

ORIGINAL

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

RECEIVED 1730
00 JUN 16 PM 12:33
RECORDS AND
REPORTING

In the Matter of)
)
Petition of BellSouth Telecommunications, Inc.)
For a Section 252(b) Arbitration of)
Interconnection Agreement with Intermedia)
Communications Inc.)

Docket No. 991854-TP
Filed: June 16, 2000

INTERMEDIA COMMUNICATIONS INC.'S MOTION FOR
LEAVE TO SUBMIT SUPPLEMENTAL AUTHORITY

COMES NOW, INTERMEDIA COMMUNICATIONS INC. ("Intermedia"), through
counsel, and files this Motion for Leave to Submit Supplemental Authority. In support thereof,
Intermedia states as follows:

1. Pursuant to the requirements of the Communications Act of 1934, as amended
(the "Communications Act"), on or about July 1, 1996, Intermedia entered into a voluntarily
negotiated interconnection agreement with BellSouth Telecommunications Inc. ("BellSouth").
The two-year interconnection agreement expired on July 1, 1998, but was subsequently extended
by mutual agreement between Intermedia and BellSouth (the "Parties") to December 31, 1999.

2. On June 28, 1999, by letter, BellSouth requested the negotiation of a new
interconnection agreement, and proposed a starting point for negotiations between the Parties.
The Parties agreed that these negotiations would be deemed to have started on July 1, 1999. The

APP
CAF
CMP
COM
CTR
ECR
LEG
OPC
PAI
RGO
SEC
SER
OTH

DE01/SORIE/116271.1

RECEIVED & FILED
FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE
07366 JUN 16 8
FPSC-RECORDS/REPORTING

Parties have agreed to operate under the terms of the existing interconnection agreement until a new interconnection agreement is approved.

3. On December 7, 1999, BellSouth filed several petitions for arbitration relating to its interconnection negotiations with Intermedia in its nine-state territory, including Florida. Intermedia filed its answer and new matter to BellSouth's petition for arbitration in Florida on January 3, 2000. Issue identification and prehearing conference were subsequently held, and the Parties filed direct and rebuttal testimony immediately thereafter. Limited discovery was permitted, and the hearing in this matter was held on April 10, 2000, before Commissioners E. Leon Jacobs, Jr. and Lila A. Jaber. Subsequent to the hearing, the Parties filed their post-hearing briefs.

4. Throughout this proceeding and in documents filed by Intermedia, Intermedia relied upon, and made citations to, state and federal decisions that it believes may have some bearing on several of the outstanding issues, including recent arbitration decisions in Florida, Georgia, North Carolina, and neighboring states. On June 13, 2000, the North Carolina Utilities Commission (the "NCUC"), under facts and circumstances substantially identical to those in this case, held in favor of Intermedia on a number of issues that are currently before this Commission. *See In the Matter of Petition of BellSouth Telecommunications, Inc. For Arbitration of Interconnection Agreement with Intermedia Communications Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996, Docket No. P-55, Sub 1178, Recommended Arbitration Order (rel. June 13, 2000) (the NCUC Intermedia Arbitration Order) (a copy of this decision is attached hereto).*

5. In the *NCUC Intermedia Arbitration Order*, the NCUC made several findings in favor of Intermedia, including but not necessarily limited to, the following:

- ***Treatment of Calls to Internet Service Providers (“ISPs”).*** The NCUC concluded that dial-up ISP traffic is subject to an interim intercarrier compensation mechanism at the same rate and in the same manner as reciprocal compensation for local traffic. Significantly, the NCUC noted that the United States Court of Appeals for the District of Columbia Circuit’s March 24, 2000 *vacatur* of the FCC’s *ISP Declaratory Ruling*¹ (see *Bell Atlantic Companies v. FCC*, __ F.3d __, 2000 WL 273383 (D.C. Cir. Mar. 24, 2000), would appear to “undercut[] those who maintain that ISP traffic is not local.” *This issue is identical to issue no. 2(a) which is currently before this Commission.*
- ***Reciprocal Compensation Rate.*** The NCUC held that, for reciprocal compensation purposes, Intermedia should be compensated at BellSouth’s tandem interconnection rate. Notably, the NCUC, based on the showings made by Intermedia (showings substantially similar to those made by Intermedia in this proceeding), found that Intermedia “has met its burden of proof that its switches cover a comparable geographic area to that covered by BellSouth’s switches” The NCUC soundly rejected BellSouth’s position that Intermedia also should demonstrate that its switches perform tandem functions. *This issue is identical to issue no. 3 which is currently before this Commission.*

¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 3689 (1999).

