceeding.

The Florida proceedings involved complaints filed by four CLECs against BST alleging that BST had failed to pay reciprocal compensation for local telephone exchange traffic transported and terminated by the CLECs to ISPs.²² The Florida Public Service Commission considered the case as "primarily a contract dispute between the parties" and therefore addressed only "the issue of whether ISP traffic should be treated as local or interstate for purposes of reciprocal compensation as necessary to show what the parties might reasonably have intended at the time they entered into their contracts."²³ Reviewing the interconnection agreement between BST and WorldCom, the commission concluded that, regardless of whether the language of the agreement was ambiguous, the "the parties intended to include ISP traffic as local traffic for purposes of reciprocal compensation under their agreement."²⁴ It explained:

Even if we assume for the sake of discussion that the parties' agreements concerning reciprocal compensation can be said to be ambiguous or susceptible of different meanings, the parties' conduct at the time of, and subsequent to, the execution of the Agreement indicates that they intended to treat ISP traffic as local traffic. None of the parties singled ISP traffic out for special treatment during their negotiations. BellSouth concedes that it rates the traffic of its own 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 to the ALECS. BellSouth's conduct subsequent to the Agreement was for a long time consistent with the interpretation of Section 1.40 [of the Agreement] urged by WorldCom. 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 execution when it later becomes enlightened or discovers an unintended consequence.

²² *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. 98-1216 (F.P.S.C. September 15, 1998) ("Florida Order") at 3-4.

²³ *Id.* at 5.

²⁴ *Id.* at 8-9.

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.” We have. By its own standards, BellSouth is found wanting. The preponderance of the evidence shows that BellSouth is required to pay WorldCom reciprocal compensation for the transport and termination of 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. We find that BellSouth must compensate WorldCom according to the parties’ interconnection agreement, including interest, for the entire period the balance owed is outstanding.²⁵

B. This Case is a Matter of Contract Interpretation and There are No Genuine Issues as to Any Material Fact

This case is a simple matter of contract interpretation. The interpretation of contracts is a matter of law and the admission of evidence is improper unless the language of the instrument is ambiguous.²⁶ “Before a trial court can consider such extrinsic evidence in interpreting a contract, the words used must be unclear such that an ambiguity exists on the face of the contract.”²⁷ Thus, unless the Commission finds that the Agreement between DeltaCom and BST is unclear, it must determine the issue of reciprocal compensation for ISP traffic as a matter of law based on the face of the Agreement without any reference to testimony or other evidence.

In *Global Naps*²⁸, BST fully litigated the issue of whether the language contained in the agreement between Global Naps and BST required payment for reciprocal compensation of ISP traffic. Because Global Naps adopted the ITC^DeltaCom Agreement pursuant to 252(i) of the Telecommunications Act of 1996, the Global Naps Agreement is identical to the ITC^DeltaCom

²⁵ *Id.* at 23-24. The Commission reached a similar conclusion as to BST’s interconnection agreements with the other CLEC complainants. *See id.* at 25 (Teleport/TCG South Florida), 26 (MCI), 27 (Intermedia).

²⁶ *Friedman v. Virginia Metal Products Corp.*, 56 so.2d 515, 516 (Fla. 1952).

²⁷ *Emergency Associates of Tampa, P.A. v. Sassano*, 664 So.2d 1000, 1002 (2d DCA 1995).

²⁸ *In re: Complaint and/or Petition for Arbitration by Global Naps, Inc. for Enforcement of Section VI(B) of its Interconnection Agreement with BellSouth Communications, Inc. and Request for Relief*, FPSC Docket No. 991267-TP (Order No. PSC-00-0802-FOF-TP) (April 24, 2000).

and BST Agreement. The Commission found that the “plain language” of the Global Naps/BST Agreement (the same contract language at issue in this proceeding) requires the payment of reciprocal compensation for all local traffic, including traffic bound for ISPs:

In this case, however, we believe the plain language of the Agreement shows that the parties intended the payment of reciprocal compensation for all local traffic, including traffic bound for ISPs. **Therefore, it is not necessary to look beyond the written agreement to the actions of the parties at the time the agreement was executed or to the subsequent actions of the parties to determine their intent.**

(Emphasis added).²⁹

Thus the Commission decided, as a matter of law, that the plain meaning of the contract between BellSouth and Global Naps was clear and did not require extrinsic evidence to determine the parties’ intent. Because the exact same language is at issue in this case, the Commission should rule that the contract language is clear and unambiguous and does not require the admission of testimony or other extrinsic evidence. To conduct discovery and a hearing in this matter will be a waste of judicial resources and result in unnecessary expense for all involved. Where there is no genuine issue of material fact, and the same issues of law were answered in prior decisions, either expressly or impliedly, contrary to the position of the defendant, summary judgment is proper.³⁰

C. This Matter Has Already Been Fully Litigated and Therefore BellSouth is Collaterally Estopped From Re-litigating Whether It Must Pay Reciprocal Compensation

The Alabama Public Service Commission’s (“APSC”) March 1999 order collaterally estops BellSouth from re-litigating the same issues.³¹ The APSC interpreted the Agreement between BST and DeltaCom as requiring payment of reciprocal compensation for ISP traffic. In that proceeding, the APSC also interpreted interconnection agreements between BST and other

²⁹ *Id.* at 7- 8.

³⁰ *Forte Towers, Inc., v. City of Miami Beach*, 360 So. 2d 81 (Fla 3rd DCA 1978).

³¹ *In re Emergency Petitions of ICG Telecom Group Inc. and ITC/DeltaCom Communications, Inc., for a Declaratory Ruling*, Docket No. 26619, Alabama Public Service Commission (March 4,1999) (“Alabama Order”) (Copy attached as Appendix C).

CLECs, Petitioner ICG Telecom Group, Inc. ("ICG"), and Intervenors Intermedia Communications, Inc. ("Intermedia"), KMC Telecom, Inc. ("KMC"), and e.spire Communications, Inc. ("e.spire").³² The CLECs sought a "determination that telephone calls originating and terminating in the same local calling area from a BellSouth provided telephone exchange service end user to the respective end users of [the CLECs], including ISPs, qualify as local traffic under the terms of their respective interconnection agreements and are, therefore, subject to the payment of reciprocal compensation under the terms and conditions of those agreements."³³ In response, BST raised essentially the same defenses and arguments that it has presented in this proceeding.³⁴

On March 4, 1999, the Alabama Public Service Commission issued its order finding "that with regard to the interconnection agreements BellSouth entered with DeltaCom, KMC, Intermedia and e.spire, telephone calls originating and terminating in the same local calling area from a BellSouth provided telephone service end user to the respective ISP end users of the effected [sic] CLEC Petitioners/Intervenors qualifies as local traffic which is subject to reciprocal compensation."³⁵ The BST interconnection agreement with DeltaCom is the identical Agreement, with Amendments, that is at issue in the present proceeding.³⁶

Focusing on the actual language of the agreements,³⁷ the APSC determined that the parties intended to treat ISP traffic as local traffic for purposes of reciprocal compensation. It stated:

In particular, we note that at the time the interconnection agreements in question were entered, ISP traffic was treated as local in virtually every respect by all industry participants

³² Alabama Order at 3; *see also id.* at 20-22 (setting out pertinent provisions from each agreement).

³³ *Id.* at 1.

³⁴ *Compare* Alabama Order at 2 *with* BST Answer.

³⁵ *Id.* at 26.

³⁶ As noted in section II of the Agreement, the Agreement governs the interconnection arrangements between the parties in all nine BST states.

³⁷ *Id.* at 20.

including the F.C.C. Like the CLEC Petitioners/Intervenors, BellSouth was fully aware of the industry's prevailing local treatment of ISP traffic at the time that it entered the interconnection agreements in question. In fact, BellSouth itself afforded ISP traffic prevailing local treatment in the same respects that the CLECs did at that time.

Even today, both BellSouth and the CLEC Petitioners/Intervenors charge their ISP customers local business line rates for local telephone exchange service that enables the ISPs' customers to access their service via a local call. The service provided to ISP customers by BellSouth and the CLEC Petitioners/Intervenors falls under their local exchange tariffs and calls to ISPs are rated and billed just as any other local call placed via a seven digit local telephone number. Neither BellSouth nor the CLEC Petitioners/Intervenors assess toll charges for those calls. BellSouth specifically advises consumers subscribing to its Internet service provider that access to the BellSouth ISP is achieved via a local call.

As further indication of the prevailing local treatment afforded to ISP traffic, BellSouth records the minutes of use associated with such calls as local for ARMIS reporting requirements with the FCC. Further, BellSouth characterizes expenses and revenues associated with ISP-bound traffic as intrastate for jurisdictional separations purposes.

Also persuasive is the evidence of record demonstrating BellSouth's awareness of the 1989 decision of the Florida Public Service Commission wherein the Florida Commission held that calls to ISPs should be viewed as jurisdictionally intrastate local exchange calls. BellSouth's knowledge of the *Florida Information Services Order* is particularly enlightening given the fact that BellSouth generally negotiates interconnection agreements on a region-wide basis. The existence of that decision strongly suggests that BellSouth was fully aware of the prevailing local treatment afforded ISP traffic by industry usage and custom long before the interconnection agreements under review were negotiated and executed. If there was indeed no intention to encompass ISP traffic within the meaning of local traffic as BellSouth claims, it is reasonable to assume that BellSouth would have taken steps to specifically excluded [sic] ISP traffic from the definition of local traffic in light of the *Florida Information Services Order*.

Perhaps the most persuasive evidence that BellSouth did not intend to exclude calls to ISPs from the definition of local traffic when it entered the agreements under review is gleaned

from the conspicuous absence of a mechanism to track, separate and exclude ISP traffic from the local billing records of the CLEC Petitioners/Intervenors. BellSouth was certainly in a position to know that such a mechanism would be necessary to segregate ISP traffic from local calls, yet no attempt was ever made to develop and incorporate such a mechanism

Given the comprehensive nature of the interconnection agreements under review and the specificity with which they address virtually all interconnection issues, we find it difficult to fathom that BellSouth would not insist on a specific, itemized exception excluding ISP traffic from the definition of local traffic had that been its intention. The prevailing local treatment afforded to ISP traffic by industry participants at the time the agreements under review were entered, and BellSouth's knowledge of that industry custom and usage, made it imperative that BellSouth specifically exclude calls to ISPs from the definition of local traffic subject to the payment of reciprocal compensation. Given the circumstances then existing, we find the absence of such a specific exclusion or exception to be persuasive of the fact that BellSouth did not intend to exclude ISP traffic from the definition of local traffic when it entered the agreement in question.³⁸

Thus, the APSC found that ISP traffic constitutes local traffic for purposes of reciprocal compensation provisions in the BST interconnection agreements.

Under the doctrine of collateral estoppel, where the parties and issues are identical and where a particular matter has been fully litigated and determined in a prior litigation which has resulted in a final decision in a court of competent jurisdiction, the parties are barred from re-litigating the same issues.³⁹ The doctrine applies to the decisions of administrative agencies acting in a judicial capacity.⁴⁰ Global Naps argued in its post-hearing brief to this Commission that collateral estoppel applied based on the APSC's decision. However, the Florida staff recommendation dated March 16, 2000 observed that collateral estoppel would not apply in the

³⁸ *Id.* at 24-26 (footnotes omitted).

³⁹ *Mobil Oil Corporation v. Shevin*, 354 So. 2d 372, 375 (Fla. 1977).

⁴⁰ *McCabe v. Woodland Towers*, Case No. 98-3082, 1999 Fla. Div. Admin. Hear. LEXIS 183. *See Akins v. Hudson Pulp & Paper Co., Inc.*, 330 So.2d 757 (Fla. 1st DCA 1976); *United States Fidelity & Guaranty Co. V. Odoms*, 444 So. 2d 78 (Fla. 5th DCA 1984).

Global Naps case because the parties were different. However, in this case collateral estoppel applies because the parties and the issues are the same. The APSC rendered a ruling in DeltaCom's favor and as the FPSC staff observed in its recommendation, the same issue of whether reciprocal compensation is due under the BellSouth and DeltaCom interconnection agreement was fully litigated .

D. Summary of Argument on Issue 1

The issue of whether reciprocal compensation is required for ISP traffic between BST and the CLECs has been extensively litigated before this Commission. This Commission has rendered several separate rulings on the same issue and all the decisions have been contrary to the position advocated by BST. BST has had a full and fair opportunity to litigate the issue in each of those proceedings. In fact, BST participated fully in the proceedings, vigorously prosecuting its case in each of them. There are no circumstances present that would justify affording BST yet another opportunity to litigate the issue again, especially where the contract language at issue is identical to that presented to this Commission in *Global Naps* and there has been no finding that the Agreement language is ambiguous. Where there are no genuine issues of material fact and where the same issues in prior decisions have been answered contrary to BST's position, summary judgment is due as a matter of law. In the alternative, the Commission should hold that BST is collaterally estopped from re-litigating whether ISP traffic is subject to reciprocal compensation under its agreement with ITC^DeltaCom.