- ***Provision of Interoffice Transport.*** The NCUC adopted BellSouth's proposed rates, but agreed with Intermedia that the rates should be "trued up" if the NCUC adopts different permanent prices for interoffice transport, including dark fiber, DS1, DS3, and OCn levels. *This issue is identical to issue no. 22 which is currently before this Commission.*
- ***Definition of "Switched Access Traffic."*** The NCUC concluded that the definition of "switched access traffic" as proposed by Intermedia should be included in the interconnection agreement. The NCUC further declined to require a definition of switched access traffic that specifically *includes* IP telephony, as advocated by BellSouth, because of the "considerable uncertainty as to how this type of telephony should be defined." *This issue is identical to issue no. 32 which is currently before this Commission.*
- ***Classification of Framed Packet Data Transported within a Virtual Circuit ("VC") that Originate and Terminate within a Local Access Transport Area ("LATA").*** The NCUC concluded that reciprocal compensation should be paid for the local portion of framed packet data transported within a VC that originates and terminates within a LATA. The NCUC explicitly noted that Section 251(c) of the Communications Act "does not differentiate between voice and data services." *This issue is identical to issue no. 37 which is currently before this Commission.*

6. As is evident from the *NCUC Intermedia Arbitration Order*, the NCUC found in favor of Intermedia on several significant issues, virtually all of which are also currently before this Commission.

WHEREFORE, Intermedia respectfully moves this Commission for leave to submit the attached supplementary authority for its consideration.

Submitted this 16th day of June, 2000.

Respectfully submitted,

INTERMEDIA COMMUNICATIONS INC.

By:



Patrick Wiggins
Charles Pellegrini
WIGGINS & VILLACORTA, P.A.
2145 Delta Blvd., Suite 200
Tallahassee, FL 32303
(850) 385-6007
(850) 385-6008 (facsimile)

Of Counsel

Scott A. Sapperstein
Senior Policy Counsel
Intermedia Communications Inc.
3625 Queen Palm Drive
Tampa, Florida 33619
(813) 829-4093
(813) 829-4923 (facsimile)

Jonathan E. Canis
Ronald J. Jarvis
Enrico C. Soriano
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W., Fifth Floor
Washington, D.C. 20036
(202) 955-9600
(202) 955-9792 (facsimile)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery* or Federal Express, overnight delivery** this 16th day of June, 2000, to the following:

Blanca Bayò, Director*
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Tim Vaccaro*
Staff Counsel
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Nancy B. White c/o Nancy Sims*
BellSouth Telecommunications, Inc.
150 South Monroe Street
Room 400
Tallahassee, Florida 32301

R. Douglas Lackey**
A. Langley Kitchings**
General Attorneys
BellSouth Telecommunications, Inc.
Suite 4300, BellSouth Center
675 West Peachtree Street, N.E.
Atlanta, Georgia 30375


Charles J. Pellegrini

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-55, SUB 1178

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Petition of BellSouth Telecommunications, Inc. For)
Arbitration of Interconnection Agreement with Intermedia) RECOMMENDED
Communications, Inc. Pursuant to Section 252(b)) ARBITRATION
of the Telecommunications Act of 1996) ORDER

HEARD IN: Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, on February 23, 2000.

BEFORE: Commissioner Sam J. Ervin, IV, Presiding, and Commissioners William R. Pittman and Robert V. Owens, Jr.

APPEARANCES:

FOR BELLSOUTH TELECOMMUNICATIONS, INC.:

Edward L. Rankin, III, General Counsel - North Carolina, BellSouth Telecommunications, Inc., Post Office Box 30188, Charlotte, North Carolina 28230

A. Langley Kitchings, General Attorney, BellSouth Telecommunications, Inc., 675 West Peachtree Street, Suite 4300, Atlanta, Georgia 30375-0001

FOR INTERMEDIA COMMUNICATIONS, INC.:

Henry C. Campen, Jr. and Layth S. Elhassani, Parker, Poe, Adams & Bernstein, L.L.P., First Union Capitol Center, Suite 1400, 150 Fayetteville Street Mall, Raleigh, North Carolina 27602-0389

Jonathan E. Canis and Ronald J. Jarvis, Kelley, Drye & Warren, L.L.P., 1200 19th Street, N.W., Suite 500, Washington, D.C. 20036

FOR THE USING AND CONSUMING PUBLIC:

Lucy E. Edmondson and Kendrick C. Fentress, Staff Attorneys, Public Staff - North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

BY THE COMMISSION: This arbitration proceeding is pending before the North Carolina Utilities Commission pursuant to Section 252(b) of the Telecommunications Act of 1996 (TA96 or the Act) and Section 62-110(f1) of the North Carolina General Statutes. On December 7, 1999, BellSouth Telecommunications, Inc. (BellSouth) filed a Petition for Arbitration of Interconnection Agreement with Intermedia Communications, Inc. (Intermedia) in this docket which initiated this proceeding. By its Petition, BellSouth requested that the Commission arbitrate certain terms and conditions with respect to interconnection between itself as the petitioning party and Intermedia.