ISSUE II: IS THE PREVAILING PARTY ENTITLED TO ATTORNEY'S FEES UNDER THE AGREEMENT?

In the *Global Naps* case, the same issue was presented. The Commission ruled in *Global Naps* that the language in the agreement is clear and the prevailing party is entitled to attorneys' fees. There can be no argument that there is any genuine issue of material fact on this point because BellSouth agreed with the Commission, arguing that the prevailing party was entitled to

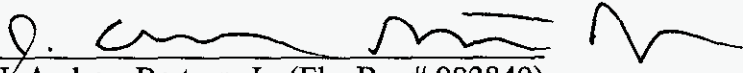
attorney's fees because "the plain language of the Agreement is unambiguous."⁴¹ The identical language is present in the DeltaCom and BellSouth interconnection agreement. The Commission should rule as a matter of law that attorneys' fees are due.

Conclusion

There is no genuine issue of material fact in this case and therefore a summary final order should be entered as a matter of law. BST has had an ample opportunity to litigate – and has actually litigated – the same issue presented in this proceeding. There are sufficient grounds for summary judgment as the same issue of law has been decided in a prior Commission decision. However, established principles of collateral estoppel can be applied to preclude BST from re-litigating whether ISP traffic constitutes local traffic subject to reciprocal compensation. Accordingly, ITC^DeltaCom requests that the Commission grant this motion for summary final order and require BST to pay ITC^DeltaCom all outstanding reciprocal compensation monies due with interest, plus attorney's fees, and grant such other relief as is just and proper.

Respectfully submitted this 15th day of May, 2000.


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⁴¹ *Global Naps*, Staff Recommendation, p. 11 (March 16, 2000).

CERTIFICATE OF SERVICE
DOCKET NO. 991946

I hereby certify that a true and correct copy of the foregoing has been furnished by **Hand-Delivery** this 15th day of May, 2000 to Nancy H. Sims, BellSouth Telecommunications, Inc., 150 South Monroe Street, Suite 400, Tallahassee, Florida 32301-1556.



Attorney

a\ITC-Recip\MotSummary

State Commissions Decisions Issued Before the ISP Order Holding That Calls to ISPs Are Subject to Reciprocal Compensation Requirements.

1. **Arizona.** Opinion and Order - Decision No. 59872, *In re Petition of MFS Intelenet for Arbitration of Interconnection Rates, Terms, and Conditions with US West*, Docket No. U-2752-6-362 (Ariz. Corp. Comm'n Oct. 29, 1996).
2. **Arkansas.** Order - Order No. 6, *Connect Communications v. Southwestern Bell*, Docket No. 98-167-C (Ark. Pub. Serv. Comm'n Dec. 31, 1998).
3. **California.** Opinion - Decision No. 98-10-057, *Order Instituting Rulemaking and Investigation on the Commission's Own Motion into Competition for Local Exchange Service*, 95-04-043 (Rulemaking) & 95-04-044 (Investigation) (Cal. Pub. Util. Comm'n Oct. 22, 1998).
4. **Colorado.** Decision Regarding Petition for Arbitration - Decision No. C96-1185, *In re Petition of MFS Intelenet for Arbitration with US West*, Docket No. 96A-287T (Col. Pub. Util. Comm'n Nov. 5, 1996).
5. **Connecticut.** Decision - *In re Petition for the Southern New England Telephone Company for a Declaratory Ruling Concerning Internet Services Provider Traffic*, Docket No. 97-05-22 (Conn. Dept. of Pub. Util. Control Sept. 17, 1997).
6. **Florida.** Order, *In re: An Investigation Into the Statewide Offering of Access to the Local Network for the Purpose of Providing Information Services*, Docket No. 880423-TP (Fla. Pub. Serv. Comm'n Sept. 5, 1989) (App. Tab 11).

Final Order Resolving Complaints - Order No. PSC-98-1216-FOF-TP, *Consolidated Complaints of WorldCom, Teleport/TCG South Florida, Intermedia, MCImetro*, Docket Nos. 971478-TP, 980184-TP, 980495-TP, 980499-TP (Fla. Pub. Serv. Comm'n Sept. 15, 1998) (App. Tab 12).
7. **Georgia.** Order Affirming and Modifying the Hearing Officer's Decision, *In re Complaint of MFS Intelenet against BellSouth*, Docket No. 8196-U, (Ga. Pub. Serv. Comm'n Dec. 28, 1998) (App. Tab 13).

Order Deciding Complaint, *In re Petition of MCImetro for Arbitration with BellSouth*, Docket No. 6865-U (Ga. Pub. Serv. Comm'n Dec. 28, 1998) (App. Tab 14).

Order Deciding Complaint, *In re: Complaint of Intermedia Communications, Inc. against BellSouth Telecommunications, Inc. for Breach of Terms of Georgia Partial Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996, and Request for Relief*, Docket No. 9920-U (Ga. Pub. Serv. Comm'n Jan. 16, 1999) (App. Tab 15).

Order Affirming and Modifying the Hearing Officer's Decision, *In re Complaint of e.spire Communications, Inc. Against BellSouth Telecommunications, Inc.*, Docket No. 9281-U (Ga. Pub. Serv. Comm'n Feb. 16, 1999) (App. Tab 16).

8. **Hawaii.** Order, *In re Investigation of the Communications Infrastructure of the State of Hawaii*, Docket No. 7702 (Haw. Pub. Serv. Comm'n Jan. 7, 1999).
9. **Illinois.** Order, *Teleport v. Illinois Bell, et al.*, Docket No. 97-0404, 97-0519, 97-0525 (Consolidated (Ill. Come. Comm'n March 11, 1998) [Affirmed on Appeal, June 18, 1999]).
10. **Indiana.** *In re Complaint of Time Warner against Indiana Bell for Violation of the Terms of the Interconnection Agreement*, Cause No. 41097 (Ind. Util. Reg. Comm'n Feb. 3, 1999).
11. **Maryland.** *Bell Atlantic-Maryland v Public Service Commission of Maryland and MFS Intelenet*, Civil No. 178260 (Cir. Ct. of Montgomery County March 26, 1998) (*Blue Divider Sheet*) - Sept. 11, 1997 Letter from Maryland Public Service Commission to Bell-Atlantic Maryland Finding that MFS is Entitled to Compensation for Termination of Telephone Calls in Question.
12. **Michigan.** Opinion and Order, *Consolidated Petitions of Brooks Fiber, TCG Detroit, MFS Intelenet, and Brooks Fiber, against Michigan Bell and Request for Immediate Relief*, Case Nos. U-111778, U-11502, U-11522, U-

11553 (Mich. Pub. Serv. Comm'n Jan. 28, 1998).

13. **Minnesota.** Order Resolving Arbitration Issues, *Consolidated Petitions of AT&T, MCImetro, and MFS Intelenet for Arbitration with US West*, Docket Nos. P-442, 441/M-96-855, P-5321, 421/M-96-909, P-3167, 421/M-96-729 (Minn. Pub. Util. Comm'n Dec. 2, 1996).
14. **Missouri.** Arbitration Order, *In the Matter of the Petition of Birch Telecom, for Arbitration of the Rates, Terms, Conditions, and Related Arrangements for Interconnection with Southwestern Bell*, Case No. TO-98-278 (Mo. Pub. Serv. Comm'n Apr. 23, 1998).
15. **New York.** Order Denying Petition and Instituting proceeding, *Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic*, Case 97-C-1275, et al. (N.Y. Publ. Serv. Comm'n July 17, 1997).

Order Closing Proceeding, *Proceeding on Motion of The Commission to Investigate Reciprocal Compensation Related to Internet Traffic*, Case 97-C-1275 (N.Y. Pub. Serv. Comm'n Mar. 19, 1998).

16. **North Carolina.** Opinion, *MCImetro v. BellSouth*, Docket No. P-55, SUB 1094 (N.C. Util Comm'n Feb. 10, 1999) (App. Tab).

Order, *In re Enforcement of Interconnection Agreement Between Intermedia Communications, Inc. and BellSouth Telecommunications, Inc.*, Docket No. P-55, SUB 1096 (N.C. Util. Comm'n November 4, 1998), *remanded for reconsideration in light of ISP Order, BellSouth Telecommunications, Inc. v. Intermedia Communications, Inc.*, No. 3:99CV05-MU (W.D.N.C. May 20, 1999) (App. Tab 18).

In re Interconnection Agreement Between BellSouth and US LEC of North Carolina, Docket No. P-55, SUB 1027 (N.C. Util. Comm'n Feb. 26, 1998), *remanded for reconsideration in light of ISP Order, BellSouth Telecommunications, Inc. v. US LEC of N.C. LLC*, No. 3:98Cv170MU (W.D.N.C. May 24, 1999) App. Tab 19).

17. **Ohio.** Opinion and Order, *In re Complaint of ICG Telecom v. Ameritech Ohio, Regarding the Payment of Reciprocal Compensation*, Case No. 97-

1557-TP-CSS (Oh, Pub. Util. Comm'n Aug. 27, 1998).

18. **Oklahoma.** Final Order - Order No. 423626, *In re Brooks Fiber for an Order Concerning Traffic Terminating to Internet Service Providers and Enforcing Provisions of the Interconnection Agreement with Southwestern Bell*, Case No. PUD 970000548 (Okla. Corp. Comm'n June 3, 1998).
19. **Oregon.** Arbitrator's Decision Adopted as amended - Order No. 96-324, *In re MFS Intelenet*, ARB 1 (Or. Pub. Util. Comm'n Dec. 9, 1996).
20. **Pennsylvania.** Opinion and Order, *Petition for Declaratory Order of TCG Delaware Valley for Clarification of Interconnection Agreement Bell Atlantic-Pennsylvania*, P-00971256 (Penn. Pub. Util. Comm'n June 16, 1998); Motion of Commissioner D. Rolka (Voted on May 21, 1998).
21. **Tennessee.** Order Affirming the Initial Order of Hearing Officer, *In re Petition of Brooks Fiber to Enforce Interconnection Agreement and for Emergency Relief*, Docket NO. 98-0118 (Tenn. Reg. Auth. Aug. 17, 1998) (App. Tab 20).

Initial Order of Hearing Officer, *In re Petition of Brooks Fiber to Enforce Interconnection Agreement and for Emergency Relief*, Docket No. 98-00118 (Tenn. Reg. Auth. Apr. 21, 1998) (App. Tab 21).

22. **Texas.** Order, *Complaint and Request for Expedited Ruling of Time Warner*, PUC Docket No. 18082 (Tex. Pub. Util. Comm'n February 27, 1998) [Affirmed on Appeal, June 16, 1998]
23. **Utah.** Arbitration Order, *In re AT&T of the Mountain States*, Docket Nos. 96-087-03, 96-095-01 (Ut. Pub. Serv. Comm'n Apr. 28, 1998).

Order, *In re Complaint against US West by Electric Lightwave Requesting the Utah Public Service Commission to Enforce Interconnection Agreement*, Docket No. 98-049-36 (Ut. Pub. Serv. Comm'n Jan. 22, 1999).

24. **Virginia.** Final Order, *Petition of Cox Virginia, for Enforcement of Interconnection Agreement with Bell Atlantic-Virginia, and Arbitration Award for Reciprocal Compensation for the Termination of Local Calls to Internet Service Providers*, Case No. PUB970069 (Va. St. Corp. Comm'n

Oct. 24, 1997).

25. **Washington.** Arbitrator's Report and Decision, *Petition for Arbitration of an Interconnection Agreement Between MFS Intelenet and US West*, Docket No. UT-960323 (Wash. Util. & Trans. Comm'n Nov. 8, 1996).
26. **West Virginia.** Commission Order, *Petition for Arbitration of Unresolved Issues for the Interconnection Negotiations Between MCI and Bell Atlantic-West Virginia*, Case No. 97-1210-T-PC (W.V. Pub. Serv. Common Jan. 13, 1998).
27. **Wisconsin.** May 13, 1998 Letter from the Public Service Commission of Wisconsin to Ameritech Finding that Calls to an Internet Service Provider are Local Traffic and Subject to Reciprocal Compensation Provisions of the Agreement.

District Court Decisions

1. *US West Communs., v. MFS Intelenet, Inc.*, No. C97-222 WD, 1998 WL 350588 (W.D.Wash., Jan. 7, 1998).
2. *Illinois Bell Tel. Co. v. WorldCom Techs.*, No. 98 C 1925, 1998 WL 419493 (N.D. Ill. July 23, 1998).
3. *Southwestern Bell Tel. Co. v. Brooks Fiber Communs.*, No. 98-CV-468-K(J), Order (N.D. Okla. Oct. 1, 1999).
4. *Michigan Bell Tel. Co. v. MFS Intelenet, Inc.*, No. 5:98 CV 18, 1999 U.S. Dist. LEXIS 12093 (W.D. Mich. Aug. 2, 1999).
5. *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, No. MO-98-CA-43, 1998 U.S. Dist. LEXIS 12938 (W.D. Tex. June 16, 1998).
6. *BellSouth Telecomms. v. Brooks Fiber Communs.*, No. 3:98-0811, Mem. (M.D. Tenn. Sept. 30, 1999).
7. *GTE Northwest, Inc. v. WorldCom, Inc.*, No. 99-912C, Minute Order (W.D. Wash. June 11, 1999).
8. *BellSouth Telecomms. v. WorldCom Techs.*, No. 4:98cv352-RH, Order Denying Stay (N.D. Fla. June 1, 1999).
9. *BellSouth Telecomms. v. MCImetro Access Transmission Service, et. al.* Civil Action No. 1: 99-CV-0248-JOF (N.D.Ga May 4,2000).
10. *BellSouth Telecomms. v. ITC^DeltaCom Communications, Inc., et. al.* CV 99-D-287-N 12-3-99 (M.D. Ala. December 3, 1999).

Circuit Court Decisions

1. *Southwestern Bell Telephone Co. v. Public Utility Commission*, No. 98-50787, 2000 WL 332062 (5th Cir. March 30, 2000)
2. *Illinois Bell Tel. Co. v. WorldCom Techs, Inc.* 179 F3d 566 (7th Cir. 1999)
3. *USWest Communications v. MFS Intelnet, Inc.* 193 F.3d 1112 (9th Cir 1999)



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SECRETARY

IN RE: EMERGENCY PETITIONS OF ICG
TELECOM GROUP INC. AND ITC
DELTACOM COMMUNICATIONS, INC. FOR
A DECLARATORY RULING.

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I. INTRODUCTION AND BACKGROUND

By Order entered on August 6, 1998, this consolidated proceeding was established to consider the separate Petitions of ICG Telecom Group, Inc. (ICG) and ITC DeltaCom Communications, Inc. (ITC DeltaCom) for a Declaratory Ruling interpreting and enforcing certain terms of their respective interconnection agreements with BellSouth Telecommunications, Inc. (BellSouth).¹ The contractual provisions which the Commission was requested to interpret address local traffic and the payment of reciprocal compensation for the exchange of such local traffic. The ICG/BellSouth interconnection agreement was executed on October 7, 1997 and approved by the Commission on November 17, 1997.² The ITC DeltaCom/BellSouth interconnection agreement was entered on March 12, 1997 and approved by the Commission on May 5, 1997.³

Both ICG and ITC DeltaCom argued in their Petitions for declaratory relief that BellSouth had improperly refused to pay reciprocal compensation for local calls terminating at their end user customers who are Internet Service Providers (ISPs). ICG and ITC DeltaCom both requested in their Petitions that the Commission render a determination that telephone calls originating and terminating in the same local calling area from a BellSouth provided telephone exchange service end user to the respective end users of ICG and ITC DeltaCom, including ISPs, qualify as local traffic under the terms of their respective interconnection agreements and are, therefore, subject to the payment of reciprocal compensation under the terms and conditions of those agreements.

The August 6, 1998 Order of the Commission established a September 3, 1998 hearing date for the Petitions of ICG and ITC DeltaCom. In the interest of advancing judicial economy, the

¹ ICG filed its Petition on/about July 6, 1998 while ITC DeltaCom submitted its Petition on/about July 14, 1998.

² Part B of the General Terms and Conditions Section of the October 7, 1997 ICG/BellSouth agreement defines "local traffic" while §§8.1 and 8.2 of said agreement define the obligations of the parties with respect to the payment of reciprocal compensation. The aforementioned §8.2 was, however, amended by mutual agreement of the parties which was entered on May 11, 1998. The entire ICG/BellSouth interconnection agreement of October 7, 1997 and the May 11, 1998 amendment thereto were incorporated by reference into ICG's Petition for a Declaratory Ruling.

³ Item 49 of Attachment B to the March 12, 1997 agreement entered between ITC DeltaCom and BellSouth defines "local traffic" while §VI (B) of that agreement defines the obligations of the parties with regard to reciprocal compensation. The parties did, however, substitute a new §VI (B) pursuant to a Fourth Amendment executed on August 22, 1997. The entire ITC DeltaCom/BellSouth interconnection agreement and the four amendments thereto were incorporated by reference into ITC DeltaCom's Petition for a Declaratory Ruling.

Appendix A

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Commission incorporated language into the August 6, 1998 Order which encouraged Competitive Local Exchange Carriers (CLECs) with interconnection agreement disputes with BellSouth which closely paralleled those of ICG and ITC DeltaCom to intervene and actively participate in the proceedings scheduled to commence on September 3rd. The Commission noted that absent compelling arguments to the contrary, it was the Commission's intention to liberally allow intervention by CLECs who could reasonably demonstrate that their interests would be affected by a Commission decision interpreting the ICG and/or ITC DeltaCom interconnection agreements as they related to the payment of reciprocal compensation for ISP traffic. On August 13, 1998 the Commission entered a Procedural Ruling establishing deadlines for the prefiling of testimony and addressing other procedural matters.

On August 18, 1998 BellSouth filed Answers to the Petitions of ICG and ITC DeltaCom. In its Answers to both Petitions, BellSouth alleged that calls made to the Internet through ISPs that originate on one carrier's network do not terminate on the other carrier's network as is required for reciprocal compensation to apply. BellSouth argued that a single Internet call thus placed may communicate with interstate, foreign and local destinations simultaneously and must, therefore, be considered jurisdictionally interstate. As such, BellSouth asserted that jurisdiction over ISP traffic was clearly vested with the Federal Communications Commission (FCC).

BellSouth also argued in its Answers to the Petitions of both ICG and ITC DeltaCom that it was axiomatic that reciprocal compensation should flow in both directions. BellSouth alleged that neither ICG nor ITC DeltaCom were entitled to the relief they sought because the ISP traffic which they based there respective claims on flowed only their way.

BellSouth urged the Commission to dismiss the Petitions of both ICG and ITC DeltaCom due to BellSouth's claim that jurisdiction over ISP traffic rests exclusively with the FCC. In the alternative, BellSouth urged the Commission to hold the Petitions of ICG and ITC DeltaCom in abeyance until the FCC renders a determination on the issues in question. BellSouth asserted that the FCC had the issue of reciprocal compensation for ISP traffic under consideration and would make a determination in the very near future.

With respect to the Petition of ITC DeltaCom, BellSouth alleged that there was no mutual agreement between BellSouth and ITC DeltaCom concerning the reciprocal compensation provisions of their interconnection agreement. BellSouth alleged that the law at the time the parties executed their agreement was such that ISP traffic was not considered to be local and, therefore, was excluded from reciprocal compensation obligations. BellSouth argued that it had no rational economic reason to agree to reciprocal compensation for ISP traffic and that local traffic has customarily been interpreted in the telecommunications industry to exclude ISP traffic.

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BellSouth also filed a separate Motion to Dismiss the Petition of ICG on August 18, 1998. In support of said Motion, BellSouth raised jurisdictional arguments similar to those raised in its Answers to the Petitions of ICG and ITC DeltaCom. BellSouth did, however, further support those arguments in a detailed Memorandum of Law.

On August 31, 1998 ICG submitted its response to BellSouth's Motion to Dismiss. ICG again asserted that consumer calls to ISPs within their local service area constituted local calls and were, therefore, intrastate telecommunications within the jurisdiction of the Commission. ICG accordingly urged the Commission to deny the Motion to Dismiss filed by BellSouth.

Pursuant to the August 6, 1998 Order of the Commission, the public hearing concerning the Petitions of ICG and ITC DeltaCom was held on September 3-4, 1998. In addition to the CLEC Petitioners ICG and ITC DeltaCom, Intermedia Communications, Inc. (Intermedia)⁴; KMC Telecom, Inc. (KMC)⁵; e.spire Communications, Inc. (e.spire)⁶; Hyperion Telecommunications, Inc. (Hyperion)⁷ were allowed to intervene and participate in the proceedings. AT&T Communications of the South Central States, Inc. and TCG MidSouth, Inc. also petitioned to intervene, but did not appear to further their interventions.

At the outset of the proceedings conducted on September 3, 1998 BellSouth and ICG were permitted to orally argue BellSouth's Motion to Dismiss ICG's Petition. After hearing the arguments of both sides, the presiding Administrative Law Judge denied BellSouth's Motion.

A total of nine witnesses testified during the two day hearing. BellSouth sponsored the direct and rebuttal testimony of Mr. Jerry Hendrix and the rebuttal testimony of Mr. Albert Halprin. ICG presented the direct testimony of Mr. Thomas E. Allen, Jr. and the direct and rebuttal testimony of Mr. J. Carl Jackson, Jr. ITC DeltaCom presented the direct testimony of Mr. Foster O. McDonald

⁴ Intermedia has an interconnection agreement with BellSouth which was originally executed on June 21, 1996 and was approved by the Commission on November 22, 1996. Said agreement defines "local traffic" at §1.D while the reciprocal compensation obligations of the parties are defined at §4.B. The Intermedia/BellSouth interconnection agreement was not directly at issue in the proceeding because Intermedia did not allege that BellSouth owed it reciprocal compensation for the transport and termination of calls to ISPs in Alabama. Intermedia represented that it intervened on the basis that any policy determinations rendered by the Commission in this proceeding might affect potential negotiations between Intermedia and BellSouth. See Intermedia Post-Hearing Brief at p. 2, fn. 2.

⁵ KMC has an interconnection agreement with BellSouth which was originally executed on February 24, 1997 and was approved by the Commission on May 5, 1997. Said agreement defines "local traffic" at §1.41 and defines the reciprocal compensation obligations of the Parties at §§1.59 and 5.8. KMC alleges that BellSouth improperly, unilaterally, and arbitrarily decided to withhold reciprocal compensation which was due KMC for calls terminating at KMC's ISP customers. Tr. at 332-333 (ODEN).

⁶ e.spire has an interconnection agreement with BellSouth which was originally executed on July 25, 1996 and was approved by the Commission on October 28, 1996. Said agreement defines local traffic at Item 48 of Attachment B and discusses the obligations of the Parties with regard to the exchange of traffic at §VI.A. As required by the aforementioned agreement, e.spire has submitted its disputes with BellSouth concerning the payment of reciprocal compensation for ISP traffic in Alabama to binding commercial arbitration. e.spire nonetheless maintains that a decision by the Commission as to the jurisdictional nature of ISP Traffic may have a precedential effect on that issue in commercial arbitration as it pertains to Alabama. e.spire Post-Hearing Brief at p. 3; Tr. at 419-420 (Quarisco-Opening Statement).

⁷ At the time of the hearing, Hyperion did not have authority as a CLEC in Alabama and had not entered into an interconnection agreement with BellSouth. Hyperion nonetheless represented that its plan was to apply for such certification in the near future and maintained that a determination in this cause could have a precedential effect on Hyperion. Hyperion subsequently received its certificate to provide CLEC service in Alabama by Order dated March 3, 1999 in Docket 26817.

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and Mr. James C. Wilkerson along with the direct and rebuttal testimony of Mr. Christopher J. Rozycki. Intermedia sponsored the direct testimony of Ms. Julia Strow while KMC submitted the direct testimony of Mr. Gregory A. Oden. The CLEC intervenors e.spire and Hyperion did not present the testimony of witnesses but did have counsel present to conduct cross-examination of BellSouth's witnesses.

At the conclusion of the proceedings of September 4, 1998 the parties to the proceedings indicated a desire to submit Post Hearing Briefs. The Commission accordingly granted the parties leave to submit simultaneous briefs no later than September 25, 1998. BellSouth, ITC DeltaCom, Intermedia and e.spire each submitted individual briefs while ICG, KMC and Hyperion submitted a joint brief. GTE South, Inc. (GTE) also submitted an *Amicus Curiae* brief in support of BellSouth.⁸

II. STATUTORY CONSIDERATIONS

In order to promote competition in the local exchange telecommunications market, the Telecommunications Act⁹ at §251(a) imposes a general duty on all telecommunications carriers to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. With regard to incumbent local exchange carriers (ILECs) such as BellSouth, the duty to interconnect is even more specifically defined by §251(c)(2). ILECs are also charged by §251(c)(1) with a specific duty to negotiate in good faith with regard to the fulfillment of the interconnection duties imposed by the Act.