The purpose of this arbitration proceeding is for the Commission to resolve the issues set forth in the Petition and Responses. 47 U.S.C.A. Section 252(b)(4)(C). Under the Act, the Commission shall ensure that its arbitration decision meets the requirements of Section 251 and any valid Federal Communications Commission (FCC) regulations pursuant to Section 252. Additionally, the Commission shall establish rates according to the provisions in 47 U.S.C.A. Section 252(d) for interconnection, services or network elements, and shall provide a schedule for implementation of the terms and conditions by the parties to the agreement. 47 U.S.C.A. Section 252(c).

Pursuant to Section 252 of TA96, the FCC issued its First Report and Order in CC Docket Numbers 96-98 and 95-185 on August 8, 1996 (Interconnection Order). The Interconnection Order adopted a forward-looking incremental costing methodology for pricing unbundled network elements (UNEs) which an incumbent local exchange company (ILEC) must sell new entrants, adopted certain pricing methodologies for calculating wholesale rates on resold telephone service, and provided proxy rates for State Commissions that did not have appropriate costing studies for UNEs or wholesale service. Several parties, including this Commission, appealed the Interconnection Order and on October 15, 1996, the United States Court of Appeals for the Eighth Circuit issued a stay of the FCC's pricing provisions and its "pick and choose" rule pending the outcome of the appeals.

The July 18, 1997 ruling of the Eighth Circuit, as amended on rehearing October 14, 1997, was largely in favor of state regulatory commissions and local phone companies and adverse to the FCC and potential competitors, primarily long distance carriers. The Eighth Circuit held that 47 U.S.C.A. Sections 251 and 252 "authorize the state commissions to determine the prices an incumbent LEC may charge for fulfilling its duties under the Act." The Court of Appeals also vacated the FCC's "pick and choose rule." Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997).

On January 25, 1999, the United States Supreme Court entered its Opinion in AT&T Corp. v. Iowa Utilities Board, 119 S.Ct. 721 (1999). The Supreme Court held, in pertinent part, that (1) the FCC has jurisdiction under Sections 251 and 252 of the Act to design a pricing methodology and adopt pricing rules; (2) the FCC's rules governing unbundled access are, with the exception of Rule 319, consistent with the Act; (3) it was proper for

the FCC in Rule 319 to include operator services and directory assistance, operational support systems, and vertical switching functions such as caller I.D., call forwarding, and call waiting within the features and services that must be provided by competitors; (4) the FCC did not adequately consider the Section 251(d)(2) "necessary and impair" standards when it gave requesting carriers blanket access to network elements in Rule 319; (5) the FCC reasonably omitted a facilities-ownership requirement on requesting carriers; (6) FCC Rule 315(b), which forbids ILECs to separate already-combined network elements before leasing them to competitors, reasonably interprets Section 251(c)(3) of the Act, which establishes the duty to provide access to network elements on nondiscriminatory rates, terms, and conditions and in a manner that allows requesting carriers to combine such elements; and (7) FCC Rule 809 (the "pick and choose" rule), which tracks the pertinent language in Section 252(i) of the Act almost exactly, is not only a reasonable interpretation of the Act, it is the most readily apparent. The Supreme Court remanded the cases back to the Eighth Circuit Court of Appeals for proceedings consistent with its opinion.

On June 10, 1999, the Eighth Circuit Court of Appeals entered an Order on remand in response to the Supreme Court's decision which, in pertinent part, reinstated FCC Rules 501-515, 601-611, and 701-717 (the pricing rules), Rule 809 (the "pick and choose" rule), and Rule 315(b) (ILECs shall not separate requested network elements which are currently combined). The Eighth Circuit also vacated FCC Rule 319 (specific unbundling requirements). The Court set a schedule for briefing and oral argument of those issues which it did not address in its initial opinion because of its ruling on the jurisdictional issues. The Court also requested the parties to address whether it should take any further action with respect to FCC Rules 315(c) - (f) regarding unbundling requirements. Iowa Utilities Board v. FCC, ___ F.3d ___ (Order Filed June 10, 1999).

On December 7, 1999, concurrent with filing its Petition for Arbitration, BellSouth filed the testimony of Alphonso J. Varner and W. Keith Milner.

On January 3, 2000, Intermedia filed an Answer and New Matter along with an Issues Matrix in response to BellSouth's Petition for Arbitration. Intermedia also filed the affidavit and testimony of J. Carl Jackson, Jr.