In conjunction with the above mentioned interconnection obligations, the Act at §251(b)(5) requires all local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of telecommunications. For purposes of compliance with §251(b)(5), the Act provides at §252(d)(2)(A) that a state Commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier. Further, such terms and conditions must determine costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

It should be noted, however, that according to the provisions of §252(a)(1), ILECs may upon receiving a request for interconnection services or network elements pursuant to §251 negotiate and

⁸ GTE represented that it did not seek intervenor status in the proceeding because it was not a party to any of the interconnection agreements under review. GTE nonetheless represented that as an Incumbent Local Exchange Carrier with interconnection agreements in place, it had an interest in the proceeding due to the likelihood that it would find itself confronted with some of the same legal issues which BellSouth had encountered. GTE emphasized that it was merely attempting to address the jurisdictional issues involved and was not attempting to address the issues of fact regarding the language of the interconnection agreements under review.

⁹ The Communications Act of 1934 as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 55, codified at 47 USC §§151 et. seq. (the Act). Cites to sections of the Act are accordingly cites to 47 USC.

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enter into a binding agreement with a requesting telecommunications carrier or carriers without regard to the standards set forth in Sections (b) and (c) of §251. This provision was undoubtedly implemented to provide flexibility in arms length negotiations.

Any interconnection agreement negotiated must be submitted to the appropriate state Commission under §252(e). The state Commission must act to approve or reject the agreement within ninety days after its submission by the parties pursuant to §252(e)(4). According to the terms of §252(e)(2)(A), the state Commission may only reject an agreement adopted by negotiation if it finds that the agreement or a portion thereof discriminates against a telecommunications carrier not a party to the agreement, or the implementation of such an agreement or a portion thereof is not consistent with the public interest, convenience and necessity. This Commission has approved each of the interconnection agreements under review in this proceeding pursuant to the provisions discussed herein.

III. THE JURISDICTION OF THE COMMISSION

The Commission's general authority to render the Declaratory Ruling sought by the Petitioners and Intervenor is derived primarily from the broad supervisory powers granted to the Commission pursuant to the Code of Alabama, 1975 §§37-1-32 and 37-2-3, as well as Rule 22 of the Commission's Rules of Practice.¹⁰ The specific authority of the Commission to interpret and enforce the terms and conditions of the interconnection agreements under review in this proceeding is a derivative of the exclusive authority granted by §252 (e) (1) of the Act to this and other state Commissions to approve or reject interconnection agreements submitted for review. That authority was explicitly recognized by the U. S. Court of Appeals for the Eighth Circuit in *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *cert. granted*, 118 S.Ct. 879 (1998) wherein the Court noted:

We also believe that state Commissions retain the primary authority to enforce the substantive terms of the agreements made pursuant to §§251 and 252. Subsection 252(e)(1) of the Act explicitly requires all agreements under the Act to be submitted for state Commission approval...We believe that the state Commission's plenary authority to accept or reject these agreements necessarily carries with it the authority to enforce the provisions of agreements that the state Commissions have approved.¹¹

Although our view that state Commissions have the plenary authority to interpret and enforce the terms and conditions of interconnection agreements which have been approved by them pursuant to §252(e)(1) is consistent with that expressed by the Eighth Circuit, we are compelled to reassess our position in light of the Supreme Court's ruling in *AT&T Corp. v. Iowa Utilities Board*, No. 97-826 (and consolidated cases), 1999 WL 24568 (U.S. Jan. 25, 1999) that the Eighth Circuit

¹⁰ The Commission's statutory authority to promulgate rules such as the Rules of Practice is derived from Code of Alabama, 1975 §37-1-38.

¹¹ *Iowa Utilities Board* at 804.

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reached that conclusion in ruling on an issue that was not ripe for consideration. More specifically, the Eighth Circuit concluded that state Commissions have the plenary authority to interpret and enforce interconnection agreements in ruling on challenges to the FCC's claim that §208 of the Act gives it authority to review agreements approved by state Commissions¹². The Supreme Court did not address the merits of the Eighth Circuit's findings regarding the plenary authority of the states to enforce interconnection agreements approved by them, but concluded that the dispute concerning the FCC's §208 authority was not yet ripe for review because the FCC had not actually adopted rules implementing that authority.

The reassessment of our jurisdictional authority concerning the interconnection agreements under review thus begins with an analysis of the FCC's discussion of its §208 authority in its *First Report and Order*. Our review of the FCC's discussion in that regard leads us to the conclusion that the FCC intended to emphasize that parties who are aggrieved by state determinations concerning interconnection agreements may subsequently elect to either bring an action for Federal District Court Review or file a §208 complaint against a common carrier with the FCC¹³. The prerequisite for either avenue of review, however, seems to be a prior determination by the appropriate state Commission.

With regard to the FCC's specific conclusion that an aggrieved party *could* file a §208 complaint alleging that a common carrier is violating the terms and conditions of a negotiated or arbitrated interconnection agreement, we find that the FCC's use of the word *could* indicates that the filing of a §208 complaint as the result of an interpretational dispute is certainly not envisioned by the FCC to be the exclusive remedy for the resolution of such a dispute¹⁴. In the case before us, ICG and ITC DeltaCom submitted petitions to this Commission seeking our review and enforcement of the terms and conditions of their respective interconnection agreements with BellSouth. It is, therefore, our position that even when the Act is construed in the broad manner which is necessary to provide the FCC with the authority it purports to have to review state approved interconnection agreements, that authority is by no stretch of the imagination exclusive. Accordingly, this Commission unequivocally has the jurisdiction to act on the Petitions submitted to us in this cause.¹⁵

¹² See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98 (Aug. 8, 1996) (Hereinafter FCC's *First Report and Order*).

¹³ FCC's *First Report and Order* at ¶128. It appears that the FCC must at a minimum implement a rulemaking proceeding to establish guidelines for the filing of such complaints.

¹⁴ FCC's *First Report and Order* at ¶127.

¹⁵ Indeed, prior to the Supreme Court's decision in *AT&T v. Iowa Utilities Board*, the FCC conceded that pursuant to the Eighth Circuit's ruling in *Iowa Utilities Board v. FCC*, it did not have jurisdiction to enforce the terms and conditions of state approved interconnection agreements and did not seek referral of such issues. See *BellSouth Telecommunications, Inc. v. U.S. LEC of North Carolina, L.L.C. et al.*, Civil Action No. 3:98CV170-MUC(V.D.N.C.), Response of Federal Communications Commission as *Amicus Curiae* to Motion for Referral of Issue, at p. 1-3.

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We now turn to a discussion of the threshold jurisdictional arguments raised by BellSouth. BellSouth argues that calls made by an end user to access the Internet or other services offered by an ISP constitute traffic that is jurisdictionally interstate. According to BellSouth, the fact that a single Internet call can simultaneously access computer databases in the same state, in other states and in other countries render such calls inseparably interstate based on the criteria of *Louisiana Public Service Commission v. FCC*, 476 US 355 (1986). Based on that assessment, BellSouth asserts that jurisdiction over ISP traffic has been, and continues to be, clearly vested with the FCC which is presently considering the precise issue raised by the Petitioners¹⁶. BellSouth accordingly urges the Commission to take no action and defer to the conclusions which will ultimately be reached by the FCC¹⁷.

On February 26, 1990, the FCC released its much anticipated Order clarifying the jurisdictional status of calls to ISPs.¹⁸ The FCC concluded therein that ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate. The FCC further concluded, however, that given the absence of a federal rule regarding the appropriate inter-carrier compensation for such traffic, parties shall be bound by their existing interconnection agreements as interpreted by state Commissions.¹⁹

The FCC conceded that in many respects, it and the incumbent LECs have long treated ISP-bound traffic as though it were local. Against that backdrop, and in the absence of a contrary FCC rule, the FCC recognized that parties entering into interconnection agreements may reasonably have agreed for the purposes of determining whether reciprocal compensation should apply to ISP-bound traffic that such traffic should be treated in the same manner as local traffic. The FCC noted that when construing the parties' agreements to determine whether the parties so agreed, state Commissions had the opportunity to consider all the relevant facts including the negotiation of the

¹⁶ The FCC also noted in its *Amicus Curiae* Brief before the United States District Court for the Western District of North Carolina (*Id.*) that pending before the Agency were requests filed by MFS Communications Company, Inc. (MFS), a CLEC, and the Association for Local Telecommunications Services (ALTS), a trade association that represents CLECs, that the FCC clarify whether the reciprocal compensation obligations of §251(b)(5) of the Act apply to calls made to CLEC subscribers that are ISPs. The FCC indicated that in response to those requests it would resolve the threshold question of whether calls to ISPs are subject to the FCC's jurisdiction. See Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings, 61 Fed. Reg. 53,922 (1996); *Pleading Cycle Established for Comments on Requests by ALTS for Clarification*, Public Notice, FCC Common Carrier Bureau/CPD 97-30, 12 FCC Red 9715 (rel. July 2, 1997). Although ALTS filed a letter with the FCC's Common Carrier Bureau seeking to withdraw its request for clarification, the FCC noted that the issue ALTS raised remains pending before the Commission pursuant to the MFS Petition and the Agency's authority on its own motion to "issue a declaratory ruling terminating a controversy or removing uncertainty." 47 CFR §1.2. See also 5 USC §554(e). BellSouth mistakenly implied in its Post-Hearing Brief at p. 7, fn. 4 that the FCC's October 30, 1998 Memorandum Opinion and Order in *GTE Telephone Operations, GTOC Tariff No. 1, GTOC Transmittal No. 11-48*, CC Docket No. 98-79 (*The GTE DSL Tariff Filing*) was envisioned as being the FCC's dispositive determination as to the jurisdictional nature of ISP traffic.

¹⁷ BellSouth's jurisdictional arguments were also advanced by GTE in its *Amicus Curiae* Brief in this cause.

¹⁸ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Declaratory Ruling, CC Docket No. 96-98 (rel. February 26, 1999) (FCC's *ISP Declaratory Ruling*); *Inter-Carrier Compensation for ISP Bound Traffic*, Notice of Proposed Rulemaking, CC Docket No. 99-68 (rel. February 26, 1999) (FCC's *ISP NPRM*).

¹⁹ *Id.* at ¶ 1.22.

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agreements in the context of the FCC's long standing policy of treating ISP-bound traffic as local and the conduct of the parties pursuant to those agreements. The FCC specifically recognized that state Commissions, not the FCC, are the arbiters of what factors are relevant in ascertaining the parties' intentions. The FCC noted that nothing in its *ISP Declaratory Ruling* should be construed to question any determination a state has made, or may make in the future, that parties have agreed to treat ISP-bound traffic as local traffic under existing interconnection agreements.²⁰

In light of the above discussion, it appears that nothing in the FCC's *ISP Declaratory Ruling* precludes this Commission from embarking on analysis of the terms and conditions of the interconnection agreements which we have been requested in this proceeding to interpret and enforce. In fact, our actions herein appear totally consistent with the aforementioned holdings of the FCC.

In order to minimize any possible confusion regarding the conclusions we reach in this proceeding, however, we emphasize at this juncture that we are not herein determining the generic issue of the jurisdictional nature of ISP traffic. To the contrary, we are considering the jurisdictional nature of such traffic only to the extent that it is prudent and necessary to determine the intent of the parties when they entered the interconnection agreements which we have been requested to review.

IV. THE SUBSTANTIVE ARGUMENTS OF THE PARTIES

A. The Substantive Arguments Advanced by the CLEC Petitioners and Intervenors

Although each of the CLEC Petitioners/Intervenors in this cause stand in a slightly different factual posture with BellSouth, they generally assert the same position with regard to the underlying legal issues identified in this proceeding. Accordingly, the arguments of the CLEC Petitioners/Intervenors are, for the most part, addressed herein in a collective fashion.

The primary argument advanced by the CLEC Petitioners/Intervenors is that pursuant to the plain language of the interconnection agreements under review, BellSouth is required to pay reciprocal compensation to each CLEC which is a party to such an agreement for terminating BellSouth originated traffic to ISPs served by the effected CLECs.²¹ They assert that the interconnection agreements under review uniformly specify that each party thereto will pay the other party for local traffic terminating on the other carrier's network at agreed upon rates. The CLEC Petitioners/Intervenors contend that ISP traffic constitutes local traffic for which reciprocal compensation must be paid.

²⁰ *Id.* at ¶'s 23-29.

²¹ ICG asserts that the fact that its interconnection agreement with BellSouth excludes traffic terminating at ISPs from reciprocal compensation pending the entry of a final order by this Commission or the FCC, or upon BellSouth's "knowing" payment of reciprocal compensation to any other CLEC, does not dilute the strength of its arguments along those lines. See Joint Post-Hearing brief of ICG, KMC and Hyperion at p. 2, fn. 2.