On January 7, 2000, BellSouth filed a Motion for Extension of Time to file its rebuttal testimony. Intermedia filed in opposition of BellSouth's Motion for Extension of Time in part on January 11, 2000, on the ground that BellSouth had prior notice of the new matters raised in Intermedia's Answer and New Matter. On January 12, 2000, the Commission issued an Order Allowing Extension of Time to File Rebuttal Testimony.

On January 12, 2000, the Commission issued an Order Setting Hearing in the matter for Wednesday, February 23, 2000.

On January 13, 2000, BellSouth filed a Motion seeking to resolve certain issues in the arbitration by addressing them in generic proceedings already pending before the Commission. Specifically, BellSouth sought to resolve issues concerning the definition of and/or rates for collocation and certain network capabilities that Intermedia wanted BellSouth to unbundle. On January 20, 2000, Intermedia filed a Motion in Opposition to BellSouth's Motion to Resolve Issues. On February 1, 2000, the Commission issued an Order Granting Motion to Resolve Issues which provided that the issues identified by BellSouth as pertaining to generic dockets on the issues of UNE rates, collocation, and performance measures should be considered in Docket Nos. P-100, Sub 133d, P-100, Sub 133j, and P-100, Sub 133k, respectively.

Also, on January 13, 2000, BellSouth filed the affidavit of Patrick C. Finlen.

On January 31, 2000, BellSouth filed the rebuttal testimony and exhibits of David A. Coon, D. Daonne Caldwell, W. Keith Milner, and Alphonso J. Varner. BellSouth also filed under seal Exhibit AJV-3, Exhibit DDC-1, and three CD-ROMs.

On February 9, 2000, BellSouth filed revised Caldwell Exhibit DDC-2 and revised Varner Exhibit AJV-1.

On February 9, 2000, the Public Staff filed its Notice of Intervention in the docket.

On February 17, 2000, Intermedia and BellSouth filed their Witness Lists and Estimated Cross-Examination Times.

On February 17, 2000, BellSouth filed revised Caldwell Exhibit DDC-1 and Varner Exhibit AJV-1.

On February 17, 2000, Intermedia filed a Motion for Acceptance of Late Filed Exhibits concerning the issue of reciprocal compensation for Intermedia's switch as a tandem switch.

On February 18, 2000, BellSouth filed a Supplemental Motion to Resolve Issues. With this Motion, BellSouth sought to supplement BellSouth's prior Motion to Resolve Issues. Specifically, BellSouth omitted an issue, Issue 18, from its previous Motion to have certain issues considered in the generic UNE docket. Intermedia did not oppose this Motion as long as the Commission would consider the issue in Docket No. P-100, Sub 133d.

Also, on February 18, 2000, Intermedia filed a Motion for Acceptance of Supplemental Testimony of J. Carl Jackson, Jr., his Supplemental Testimony and Exhibits.

On February 21, 2000, the Public Staff filed its Estimated Cross-Examination Times. Also on that day, BellSouth and Intermedia filed a revised Joint Issues Matrix.

On February 22, 2000, BellSouth filed its proprietary CD ROMs.

On February 22, 2000, BellSouth filed the rebuttal testimony and exhibits of Alphonso J. Varner.

This matter came on for hearing on February 23, 2000. Pursuant to a request from the Parties, the hearing was continued until 2:30 p.m. At the commencement of the hearing, all the issues had been deferred, withdrawn, or settled, except Issues 2(a), 3, 18, 22, 31, 32, 33, 37, 38, and 45. The Commission then heard the Parties' Motion to decide Issue 2(a), which pertains to the definition of local traffic for purposes of the Parties' reciprocal compensation obligations under Section 251 (b)(5) of the Act on the record without further testimony. The Parties requested that the Commission take administrative notice of the records of the ICG Telecom Group, Inc./BellSouth, ITC^DeltaCom/BellSouth and Time Warner Telecom of North Carolina, L.P./ BellSouth arbitrations in Docket Nos. P-582, Sub 6, P-500, Sub 10, and P-472, Sub 15, respectively. That Motion also asked that the Parties be allowed to brief the issue further. The Commission allowed the Motion.

The Commission also allowed BellSouth's February 18, 2000, Motion to Defer an Additional Issue, Issue 18, to a generic proceeding.

BellSouth presented the testimony of Alphonso J. Varner, (Direct, Rebuttal, and Supplemental Rebuttal). Intermedia presented the testimony of J. Carl Jackson, Jr. (Direct and Supplemental Direct). The rebuttal testimony of D. Daonne Caldwell was entered into the record by stipulation.

On February 25, 2000, BellSouth and Intermedia filed a Corrected Motion Regarding Inter-Carrier Compensation.

On February 29, 2000, the Commission issued an Order Seeking Late-Filed Exhibits pertaining to Issue 3, whether Intermedia should be compensated for end office, tandem and transport elements for purposes of reciprocal compensation. This Order requested that Intermedia submit on or before March 6, 2000: (1) a description of the relevant switches and associated technology necessary to provide service; (2) the number and location of customers, if available; and (3) any other information relevant to the Company's capability and intent to serve. In response, Intermedia submitted supplemental exhibits on March 6, 2000. On March 10, 2000, BellSouth filed a Reply to Intermedia's exhibits.

On March 1, 2000, BellSouth filed the redacted direct and rebuttal testimony of Alphonso J. Varner. BellSouth also withdrew Exhibit AJV-4, the direct and rebuttal testimony of W. Keith Milner, and the rebuttal testimony and exhibits of David A. Coon.

On March 3, 2000, Intermedia filed the redacted and revised testimony of J. Carl Jackson, Jr.

On March 6, 2000, Intermedia filed its confidential Supplemental Exhibits concerning issue 3.

On March 10, 2000, BellSouth filed its Reply to Intermedia's March 6, 2000 Supplemental Exhibits.

On May 2, 2000, BellSouth filed a Notice that Matrix Issue No. 45 had been resolved by the Parties.

A glossary of the acronyms referenced in this Order is attached hereto as Appendix A.

WHEREUPON, based upon a careful consideration of the entire record in this arbitration proceeding, the Commission now makes the following

FINDINGS OF FACT

1. Dial-up Internet Service Provider (ISP) traffic is subject to an interim intercarrier compensation mechanism at the same rate and in the same manner as reciprocal compensation for local traffic. Such rate should be subject to true-up at such time as the Commission has ruled pursuant to the FCC's subsequent Order on the subject.

2. For reciprocal compensation purposes, Intermedia should be compensated at BellSouth's tandem interconnection rate.

3. It is appropriate to adopt BellSouth's proposed language and proposed rates for interoffice transport for inclusion in the Interconnection Agreement, but allow for a true-up of the rates if the Commission adopts different permanent prices for interoffice transport in Phase I of its generic UNE proceeding in Docket No. P-100, Sub 133d.

4. The Commission declines to adopt the definitions for IntraLATA Toll Traffic proposed by either BellSouth or by Intermedia. The Parties are encouraged to continue to negotiate an appropriate definition that would be consistent with the Commission's conclusions set forth in Finding of Fact No. 7.

5. The definition of "switched access traffic" as proposed by Intermedia should be included in the Agreement. The Commission declines to require a definition of switched access traffic that specifically includes Internet Protocol (IP) telephony at this time.

6. The Commission finds it appropriate to adopt Intermedia's proposed language concerning lost switched access revenues due to lost or damaged billing data, but declines to require the inclusion of a clause requiring liability for lost switched access revenues resulting from lost or damaged billing data. Therefore, the last three sentences of Intermedia's proposed language which reference lost revenues or a liability cap of \$10,000, should be excluded from the Agreement.

7. Reciprocal compensation should be paid for the local portion of framed packet data transported within a Virtual Circuit (VC) that originates and terminates within a Local Access and Transport Area (LATA). BellSouth and Intermedia are directed to propose a mechanism to provide for such compensation. Such proposal should be a joint proposal, if possible, and should include a description of and basis for the proposal. The proposal(s) should take into consideration that, while intraLATA frame relay circuits can be considered local for the purposes of physical installation and interconnection, the traffic occurring over the facilities can and probably will be local and intraLATA toll.

8. When there are no VCs on a frame relay interconnection facility when it is billed, the Parties should deem the Percent Local Circuit Use (PLCU) to be zero.

9. Matrix Issue No. 45 ("Should the Interconnection Agreement specifically state that the Agreement does not address or alter either Party's provision of Exchange Access Frame Relay Service or InterLATA Frame Relay Service?") has been resolved by the Parties and it has been withdrawn from this arbitration.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 1

MATRIX ISSUE NO. 2(a): Should the definition of "Local Traffic" for the purposes of the Parties' reciprocal compensation obligations under Section 251(b)(5) of TA96 include ISP traffic?

POSITIONS OF PARTIES

BELLSOUTH: No. The FCC's Declaratory Ruling, confirmed unequivocally that the FCC has, will retain, and will exercise jurisdiction over ISP traffic. In short, the FCC determined that ISP traffic is interstate traffic, not local traffic. Under the provisions of the Act and FCC Rules, only local traffic is subject to reciprocal compensation obligations. Thus, reciprocal compensation is not applicable to ISP-bound traffic. However, BellSouth recognizes that the Commission has established an intercarrier compensation mechanism

by its decisions in Docket Nos. P-582, Sub 6 and P-472, Sub 15 and has agreed to incorporate that mechanism into the Parties' Interconnection Agreement in this docket.