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Although there are some minor distinctions in the respective interconnection agreements, the CLEC Petitioners/Intervenors assert that the agreements generally define local traffic as any telephone call that originates in one exchange and terminates in either the same exchange or a corresponding Extended Area Service (EAS) exchange.²² The CLEC Petitioners/Intervenors maintain that the definition of local traffic in the respective interconnection agreements does not discriminate among types of end users or exclude calls from end users in the same local calling area to other end users in the same local calling area that happen to be ISPs. As such, the CLEC Petitioners/Intervenors contend that calls originated by BellSouth and transported and terminated by the CLEC Petitioners/Intervenors to their ISP customers are indeed local traffic for which BellSouth must pay reciprocal compensation pursuant to the interconnection agreements under review. Given the clarity in the aforementioned agreements, the CLEC Petitioners/Intervenors assert that the Commission need not look outside the terms of those agreements to resolve the dispute concerning the payment of reciprocal compensation for ISP traffic.

In the event the Commission concludes that there is ambiguity in the interconnection agreements concerning the definition of local traffic and the obligations of the parties to pay reciprocal compensation for calls to ISPs within the local calling area, the CLEC Petitioners/Intervenors advance numerous arguments in support of their position that a reasonable interpretation of their agreements leads to the logical conclusion that BellSouth should pay reciprocal compensation for the ISP traffic in question. The CLEC Petitioners/Intervenors support those arguments with evidence of record which is extrinsic to the interconnection agreements themselves.

The CLEC Petitioners/Intervenors assert that in determining the intent of the parties to the interconnection agreements under review, the Commission should consider the fact that, with the exception of the negotiations conducted between BellSouth and ICG, the subject of reciprocal compensation for ISP traffic was never openly discussed during any of the negotiations between BellSouth and the CLEC Petitioners/Intervenors with whom they executed those interconnection agreements.²³ With the exception of ICG, the CLEC Petitioners/Intervenors allege that reciprocal compensation for ISP traffic was never openly discussed during negotiations due to the fact that all parties understood such traffic to be local in nature and, therefore, subject to reciprocal compensation.

In support of their position, the CLEC Petitioners/Intervenors point to the fact that ISP calls are considered local pursuant to common industry practices. Specifically, the CLEC

²² ICG, KMC, Hyperion Joint Post Hearing Brief at pp. 2 and 12; ITC DeltaCom Post Hearing Brief at pp. 3-4; Intermedia Post Hearing Brief at p. 10; e.spire Post Hearing Brief at p. 5.

²³ BellSouth generally concurs with those representations. See BellSouth Post Hearing Brief at p. 11.

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Petitioners/Intervenors argue that BellSouth charges its own ISP customers local business line rates for local telephone exchange service that enables the ISP's customers to connect to their service via a local call. Much like the CLEC Petitioners/Intervenors, the service provided by BellSouth to its ISP customers is generally under its local exchange tariff and calls to the ISPs are rated and billed just like any other local call placed via a seven digit local telephone number. BellSouth does not assess toll charges for these calls and in fact records the minutes associated with such calls as local for purposes of jurisdictional separations and ARMIS reporting requirements with the FCC.

The CLEC Petitioners allege further that BellSouth had knowledge of a 1989 Florida Public Service Commission decision wherein the Florida Commission determined that calls to ISPs should be viewed as jurisdictionally local.²⁴ The CLEC Petitioners/Intervenors assert that BellSouth was fully aware of the Florida PSC's decision at the time it entered the interconnection agreements in question.

Given these prevalent local treatments of ISP traffic and BellSouth's knowledge of same, the CLEC Petitioners/Intervenors assert that it was incumbent upon BellSouth to raise an issue concerning such traffic during negotiations and to specifically exclude it from the definition of local traffic and/or the obligation to pay reciprocal compensation. The Petitioners allege that their argument that BellSouth never intended to exclude ISP traffic from the definition of local traffic subject to reciprocal compensation is bolstered by the fact that BellSouth never broached the subject of developing a mechanism to distinguish and separate ISP traffic from other local traffic. They contend that such a mechanism would have been an absolute necessity had BellSouth legitimately intended to exclude such traffic for purposes of paying reciprocal compensation.²⁵

The CLEC Petitioners/Intervenors rely on numerous arguments to counter the BellSouth claims that calls to ISPs, which would otherwise be local, are not such under the interconnection agreements' definition of local traffic because they do not in fact terminate at the ISP. First, the CLEC Petitioners/Intervenors alleged that the evidence persuasively shows that when a call reaches an ISP, the call is "answered" due to the fact that the call receives "answer supervision". They contend that the call is established for billing purposes when the ISP answers the incoming call. The CLEC Petitioners/Intervenors thus argue that calls placed over the public switched telephone network to ISPs are "terminated" when they are delivered to the telephone exchange service premise bearing the telephone number of the ISP which is called.

²⁴ *Investigation Into the Statewide Offering of Access to the Local Network for Purposes of Providing Information Services*, Docket No. 880423-TP, Order (September 5, 1989, Florida Public Service Commission) (*Florida Information Services Order*).

²⁵ See Tr. at p. 64 (Wilkerson), Tr. at p. 365 (Strow).

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In further support of their argument that calls to ISPs terminate at the ISP's point of presence, the CLEC Petitioners/Intervenors point to the FCC's definition of "termination" for purposes of reciprocal compensation as established in the FCC's *First Report and Order*. The CLEC Petitioners/Intervenors point specifically to the FCC language stating:

We define termination for purposes of §251(b)(5) (the reciprocal compensation provision of the 1996 Act) as the switching of traffic that is subject to §251(b)(5) [e.g. local traffic] at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called parties premises.²⁶

The CLEC Petitioners/Intervenors further point to recent rulings in the FCC's *Universal Service Order* describing Internet traffic as calls with two severable components.²⁷ They maintain that pursuant to the rulings of the FCC, the first component is the local exchange telecommunications call to the ISP which is properly subject to reciprocal compensation. They allege that the second component is the information service component which is irrelevant for purposes of determining BellSouth's reciprocal compensation obligation.²⁸

The CLEC Petitioners/Intervenors further assert that the FCC recently affirmed its conclusion that the local call to the ISP is separate and distinguishable from any subsequent ISP activity in its *Advanced Telecommunications Order*.²⁹ The CLEC Petitioners/Intervenors directed the Commission to the language in that Order where the FCC specifically stated that:

An end-user may utilize a telecommunications service together with an information service, as in the case of Internet access. In such a case, however, we treat the two services separately: The first is a telecommunications service (e.g., the xDSL-enabled transmission path), and the second service is an information service, in this case Internet access.³⁰

Additional FCC precedent cited by the CLEC Petitioners/Intervenors includes the FCC's *Access Charge Reform Order* wherein the FCC declined to allow local exchange carriers to assess interstate access charges on ISPs.³¹ They assert that the FCC in that Order unambiguously characterized the connection from the end user to the ISP as local traffic when it concluded that: "To maximize the number of subscribers that can reach them through a local call, most ISPs have deployed points of presence."

²⁶ See FCC's *First Report and Order* at ¶1040.

²⁷ *Federal-State Joint Board on Universal Service Report and Order*, CC Docket No. 96-45, (rel. May 8, 1997) (*Universal Service Order*).

²⁸ *Id.* at ¶789.

²⁹ *Deployment of Wireline Services Offering Advanced Telecommunications Capability* and consolidated cases, CC Docket No. 98-147 and consolidated Dockets, Memorandum Opinion and Order and Notice of Proposed Rulemaking (rel. Aug. 7, 1998) (*Advanced Telecommunications Order*).

³⁰ *Id.* at ¶36.

³¹ *In Re: Access Charge Reform*, First Report and Order, CC Docket No.'s 96-242, 94-1, 91-213, 95-72 (rel. May 17, 1997) (*Access Charge Reform Order*), ¶¶ 344-348.

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The CLEC Petitioners/Intervenors also cite the FCC'S *Non Accounting Safeguards Order* wherein the FCC again determined that the local call placed to an ISP is separate from the subsequent information service provided.³² According to the CLEC Petitioners/Intervenors, severability of these components was key to the FCC's conclusion that if each was provided, purchased, or priced separately, the combined transmissions did not constitute a single interLATA transmission.

The CLEC Petitioners/Intervenors also note that in a recent Report to Congress concerning Universal Service matters, the FCC stated that ISPs are not telecommunications service providers and, therefore, are not subject to regulation as common carriers.³³ Similarly, the CLEC Petitioners/Intervenors point to the conclusions recently drawn by the U.S. Court of Appeals for the Eighth Circuit in *Southwestern Bell Telephone Company v. FCC*, No. 97-2618 at 39 (8th Cir., August 19, 1998) wherein the Court declared that ISPs do not utilize LEC services and facilities in the same way or for the same purposes as other customers who are assessed per-minute interstate access charges. The court went on to note that ISPs subscribe to LEC facilities in order to receive local calls from customers who want to access the ISPs data, which may or may not be stored in computers outside the state in which the call was placed.

The CLEC Petitioners/Intervenors assert that the above noted conclusions of the FCC and the Eighth Circuit refute BellSouth's arguments that ISP calls do not terminate at the ISP but rather "transit" the CLEC network to remote Internet host computer sights which may simultaneously be interstate and international during the course of any given call. According to the CLEC Petitioners/Intervenors, BellSouth's arguments in that regard ignore the above noted dichotomy recognized by the FCC and the fact that the CLEC Petitioners/Intervenors provide the necessary telecommunications functions in a switched communications system to terminate calls to ISPs. The CLEC Petitioners/Intervenors surmise that it is abundantly clear that the FCC at this time does not consider a call that would otherwise be a local exchange call to be an interstate or international communication merely because the local exchange end user is an ISP.

In addition to the FCC precedent discussed above, the CLEC Petitioners/Intervenors cite decisions from other jurisdictions where the issue of whether ISP traffic is local and, therefore, subject to reciprocal compensation has been addressed. At the time Post Hearing Briefs were submitted by the parties, some twenty-one state Commissions had addressed the issue of reciprocal

³² *Implementation of Non Accounting Safeguards of §§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 (rel. Dec. 24, 1996) (Non Accounting Safeguards Order)*, ¶ 120.

³³ *Federal-State Joint Board on Universal Service, Report to Congress, CC Docket No. 96-45 (April 10, 1998) ¶106.*

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compensation as it relates to ISP traffic.³⁴ The CLEC Petitioners/Intervenors assert that every state Commission which has taken final action with respect to the classification of calls placed to ISPs has ruled that such calls constitute local traffic and are, therefore, subject to the payment of reciprocal compensation.

The CLEC Petitioners/Intervenors also note that on June 22, 1998 the United States District Court for the Western District of Texas issued its *nunc pro tunc* Order affirming the Texas PUC's decision that calls to ISPs are local and further affirming the Texas PUC's decision that the interconnection agreement in question provided for reciprocal compensation for the termination of calls to ISPs.³⁵ Similarly the CLEC Petitioners/Intervenors point out that on July 21, 1998, the United States District Court for the Northern District of Illinois affirmed the Illinois Commerce Commission's determination that local exchange carriers are entitled to reciprocal compensation under reviewed interconnection agreements for calls terminated to ISPs.³⁶ The CLEC Petitioners/Intervenors also represented that the United States District Court for the Western District of Washington found in reviewing an interconnection agreement approved by the Washington Utilities and Transportation Commission, that the state Commission had not acted arbitrarily or capriciously in "deciding not to change the current treatment of ESP call termination from reciprocal compensation to special access fees".³⁷

Since the time that the parties submitted their Post-Hearing Briefs, other state Commissions have entered rulings on the issue of whether ISP traffic is subject to reciprocal compensation. Those decisions were provided to the Commission and all other parties of record by counsel for ICG and ITC DeltaCom. Like the other state Commissions, each of those states held that calls terminating to ISPs are local traffic and are, therefore, subject to the payment of reciprocal compensation.³⁸

The final category of arguments raised by the CLEC Petitions/Intervenors allege that a finding by the Commission in favor of BellSouth in this instance would contravene public policy in at least

³⁴ See Appendix A attached hereto.

³⁵ *Southwestern Bell Telephone Company v. The Public Utility Commission of Texas*, Case No. MO98-CA43, Order (*nunc pro tunc*) (W.D. TX., June 22, 1998).

³⁶ *Illinois Bell Telephone Company, d/b/a Ameritech Illinois v. WorldCom Technologies, Inc.*, Case No. 98-C-1925 Memorandum Opinion and Order, (N.D. ILL., July 21, 1998). The court held that the Illinois Commission properly concluded that pursuant to industry practice, a call "terminates" at the ISP thus making it a local call subject to reciprocal compensation *Id.*, Slip op. at 26-28.

³⁷ *U.S. West Communications, Inc. v. MFS Internet, Inc.*, Case No. C97-222 WD, Order on Motions for Summary Judgement (W.D. Wash., Jan. 7, 1998). ESP = Enhanced Service Providers of which ISP's are a subset.