INTERMEDIA: Yes. The definition of local traffic should include traffic that originates from or is carried to an Enhanced Service Provider (ESP) or ISP. This issue was arbitrated in the ICG Telecom Group, Inc. (ICG) Arbitration, and the FCC has not made any changes which should alter the Commission's conclusion there. In addition, the FCC's Declaratory Ruling was recently (March 24, 2000) vacated by the United States Court of Appeals for the District of Columbia Circuit (D. C. Circuit), and therefore BellSouth may no longer rely upon the Declaratory Ruling to support its position that ISP traffic is jurisdictionally interstate. Until the FCC adopts a rule of prospective application, reciprocal compensation is appropriate for calls originated by BellSouth's end users to ISPs served by Intermedia. Without payment of reciprocal compensation, Intermedia will not receive compensation at all until the FCC adopts a prospective compensation rule at some indefinite point in the future.

PUBLIC STAFF: Yes. The law and rules governing this hotly disputed issue are confusing and often contradictory. Section 251(b)(5) of TA96 requires that interconnecting parties "establish telecommunications." 47 CFR § 51.701(a) restricts reciprocal compensation to "local telecommunications traffic." The FCC determined that the calls were nonlocal, in the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, 14, FCC Rcd 3689, 3690 (¶ 1) (1999). Despite this determination, the FCC stated that parties may voluntarily negotiate reciprocal compensation in their interconnection agreements, and that state commissions may find that reciprocal compensation for calls to ISPs is appropriate. Id. at 3703-05 (¶¶ 24-25).

On March 24, 2000, the D.C. Circuit vacated this ruling and remanded it to the FCC in Bell Atlantic Companies v. FCC, ___ F.3d ___, 2000 WL 273383 (D.C. Cir. March 24, 2000). If the FCC determines calls to ISPs are intrastate, then the Commission's jurisdiction over this issue should not be affected. However, even if the FCC deems such calls to be interstate; it is not a foregone conclusion that such a ruling would supersede a state commission's authority over arbitration of interconnection agreements. See also, Southwester Bell Telephone Co. v. Public Utility Commission of Texas, ___ F.3d ___, 2000 WL 332062, n. 2 (5th Cir. March 30, 2000).

This Commission first considered the issue of whether calls to ISPs were subject to reciprocal compensation in Docket No. P-55, Sub 1027. The Commission determined that the Interconnection Agreement between US LEC of North Carolina, Inc. (US LEC) and BellSouth did not distinguish calls to ISPs from other local traffic. The Commission also determined that a call terminates when delivered to the local exchange number of the ISP.

- - Since that ruling, BellSouth has been a party to arbitration in three Interconnection Agreements and has asked the Commission in each proceeding to determine that calls to ISPs are not local traffic subject to reciprocal compensation. The Commission has issued Orders in each docket determining that calls to ISPs, for the purpose of reciprocal compensation, are local traffic. BellSouth has not presented adequate justification in this case for the Commission to depart from its previous rulings on this issue. As such, the Parties are due reciprocal compensation for calls to ISP customers.

DISCUSSION

Students of the reciprocal compensation issue will recall that the Commission first considered the issue of whether calls to ISPs were subject to such compensation in Docket No. P-55, Sub 1027, where the Commission determined that such traffic was local. Subsequently, the FCC on February 26, 1999, issued its Declaratory Ruling finding such traffic to be interstate. However, the FCC stated that the parties could voluntarily negotiate reciprocal compensation for such calls in their interconnection agreements and state commissions could find reciprocal compensation for calls to ISPs to be appropriate. The FCC also stated that it would issue a subsequent Order to provide guidance as to the implementation of its Declaratory Ruling.

This Commission in subsequent arbitrations has provided for reciprocal compensation for ISP traffic at the same rate as that for local traffic generally – i.e., at the sum of certain UNE rates. However, out of deference to the FCC's ruling, the Commission has characterized this as an "interim intercarrier compensation mechanism," rather than categorizing the traffic as "local" (or as "nonlocal," for that matter). Moreover, the Commission has also provided that the rate applicable to ISP traffic will be subject to true-up at such time as the Commission has implemented the FCC's premised subsequent ruling. This true-up does not apply to local traffic subject to reciprocal compensation, generally.

Into this rather complicated mix has come the ruling by the D.C. Circuit on March 24, 2000, where the Court found the reasoning applicable to the "one-call theory" in the FCC's Declaratory Ruling inadequate, vacated the Order, and sent the matter back to the FCC for further consideration.

In the short term, it would certainly appear that the D.C. Circuit ruling undercuts those who maintain that ISP traffic is not local. In the longer term, however, the matter is less clear. Should the FCC be able to fortify and explicate its Declaratory Ruling better, it may very well ultimately prevail – and things will be on the same track they were before the March 24, 2000, D.C. Circuit ruling.