³⁸ *Connect Communications Corporation v. Southwestern Bell Telephone Company*, Docket 98-167-C, Order No. 6 (Arkansas Public Service Commission, December 31, 1998); Complaint of MFS Internet of Georgia against BellSouth Telecommunications, Inc., Docket No. 8196-U (Georgia P.S.C. December 28, 1998); Complaint against U.S. West Communications, Inc. By Electric Lightwave, Inc., Docket No. 98-049-36 (Utah P.S.C., January, 1999); Complaint of WorldCom Technologies, Inc. against New England Tel. And Tel. Co., d/b/a Bell Atlantic - Massachusetts for Alleged Breach of Interconnection Terms entered into under §§251 and 252 of the Telecommunications Act of 1996; D.T.E. 97-116 (Mass. Dept. Of Telecom. And Energy, Oct. 26, 1998); Docket 98-10-057, ISP Decision (California Public Utilities Commission, Oct. 22, 1998).

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two significant aspects. First, they argue that an adoption of the BellSouth position would create a class of calls for which there would be no compensation. They argue that when a BellSouth customer places a call to a CLEC customer which is an ISP, BellSouth originates the call and then hands the call off to the CLEC at their mutual point of interconnection. The CLEC transports and terminates the call to its ISP customer. BellSouth is fully compensated by its customer for arranging for the completion of its calls to ISPs from the payment of tariffed local exchange rates and subscriber line charges. By contrast, the CLEC receives no compensation from BellSouth's customer for providing termination services and is barred by FCC rules from charging access charges to the ISP. The CLEC Petitioners/Intervenors, therefore, allege that unless BellSouth pays reciprocal compensation for the termination of calls placed to ISPs, BellSouth will be utilizing the network facilities of the CLECs at no cost and in violation of §§251 and 252 of the Telecommunications Act.

As their second public policy argument, the CLEC Petitioners/Intervenors contend that if they are not compensated for the cost involved in terminating calls to ISPs, their service to ISPs will be uneconomical and they will be forced to discontinue service to that class of customers. If that occurs, the CLEC Petitioners/Intervenors assert that BellSouth will be in a position to achieve a monopoly over the provisioning of local service to ISPs. They contend that such a result is clearly contradictory to the procompetitive goals of the Telecommunications Act. They contend further that such a scenario would generally threaten the competitiveness of Internet access because BellSouth will be in a position to monopolize Internet access by forcing ISPs out of the market in favor of its own ISP.

The CLEC Petitioners/Intervenors thus assert that an adoption of BellSouth's position would have the practical effect of precluding the CLEC Petitioners/Intervenors from soliciting ISPs as customers. They allege that it would then be more difficult for CLECs such as themselves to establish a competitive presence in Alabama because ISPs as a class of customers would be practically unavailable to them. The CLEC Petitioners/Intervenors point out that such a scenario would preclude ISPs from enjoying the benefits of local telecommunications competition.

Some of the CLEC Petitioners/Intervenors also raise the issue of whether an adoption of BellSouth's position would preclude BellSouth from achieving §271 approval from the Commission. We will not address the merits of those arguments for purposes of this proceeding.

B. The Substantive Arguments Advanced By BellSouth

BellSouth acknowledges that the core issue raised by the CLEC Petitioners/Intervenors is whether BellSouth and those parties agreed, through their respective interconnection agreements, to treat calls through which an end user obtains access to services offered by an Internet service

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provider as local traffic subject to reciprocal compensation. BellSouth contends that the Petitioners bear the burden of proving that they and BellSouth mutually agreed to subject ISP traffic to the reciprocal compensation obligations of their respective agreements and that BellSouth's refusal to pay reciprocal compensation for ISP traffic constitutes a breach of contract.

BellSouth notes that each party to the proceeding, with the exception of ICG, has admitted that the explicit topic of whether ISP traffic would be subject to reciprocal compensation never arose during contractual negotiations. BellSouth points out that each of those parties has further represented that they assumed that BellSouth agreed that ISP traffic would be encompassed by the local traffic definition in their respective agreements.

BellSouth asserts, however, that the law existing at the time that the parties negotiated the agreements in question reflects that it was unreasonable for the CLEC Petitioners/Intervenors to "blithely" assume that BellSouth agreed with their proposed treatment of ISP traffic. BellSouth in fact alleges that it did not view ISP traffic to "terminate" within the local calling area based on the laws and regulations which were effective at the time of the negotiations in question.

BellSouth represents that the CLEC Petitioners/Intervenors have not shown that BellSouth either held a contrary view, or that such a view was inherently unreasonable. Accordingly, BellSouth maintains that the CLEC Petitioners/Intervenors have failed to show that the party's mutually agreed to an essential element of the agreements in question - the scope of the reciprocal compensation obligations of the parties. Since there was never an express meeting of the minds on that essential term of the agreements, BellSouth contends that the Commission should find that it did not breach the agreements when it later refused to pay reciprocal compensation for ISP traffic.

BellSouth maintains that the rules of contractual interpretation in Alabama dictate that the Commission must consider the FCC decisions and rules, case law, and trade usage at the time the parties negotiated and executed the agreements in question in order to determine what types of calls the parties intended to encompass within the term local traffic, and to aid and interpret the requirement that reciprocal compensation applies only to that traffic. BellSouth further emphasizes that the Commission must decide whether the interpretation of the agreements advanced by the CLEC Petitioners/Intervenors is reasonable in light of the practical effect those interpretations will have. Finally, BellSouth argues that the Petitioners have the burden of demonstrating that, at the time BellSouth negotiated the agreements in question, it considered FCC precedent to require ISP traffic to be included within the definition of local traffic for purposes of reciprocal compensation.

BellSouth asserts that the CLEC Petitioners/Intervenors have clearly not met their burden of proof because (1) The FCC has expressly found services provided by ISPs to be interstate in nature; (2) The FCC has traditionally determined the jurisdictional nature of a call by examining its

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end to end nature; and (3) it would have been economically irrational for BellSouth to have agreed to subject ISP traffic to the payment of reciprocal compensation.

In addressing the issue of economic irrationality, BellSouth asserts that traffic collected by non-voice ISPs will always be one-way, not two-way traffic. According to BellSouth, such traffic will originate from an end user through the ISP network and terminate on the Internet host computer. Reciprocal compensation, therefore, becomes one-way compensation to those CLECs specifically targeting large ISPs. Hence, if ISP traffic were subject to the payment of reciprocal compensation, the originating carrier in most instances would be forced to pay the interconnecting carrier more than the originating carrier receives from an end user to provide local telephone service. As Mr. Hendrix of BellSouth testified, it would have made no economic sense for BellSouth to have agreed to such an absurd result.³⁹

With regard to developments at the FCC, BellSouth emphasized that the Association for Local Telecommunications Services (ALTS), a CLEC trade association, had originally filed a letter with the FCC asking for clarification of whether ISP traffic should be included within the definition of local traffic. According to BellSouth, ALTS' decision to turn to the FCC for clarification clearly demonstrated an understanding and acknowledgment by its CLEC membership that ISP traffic is jurisdictionally interstate, not local. Although ALTS subsequently requested that its original Petition be withdrawn, the FCC opted to transfer the issues raised by ALTS into another Docket, in lieu of simply closing the matter. According to BellSouth, those actions on the part of the FCC demonstrate the FCC's unwillingness to relinquish exclusive jurisdiction of the ISP traffic issue to the states.⁴⁰ BellSouth further notes that the FCC's decision to address the issue of the jurisdictional nature of ISP traffic in conjunction with its ruling on *GTE's DSL Tariff Filing* was also indicative of its jurisdiction concerning the issue.⁴¹

BellSouth also vehemently challenges the severability or "two-call" theory regarding ISP traffic which was espoused by the CLEC Petitioners/Intervenors. BellSouth contends that calls from end users to ISPs only transit through the ISP's local point of presence to the Internet and does not terminate there. According to BellSouth, there is no interruption of the continuous transmission of signals that would justify treating the ISP as anything other than another link in the chain of transmission between the end user and the Internet host computer.⁴²

³⁹ Tr. at p. 533 (Hendrix).

⁴⁰ See fn 16 *supra*.

⁴¹ *Id.*

⁴² Tr. at p. 529 (Hendrix).

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In fact, BellSouth contends that the CLEC Petitioners/Intervenors' contention that a call from an end user to an ISP is nothing more than a local call separate and distinguishable from the ISP's subsequent routing of the call to the Internet is inconsistent with the FCC's description of Internet service in its *Non-Accounting Safeguards Order*.⁴³ BellSouth asserts that in actuality, ISPs take calls and, as part of the information service they offer to the public, transmit those calls to and from the communications networks of other telecommunications carriers. According to BellSouth, those calls are ultimately delivered to Internet host computers which are in all likelihood not in the local serving area of the ISP.⁴⁴ BellSouth contends that the fact that ISPs reformat information received from users via circuit-switched connections into packets does not demonstrate that the calls to the ISPs terminate at the ISP location.

BellSouth maintains that the fact that ILECs deliver ISP traffic to CLECs over local interconnection trunks, use signaling associated with local calling, and send answer supervision when a call is received has no jurisdictional significance. BellSouth alleges that the 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 the facilities used, but by the nature of the traffic that flows over those facilities. BellSouth, therefore, represents that it is irrelevant that the originating end user and the ISP's point of presence are in the same local calling area, or that the local interconnection trunks are used to transmit those calls, because the ISP's point of presence is not the terminating point of such ISP traffic. BellSouth emphasizes that what is dispositive from a jurisdictional perspective is the relationship between where the call begins and where it ends. They allege that the Petitioners severability or "two call" theory completely ignores the end to end nature of an Internet call and has been rejected by the FCC in a number of contexts.

The first FCC decision cited by BellSouth in support of its position that the FCC has rejected the severability or "two call" theory is the FCC's decision in *The Memory Call Case*.⁴⁵ In *The Memory Call Case*, the FCC was urged to find that when a voice mail service is accessed from out of state, two jurisdictional transactions take place: One from the caller to the telephone company switch that routes the call to the intended recipient's location, which is interstate, and another from the switch forwarding the call to the voice mail apparatus and service, which is purely intrastate. According to BellSouth, the FCC employed an end to end analysis to determine the jurisdictional nature of such calls, and concluded that the entire communication was interstate even though the "second call" (the

⁴³ See fn. 32, *supra*.

⁴⁴ Tr. at pp. 507-508 (Hendrix).

⁴⁵ *Petition for Emergency Relief and Declaratory Ruling filed by BellSouth Corporation*, 7 FCC Red. 1619 (1992), *aff'd Georgia Public Service Commission v. FCC*, 5 F.3d 1499 (11th Cir. 1993) (Hereinafter referred to as *The Memory Call Case*).

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actual accessing of the customers voice mail box) occurred within a piece of equipment that was purely in the State of Georgia.⁴⁶

BellSouth also pointed out that the FCC asserted its jurisdictional authority over local calls used to provide interstate service in its *Foreign Exchange Decision*.⁴⁷ Said decision involved a challenge of an intrastate New York Telephone tariff imposing a charge on the local exchange service used by out of state customers of FX and common control switching arrangement (CCSA) services. Notwithstanding the fact that the originating caller utilized FX service by dialing a local number and paying local charges, and despite the fact that the FX customer had to purchase local exchange service from New York Telephone, the FCC concluded that this service as a whole was interstate and thus subject to FCC jurisdiction.

BellSouth asserts that the holding in the *Foreign Exchange Decision* is directly relevant to the instant dispute because in both cases, an interstate call is completed in part through the use of intrastate local exchange services. Further, originating end users of Foreign Exchange Services and ISP service make calls by dialing a local number and paying local service charges. Just as in the *Foreign Exchange Decision*, BellSouth asserts that the FCC declines to treat such calls as the sum of their jurisdictionally separable components. Instead, the FCC considers the service as a whole to be interstate. According to BellSouth, calls bound for the Internet through an ISP switch can only be characterized as interstate exchange access traffic, not local traffic because such calls terminate not at the ISP's equipment, but rather at the Internet host computer containing the data that the originating end user seeks to access.

BellSouth recognizes that the FCC has for some time exempted ISPs from paying switched access charges to the LECs for originating traffic to them. ISPs are instead permitted to receive calls over local exchange service lines purchased from the LEC. BellSouth asserts, however, that the FCC's decision to exempt ISPs from paying access charges for policy and political reasons in no way alters the fact that the traffic they collect is access traffic, not local traffic. BellSouth contends that if the FCC had indeed concluded that traffic received by ISPs was local, there would be no need for it to exempt that traffic from the access charge regime.

BellSouth similarly discounts the conclusions reached by the FCC in its *Universal Service Order* wherein it declared that 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. According to BellSouth,

⁴⁶ *Id.* at 1620-21.

⁴⁷ *New York Telephone Co. - Exchange System Access Line Terminal Charge for FX and CCSA service*, Memorandum, Opinion and Order, 76 F.C.C. 2d 349(1980). (The FCC's *Foreign Exchange Decision*).