So, in view of these considerations, how should the Commission proceed? There are really only two practical alternatives. One would be to stay the course in line with its

previous decision – that is, an ISP rate for intercarrier compensation that is identical to the general reciprocal compensation rate but subject to eventual true-up. The other would be to consider ISP traffic to be explicitly local and have it subject to the general reciprocal compensation rate, but not subject to eventual true-up but, at most, to prospective adjustment depending on how the issue sorts itself out on the federal level.

The Commission concludes that this first alternative, an ISP rate for intercarrier compensation that is identical to the general reciprocal compensation rate but subject to eventual true-up, is preferable for several reasons. First, in this docket, BellSouth has already agreed to incorporate the original mechanism decided upon in previous arbitrations into this one. These filings were received after the March 24, 2000, D.C. Circuit decision, but BellSouth has chosen not to make an issue of it. Second, to change the ruling would probably require revisiting previous cases. Third, there is no pressing practical reason to revisit the issue in light of the March 24, 2000, D.C. Circuit decision. The implementation of a true-up is a contingent event. It will only happen at such time as the FCC has issued its follow-up ruling and this Commission has acted upon it. If the FCC is unable to have its Declaratory Ruling sustained, then obviously there will be no follow-up ruling and, hence, no true-up. If, on the other hand, the FCC prevails, there will be a mechanism already in place to provide for the true-up.

CONCLUSIONS

The Commission concludes that dial-up ISP traffic is subject to an interim intercarrier compensation mechanism at the same rate and in the same manner as reciprocal compensation for local traffic. Such rate should be subject to true-up at such time as the Commission has ruled pursuant to the FCC's subsequent Order on the subject.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 2

MATRIX ISSUE NO. 3: Should Intermedia be compensated for end office, tandem, and transport elements, for purposes of reciprocal compensation?

POSITIONS OF PARTIES

BELLSOUTH: No. If a call is not handled by a switch on a tandem basis, it is not appropriate to pay reciprocal compensation for the tandem switching function. BellSouth will pay the tandem Interconnection rate only if Intermedia's switches are actually performing the local tandem switching functions and providing the same geographic coverage. Intermedia is seeking to be compensated for the cost of equipment it does not own and for functionality it does not provide. Therefore, Intermedia's request for tandem switching compensation when tandem switching is not performed should be denied.

INTERMEDIA: Yes. FCC Rule 51.711(a)(3) requires that where the interconnecting carrier's switch serves a geographic area comparable to that served by the ILEC's tandem switch, the interconnecting carrier is entitled to receive compensation at the tandem interconnection rate. Consequently, BellSouth should be required to pay reciprocal compensation to Intermedia for end office, tandem, and transport elements. Intermedia's switches in the Charlotte and Raleigh metropolitan areas serve areas geographically comparable to those served by BellSouth's tandem switches in those areas.

PUBLIC STAFF: No. Intermedia has failed to show that its switches provide tandem switching functions when terminating calls from BellSouth's end users and has failed to show that its switches provide service to areas comparable to those served by BellSouth's local tandem switches.

DISCUSSION

BellSouth explained that a tandem switch connects one trunk to another trunk and is an intermediate switch or connection between the switch where a telephone call originates and the switch which terminates the call. BellSouth maintained that an end-office switch is connected to a telephone subscriber and allows the call to be originated or terminated. BellSouth stated that if Intermedia's switch is an end-office switch, then it is handling calls that originate from or terminate to customers served by that local switch, and thus Intermedia's switch is not providing a tandem function.

BellSouth argued that although this Commission has considered this issue before in the BellSouth/ICG arbitration, and concluded that ICG was entitled to the tandem switching rate, that case involved different facts than those produced here. BellSouth contended that in this proceeding Intermedia could not tell this Commission where its customers are located. As such, BellSouth believes that there is no showing that Intermedia's switches serve geographic areas comparable to BellSouth's. In BellSouth's opinion, the evidence in the record does not support Intermedia's contention that its switches provide the transport element. Further, it is BellSouth's position that the Act does not contemplate that compensation for transporting and terminating local traffic should be symmetrical when one party does not actually use the network facility for which it seeks compensation. Thus, BellSouth opined that Intermedia is not entitled to tandem switching compensation when tandem switching is not performed.

Intermedia witness Jackson stated that Intermedia's switches in the Charlotte and Raleigh metropolitan areas serve geographic areas comparable to those served by BellSouth's tandem switches in those areas. Intermedia asserted that its network design is entirely different than BellSouth's. Intermedia explained that instead of using a multiplicity of switches to cover an area, Intermedia uses a single switch to cover the same area. With respect to the Raleigh LATA, witness Jackson testified that Intermedia serves areas of both GTE South Incorporated's (GTE's) and Sprint Communications Company,

L.P.'s (Sprint's) territory which are not served by BellSouth. Witness Jackson testified that while Intermedia does not have a ubiquitous network like that of BellSouth, Intermedia could purchase, lease, or build facilities to serve its customers.