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the fact that Internet service itself may not be a telecommunication service -- the actual issue before the FCC in the Universal Service proceeding -- is relevant only to the issue of whether ISPs must contribute to the Universal Service Fund and is not relevant to the jurisdictional classification of traffic received by ISPs. With Internet traffic, BellSouth maintains that it is the beginning and ending point of communication, not the application of Universal Service rules to the components of the transmission, which dictates its jurisdictional status.

In sum, BellSouth concludes that nothing in any of the FCC decisions cited by the CLEC Petitioner/Intervenors compels the conclusion that ISPs must be viewed as end users at whose premises Internet calls terminate. BellSouth asserts that the FCC precedent it cites clearly evidences the FCC's recognition of the interstate nature of calls carried by ISPs.

With respect to the numerous state and federal court decisions on the issue of ISP traffic cited by the CLEC Petitioners/Intervenors, BellSouth urges the Commission to consider that many state Commissions that have examined the issue have recognized that the matter is currently before the FCC and have indicated that their determinations may be subject to change once the FCC issues a ruling on the jurisdictional nature of ISP traffic. BellSouth asserts that it would be incorrect to construe the decisions of these other state Commissions regarding the application of reciprocal compensation to ISP traffic as definitive determinations that ISP traffic is local traffic subject to reciprocal compensation under the Act.⁴⁸ In an effort to provide the Commission with a better understanding as to the impact of the other state Commission decisions cited, BellSouth attached to its Post-Hearing Brief a copy of an analysis of the various state Commission decisions on the ISP issue prepared by SBC Telecommunications, Inc. and filed with the FCC on August 14, 1998 in *SBC Telecommunications, Inc., ex parte Jurisdictional Nature of Calls to Internet Service Providers*: CCB/CPD 97-30. BellSouth requested that the Commission take administrative notice of that Docket. BellSouth's request in that regard is hereby granted.

BellSouth lastly challenges the contention of the CLEC Petitioners/Intervenors that the Commission will impede competition in the State of Alabama if it determines that ISP traffic is not local traffic subject to reciprocal compensation. BellSouth asserts that the CLEC Petitioners/Intervenors have offered no evidence to support their position and in fact contends that the inclusion of ISP traffic in the definition of local traffic will yield catastrophic results in Alabama's local residential market. BellSouth asserts that it is apparent that the Petitioners have no intention of competing in Alabama's local residential market and intend to rely upon BellSouth's mandated role as the ILEC "carrier of last resort" to provide service to the less profitable residential market. BellSouth asserts that the CLEC Petitioners/Intervenors' demands will serve only to improperly

⁴⁸ Tr. at pp. 446-448 (Halprin).

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increase BellSouth's cost of providing service to the citizens of Alabama and will thus exclusively benefit the CLEC Petitioners/Intervenors.

V. DISCUSSION AND CONCLUSIONS

Despite the somewhat complex arguments advanced by the parties in this cause, the bottom line issue in this proceeding is relatively straight forward. The Commission must determine whether the parties to the interconnection agreements under review intended, at the time those agreements were entered, to treat telephone calls originating and terminating in the same local calling area from a BellSouth provided telephone exchange service end user to the respective ISP end users of the effected CLEC Petitioners/Intervenors as local traffic subject to the payment of reciprocal compensation.

The Commission must first focus on the actual language of the five interconnection agreements under review. The agreements which ITC DeltaCom, KMC, e.spire and Intermedia executed with BellSouth do not specifically reference ISP traffic. Each of those agreements do, however, have similar definitions of local traffic and similarly define the reciprocal compensation obligations of the parties.

The interconnection agreement executed between ICG and BellSouth has significant variations from the aforementioned agreements. In particular, the ICG/BellSouth agreement contains a provision excluding ISP calls from the payment of reciprocal compensation except in certain circumstances.

We begin our assessment of the individual agreements with a review of the provisions of the ITC DeltaCom agreement with BellSouth which address local traffic and define the reciprocal compensation obligations of the parties. We follow that assessment with a review of the terms and conditions of the agreements executed between BellSouth and KMC, Intermedia and e.spire which address local traffic and the reciprocal compensation obligations of the parties.

The terms and conditions of the ITC DeltaCom/BellSouth agreement which define local traffic are found at Attachment B to the original agreement executed between ITC DeltaCom and BellSouth on March 12, 1997. Said Attachment, at Item 49, defines local traffic as follows:

"Local traffic" means any telephone call that originates in one exchange or LATA and terminates in either the same exchange or LATA or a corresponding Extended Area Service ("EAS") exchange. The terms Exchange and EAS exchanges are defined and specified in Section A.3 of BellSouth's General Subscriber Service tariff.

Also under review in the ITC DeltaCom agreement are the provisions defining the obligations of the parties with regard to reciprocal compensation. Item 3 of the August 22, 1997 Fourth Amendment to the ITC DeltaCom/BellSouth agreement reflects the mutual agreement of the parties to substitute a new Section VI (B) to the agreement which addresses those obligations. That substitute section reads in pertinent part as follows:

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the exception of the local traffic specifically identified in subsection (C) after, each party agrees to terminate local traffic originated and routed to it by other party. Each party will pay the other for terminating its local traffic on the others network the local interconnection rate of \$.009 per minute of use in all rates...⁴⁹

The interconnection agreement between KMC and BellSouth which was approved by the Commission on May 5, 1997 defines local traffic at Section 1.41 as follows:

"Local traffic" refers to calls 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 (e.g. Extended Area Service Zones in adjacent local calling areas). Local traffic includes the 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 the 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.

At Section 1.59, the KMC/BellSouth agreement defines the reciprocal compensation obligation of the parties as follows:

"Reciprocal compensation" is as described in the Act and refers to the payment arrangements that recover costs incurred for the transport and termination of telecommunications traffic originating on one party's network and terminating on the other party's network.

The KMC/BellSouth agreement addresses the reciprocal compensation obligations of the parties with even more specificity at Sections 5.8.2 and 5.8.3:

5.8.2 The parties shall compensate each other for transport and termination of local traffic (local call termination) at a single identical reciprocal and equal rate as set forth in Exhibit 8.

5.8.3 The reciprocal compensation arrangements set forth in this agreement are not applicable to switched exchange access service. All switched exchange access service and all intraLATA toll traffic shall continue to be governed by the terms and conditions at the applicable federal and state tariffs.

The interconnection agreement between Intermedia and BellSouth was originally approved by the Commission on November 22, 1996. Said agreement defines local traffic at Section 1.D as follows:

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 Service ("EAS") exchange. The terms Exchange and EAS exchanges are defined and specified in Section A.3 of BellSouth's General Subscriber Service tariff.

With regard to the Intermedia/BellSouth agreement's treatment of the reciprocal compensation obligations of the parties, the agreement states in pertinent part at Section 4.B that:

Each party will pay the other for terminating its local traffic on the others' network the local interconnection rates as set forth in Attachment B-1 by this reference incorporated herein...

⁴⁹ The subsection (C) referenced in the aforementioned language is an exclusion governing intermediary tandem switching and transport services which appear to be irrelevant for purposes of our consideration herein.

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The interconnection agreement between e.spire and BellSouth was approved by the Commission on October 28, 1996. Said agreement defines local traffic at Attachment B, Item 4B as follows:

Local traffic is defined as any telephone calls that originate in one exchange and terminate in either the same exchange or a corresponding Extended Area Service ("EAS") exchange.

The e.spire/BellSouth agreement addresses the exchange of traffic at Section 7.A. The agreement specifies therein that:

The parties agree...that local interconnection is defined as the delivery of local traffic to be terminated on each party's local network so that customers of either party have the ability to reach customers of the other party without the use of access codes or delay in the processing of the call. The parties further agree that the exchange of traffic on BellSouth's Extended Area Service (EAS) shall be considered local traffic and compensation for the termination of such traffic shall be pursuant to the terms of this section.

It is also significant to note that each of the aforementioned interconnection agreements have "Entirety" or "Merger" Clauses which are substantially similar. Those provisions specify that the agreements in question, along with specified attachments thereto, set forth the entire understanding and agreement of the parties. The "Entirety Clauses" also generally specify that subsequent or contemporaneous writings are not binding unless signed by a duly authorized officer or representative of the party to be bound.⁵⁰

Recapping the arguments of the parties in summary fashion, ITC DeltaCom, KMC, Intermedia and e.spire assert that pursuant to the plain language of their respective interconnection agreements with BellSouth, calls to ISPs are included within the definition of local traffic. They, therefore, maintain that calls to ISP are clearly subject to the reciprocal compensation obligations of their respective agreements. Even if the Commission determines that their agreements are ambiguous and considers extrinsic evidence in order to determine the intent of the parties, the aforementioned CLEC Petitioners/Intervenors maintain that the extrinsic evidence they have cited leads to the logical conclusion that BellSouth never intended to exclude ISP traffic from the reciprocal compensation obligations of their respective interconnection agreements. ICG readily concedes that it has different contractual language than the remaining CLEC Petitioners/Intervenors, but nonetheless maintains that the payment of reciprocal compensation by BellSouth to the other CLEC Petitioners/Intervenors will require BellSouth to pay ICG reciprocal compensation for ISP traffic pursuant to an amendment agreed to by BellSouth.

BellSouth asserts that the CLEC Petitioners/Intervenors bear the burden of proving that they and BellSouth mutually agreed to subject ISP traffic to the reciprocal compensation obligations of

⁵⁰ ITC DeltaCom/BellSouth agreement at Section XXX; KMC/BellSouth agreement at Section 36.01; Intermedia/BellSouth agreement at Section XXIX; e.spire/BellSouth agreement at XXX.

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the respective interconnection agreements, and that BellSouth's refusal to pay reciprocal compensation for ISP traffic constitutes a breach of those contracts. BellSouth alleges that its agreement with ICG clearly excludes ISP traffic from the reciprocal compensation obligations.

With regard to the Petitioner ITC DeltaCom and the CLEC Intervenors KMC, e.spire and Intermedia, BellSouth asserts that the explicit topic of whether ISP traffic would be subject to reciprocal compensation never arose during their contractual negotiations. As noted previously, BellSouth contends that it was unreasonable for those parties to assume that because the topic never came up, BellSouth agreed with their proposed treatment of ISP traffic. In fact, BellSouth asserts that based on the law which existed at the time the interconnection agreements in question were negotiated, BellSouth did not view ISP traffic to terminate within the local calling area.

BellSouth alleges that none of the parties have shown that BellSouth held a contrary view or that such a view was inherently unreasonable. BellSouth accordingly concludes that the aforementioned CLEC Petitioners/Intervenors have failed to show that the parties mutually agreed to their respective reciprocal compensation obligations which is an essential element of their agreements. BellSouth, therefore, maintains that the CLEC Petitioners/Intervenors cannot show that BellSouth has breached the interconnection agreements in question by refusing to pay reciprocal compensation for ISP traffic. BellSouth contends that it is appropriate for the Commission to consider the extensive extrinsic evidence which BellSouth has submitted in support of its position.

The rules of contractual interpretation in Alabama dictate that the Commission must first conclude whether the interconnection agreements under review contain any ambiguity. Specifically, the Commission must determine whether the agreements in question are susceptible to more than one reasonable interpretation. *Reynolds v. Alabama Department of Transportation*, 926 F. Supp. 1077 (M.D. Ala. 1996). The mere fact that BellSouth, as a party to the aforementioned agreements, alleges that they have a different construction of those agreements than do the CLEC Petitioners/Intervenors does not conclusively establish that the agreements are indeed ambiguous. *American Farm Bureau Federation v. Alabama Farmers Federation*, 935 F. Supp. 1533 (M.D. Ala. 1996), *aff'd*. 121 F.3d 723 (11th Cir. 1997). An ambiguity is held to exist only when the Commission finds that the agreements in question are reasonably subject to more than one interpretation. *U. S. for Use and Benefit of Capps v. Fidelity and Deposit Company of Maryland*, 875 F. Supp. 803 (M.D. Ala. 1995) and *Reynolds v. Alabama Department of Transportation, supra*.

Although the interconnection agreements that ITC DeltaCom, KMC, Intermedia and e.spire each executed with BellSouth seem rather straight forward with regard to the definition of local traffic and the reciprocal compensation obligations of the parties, none of those agreements address with specificity ISP traffic or the meaning of the word "terminates" as used in each agreement's definition

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of local traffic. The silence of the agreements on these important matters does give rise to some reasonable ambiguity concerning the interpretation of the agreements.

Having concluded that the agreements in question are reasonably subject to ambiguity, the determination of the true meaning of the agreements and the intent of the parties becomes a question for the Commission. *Bain v. Gartrell*, 666 So.2d 523, 524 (Ala. Civ. App. 1995). In rendering determinations regarding the meaning of ambiguous agreements and the intent of the parties with regard to same, the Commission may look to extrinsic evidence. *Terry Cove North v. Baldwin County Sewer*, 480 So.2d 1171, 1173 (Ala. 1985). The Commission must, however, strive to accord the contracts a reasonable interpretation to the extent permitted by the language of the contracts. *American Farm Bureau Federation v. Alabama Farmers Federation*, supra. It is the duty of the Commission to presume that the parties intended to make a reasonable contract rather than an unreasonable one. *Ex parte Agee*, 669 So.2d 102, 105, rehearing denied on remand *Agee v. Moore*, 669 So.2d 106 (Ala. 1995).

In particular, we note that at the time the interconnection agreements in question were entered, ISP traffic was treated as local in virtually every respect by all industry participants including the F.C.C. Like the CLEC Petitioners/Intervenors, BellSouth was fully aware of the industry's prevailing local treatment of ISP traffic at the time that it entered the interconnection agreements in question. In fact, BellSouth itself afforded ISP traffic prevailing local treatment in the same respects that the CLECs did at that time.

Even today, both BellSouth and the CLEC Petitioners/Intervenors charge their ISP customers local business line rates for local telephone exchange service that enables the ISPs' customers to access their service via a local call. The service provided to ISP customers by BellSouth and the CLEC Petitioners/Intervenors falls under their local exchange tariffs and calls to ISPs are rated and billed just as any other local call placed via a seven digit local telephone number. Neither BellSouth nor the CLEC Petitioners/Intervenors assess toll charges for those calls. BellSouth specifically advises consumers subscribing to its Internet service provider that access to the BellSouth ISP is achieved via a local call.³¹

As further indication of the prevailing local treatment afforded to ISP traffic, BellSouth records the minutes of use associated with such calls as local for ARMIS reporting requirements with the FCC. Further, BellSouth characterizes expenses and revenues associated with ISP-bound traffic as intrastate for jurisdictional separations purposes.

Even the FCC noted in its *ISP Declaratory Ruling* that it has since 1983 treated enhanced service providers, of which ISPs are a subset, as end users under the access charge regime and

³¹ Tr. at p. 121.

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permitted them to purchase their links to the public switched telephone network through intrastate local business tariffs rather than through interstate access tariffs. The FCC specifically recognized that it has, by its actions in that regard, discharged its interstate regulatory obligations through the application of local business tariffs and has thus treated ISP-bound traffic as though it were local.⁵²

We again emphasize that the prevailingly local treatments of ISP traffic detailed above were also in place at the time the interconnection agreements under review herein were entered. We thus conclude that the industry custom and usage at that time dictated that ISP traffic be treated as local and, therefore, subject to reciprocal compensation. We find that the treatment of ISP traffic as local was in fact so prevalent in the industry at that time that BellSouth, if it so intended, had an obligation to negate such local treatment in the interconnection agreements it entered by specifically delineating that ISP traffic was not to be treated as local traffic subject to the payment of reciprocal compensation. See *Loeb & Co., Inc. v. Martin*, 327 So.2d. 711 (Ala. 1976).

Also persuasive is the evidence of record demonstrating BellSouth's awareness of the 1989 decision of the Florida Public Service Commission wherein the Florida Commission held that calls to ISPs should be viewed as jurisdictionally intrastate local exchange calls.⁵³ BellSouth's knowledge of the *Florida Information Services Order* is particularly enlightening given the fact that BellSouth generally negotiates interconnection agreements on a region-wide basis. The existence of that decision strongly suggests that BellSouth was fully aware of the prevailingly local treatment afforded ISP traffic by industry usage and custom long before the interconnection agreements under review were negotiated and executed. If there was indeed no intention to encompass ISP traffic within the meaning of local traffic as BellSouth claims, it is reasonable to assume that BellSouth would have taken steps to specifically excluded ISP traffic from the definition of local traffic in light of the *Florida Information Services Order*.

Perhaps the most persuasive evidence that BellSouth did not intend to exclude calls to ISPs from the definition of local traffic when it entered the agreements under review is gleaned from the conspicuous absence of a mechanism to track, separate and exclude ISP traffic from the local billing records of the CLEC Petitioners/Intervenors. BellSouth was certainly in a position to know that such a mechanism would be necessary to segregate ISP traffic from local calls, yet no attempt was ever made to develop and incorporate such a mechanism. Ms. Strow of Intermedia pointed out that ISP calls are recorded as local calls and the CLECs are the only entities who can, with certainty, identify such traffic⁵⁴. That claim is validated by the difficulty BellSouth has experienced in its recent efforts

⁵² FCC's *ISP Declaratory Ruling* at ¶23. See fn. 18 *supra*.

⁵³ *Id.* at fn. 24 *supra*.

⁵⁴ Tr. at pp. 401, 406-407.

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to unilaterally identify ISP traffic for purposes of withholding reciprocal compensation for such disputed traffic.

Given the comprehensive nature of the interconnection agreements under review and the specificity with which they address virtually all interconnection issues, we find it difficult to fathom that BellSouth would not insist on a specific, itemized exception excluding ISP traffic from the definition of local traffic had that been its intention. The prevailing local treatment afforded to ISP traffic by industry participants at the time the agreements under review were entered, and BellSouth's knowledge of that industry custom and usage, made it imperative that BellSouth specifically exclude calls to ISPs from the definition of local traffic subject to the payment of reciprocal compensation. Given the circumstances then existing, we find the absence of such a specific exclusion or exception to be persuasive of the fact that BellSouth did not intend to exclude ISP traffic from the definition of local traffic when it entered the agreements in question.

In conclusion, we find that with regard to the interconnection agreements BellSouth entered with ITC DeltaCom, KMC, Intermedia and e.spire, telephone calls originating and terminating in the same local calling area from a BellSouth provided telephone service end user to the respective ISP end users of the effected CLEC Petitioners/Intervenors qualifies as local traffic which is subject to reciprocal compensation. Based on the discussion above, we find that BellSouth was clearly in a position to know that the exclusion of such traffic from the definition of local traffic for purposes of the payment of reciprocal compensation was a necessity. BellSouth did not, however, incorporate such an exclusion and is, therefore, in breach of the interconnection agreements with ITC DeltaCom, KMC, Intermedia and e.spire under which it has withheld reciprocal compensation for ISP traffic. Certainly, BellSouth's August 12, 1997 memorandum to all CLECs declaring BellSouth's position that ISP traffic was jurisdictionally interstate did nothing to incorporate an exception for ISP traffic into the interconnection agreements of ITC DeltaCom, KMC, Intermedia and e.spire. The Entirety Clauses contained in each of those agreements precludes such unilateral action.

We accordingly find that BellSouth must, within 20 days of the effective date of this order, pay all reciprocal compensation amounts withheld for ISP traffic under their interconnection agreements with ITC DeltaCom, KMC and Intermedia. BellSouth must also continue to pay such amounts for the duration of those interconnection agreements. Our conclusions in this regard would also apply to the interconnection agreement executed between BellSouth and e.spire but for the fact that those parties have submitted their reciprocal compensation disputes to arbitration.

We now turn to an analysis of the interconnection agreement between ICG and BellSouth which was approved by the Commission on November 17, 1997. As noted previously, that agreement has terms and conditions which notably deviate from those contained in the

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interconnection agreements of the remaining CLEC Petitioners/Intervenors. Although the definition of local traffic in that agreement as set forth at Part B of the General Terms and Conditions Section is substantially similar to the definition of local traffic in the agreements discussed above, the provisions of the ICG/BellSouth agreement which discuss the obligations of the parties with regard to reciprocal compensation are radically different. More particularly, the ICG/BellSouth interconnection agreement at Sections 8.1 and 8.2 of Attachment 3 provide as follows:

8.1 BellSouth shall provide for the mutual and reciprocal recovery of the costs of transporting and terminating local calls on its and ICG's network. The parties agree that charges for transporting and termination of calls on its respective networks are set forth in Attachment 11.

8.2 Interconnection with Enhanced Service Providers (ESPs). BellSouth will exempt traffic originated to and terminated by ESPs from the reciprocal compensation arrangements of this agreement. The parties acknowledge that the issue of compensation for ESP traffic is being addressed by the FCC. The parties agree to implement the final order addressing compensation or lack thereof for this traffic from the date this agreement is executed.

Section 8.2 above was, however, amended pursuant to the mutual agreement of ICG and BellSouth. The May 11, 1998 amendment modifying the language Section 8.2 of Attachment 3 states:

Until the state Public Service Commission or the FCC determines, in a final and non-appealable order, as referenced in Section 16.4, whether enhanced service provider and information service provider traffic is within the definition of Local Traffic, this traffic will be held for payment until the jurisdiction of such traffic is determined, except as noted below. The Parties will adjust, if necessary, their mutual compensation billing for local traffic termination to reflect the FCC's or Commission's decision. The period of adjustment shall be from the effective date of the original agreement dated October 7, 1997, to the date the order of the FCC or Commission becomes final and non-appealable, as referenced in Section 16.4. BellSouth and ICG will, in the interim, pay for local non-ISP/ESP traffic as specified in Attachment 3. Both parties agree to provide for fair and equitable treatment under this agreement, and BellSouth will not knowingly discriminate against ICG for the payment of reciprocal compensation for all local traffic. In particular, if BellSouth knowingly pays any CLEC for ISP/ESP traffic prior to a final and non-appealable order, then BellSouth shall pay ICG for such traffic within ten days regardless of whether there is a final and non-appealable order.

Clearly, the agreement between BellSouth and ICG excludes ISP traffic from the reciprocal compensation obligations set forth in the document absent the occurrence of the conditions described in the amendment delineated above. With regard to the condition that payment of reciprocal compensation for enhanced service provider and information service provider traffic will be held for payment until the jurisdiction of such traffic is determined to be local in a final non-appealable order from this Commission or the FCC, we note that we are not herein issuing a policy determination that ISP traffic is jurisdictionally local. Such a generic policy determination appears to be necessary to trigger the condition of payment in the ICG/BellSouth amendment given the agreement between ICG and BellSouth to exclude ISP traffic from the reciprocal compensation obligations of the parties pending such a jurisdictional determination. Unlike the scenario with the other agreements under review, ICG and BellSouth specifically discussed the treatment of ISP traffic

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and agreed to exclude it from the payment of reciprocal compensation absent a determination that such traffic is jurisdictionally local.

We further note that the FCC's *ISP Declaratory Ruling* does establish as a matter of policy that ISP-bound traffic is jurisdictionally interstate. That finding by the FCC also appears to preclude the payment of reciprocal compensation for ISP traffic under the ICG/BellSouth agreement.

The other condition of payment delineated in the ICG/BellSouth amendment set forth above is triggered by BellSouth's "knowing" payment to any CLEC for ISP/ESP traffic *prior to a final and non-appealable order*. Clearly, if BellSouth "knowingly" pays reciprocal compensation to the other CLEC Petitioners/Intervenors for ISP traffic *prior to a final non-appealable order* from this Commission or the FCC, BellSouth must also pay ICG reciprocal compensation for such traffic.

IT IS, THEREFORE, ORDERED BY THE COMMISSION, That BellSouth Telecommunications, Inc. shall within 20 days of the effective date of this order, remit to ITC DeltaCom, Communications, Inc., KMC Telecommunications, Inc. and Intermedia Communications, Inc. any and all reciprocal compensation amounts withheld for ISP traffic. Reciprocal compensation for such traffic shall also be paid on a going forward basis so long as the interconnection agreements interpreted herein remain in effect. It is the Commission's understanding that e.spire Communications, Inc.'s reciprocal compensation claims against BellSouth are being addressed through independent arbitration proceedings.

IT IS FURTHER ORDERED BY THE COMMISSION, That with regard to the interconnection agreement between ICG Telecom Group, Inc. and BellSouth Telecommunications, Inc., ISP traffic is clearly excluded from the reciprocal compensation obligations of the parties. However, in the event that BellSouth "knowingly" pays any CLEC for Internet service provider or enhanced service provider traffic prior to a final and non-appealable order of this Commission or the Federal Communications Commission, BellSouth shall within ten (10) days pay ICG for such traffic regardless of whether there is a final and non-appealable order.

IT IS FURTHER ORDERED, That jurisdiction in this cause is hereby retained for the issuance of any further orders as may appear just and reasonable in the premises.

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IT IS FURTHER ORDERED, That this Order shall be effective as of the date hereof,
DONE at Montgomery, Alabama, this *4th* day of March, 1999.

ALABAMA PUBLIC SERVICE COMMISSION

Jim Sullivan
Jim Sullivan, President

Jan Cook
Jan Cook, Commissioner

George C. Wallace, Jr.
George C. Wallace, Jr., Commissioner

ATTEST: A True Copy

Walter L. Thomas, Jr.
Walter L. Thomas, Jr., Secretary