In response to the Commission's February 29, 2000 Order, Intermedia submitted additional information on March 6, 2000, concerning its service area and the functionality of its switches. With respect to the issue of geographic comparability, Intermedia submitted a list of its customers by location and type of service; a listing of the Company's collocations, including collocations in GTE offices; a snapshot of incoming traffic from Raleigh and Charlotte exchange areas; county maps depicting current and future rate centers in and around Raleigh and Charlotte; and Company promotional materials. Intermedia contended that the customer information it submitted shows a sizeable number of customers in a widely dispersed area in and around both Charlotte and Raleigh. Further, Intermedia contended that the snapshot of incoming traffic it submitted shows incoming calls from a large number of exchanges in and around both cities, and that the rate center maps and promotional materials also demonstrate a capability and intent to serve a large geographical area.

With respect to the functionality issue, Intermedia submitted information from the manufacturer of its two North Carolina switches which describes the technology inherent in the switches used by Intermedia. Intermedia also included diagrams and narratives describing the trunk topology of its two North Carolina switches and call diagrams depicting the functions performed by its switches. Intermedia witness Jackson testified that "The [Intermedia] switches perform the functions of a tandem, such as remote traffic aggregation, and the functions of end offices switches, such as providing dial tone. Due to this different network design concept, Intermedia's single switches have to perform all of the relevant functions, including the function BellSouth assigns to its tandem switches." Intermedia contended that the materials from the manufacturer of Intermedia's switches demonstrate that the Nortel DMS 500 switch employed by Intermedia performs both end office and tandem switching functions. Intermedia asserted that the diagrams submitted by Intermedia support witness Jackson's testimony that the Intermedia switch performs the traffic aggregation function of a BellSouth tandem switch.

BellSouth did not file objections to Intermedia's Exhibits filed March 6, 2000, nor did BellSouth seek an evidentiary hearing. On March 10, 2000, BellSouth filed a reply to Intermedia's exhibits filed on March 6, 2000. BellSouth stated that Intermedia had failed to demonstrate that it incurs any functional costs that would justify BellSouth paying Intermedia the tandem interconnection rate. BellSouth refuted Intermedia's Exhibits, point by point, and argued that nothing in the submitted material indicates that Intermedia's local switches perform tandem functions in terminating local traffic. BellSouth also contended that Intermedia does not provide tandem switching of local traffic between BellSouth and GTE switches, that Intermedia has inappropriately labeled Intermedia's collocation sites as Intermedia end-office switches, that Intermedia inflated its number of end users by

repeating the same customer numerous times by listing each individual service to which the customer subscribes, and that Intermedia has only three collocation sites for the Raleigh LATA and two collocation sites for all of the Charlotte LATA, indicating a very limited number of customers for a very small geographic area.

The additional information filed by Intermedia on March 6, 2000, in response to the Commission's February 29, 2000 Order seeking late-filed exhibits, and BellSouth's response of March 10, 2000, to Intermedia's exhibits are hereby allowed in evidence in this proceeding as late-filed exhibits.

The Public Staff contended that although Intermedia provided information in its March 6, 2000 filing which demonstrates that Intermedia's switches have the capability of functioning as tandem switches, the issue before the Commission is whether Intermedia's switches, in terminating traffic from BellSouth's customers to Intermedia's end users, not merely have the capability of performing, but actually perform, tandem switching functions.

The Public Staff further contended that based upon the information provided by Intermedia in its March 6, 2000 filing, Intermedia does not have switches in the ILEC's end offices where it collocates. Since traffic can be switched only through the use of a switch, the Public Staff questioned how Intermedia can claim that it performs switching functions at its collocation facilities. The Public Staff stated that there is insufficient evidence in the record to support a finding that Intermedia may be providing tandem switching functions.

The Public Staff stated that Intermedia has not shown, for the calls in question, that either its switch in Charlotte or its switch in Raleigh performs the basic switch trunk function of connecting trunks to trunks. The Public Staff believes that since the record fails to support Intermedia's claim that its switches perform a trunk-to-trunk switching function for these calls, the Commission should conclude that they do not operate as local tandem switches and Intermedia is not entitled to receive tandem switching compensation for those calls. It is the Public Staff's opinion that performance of the tandem switching function in terminating calls is a necessary, but not sufficient, condition alone to qualify those calls for tandem switching compensation.

The Public Staff argued that, contrary to Intermedia's contentions, whether the switches are capable of serving an area comparable to those served by BellSouth's local tandems is not determinative of this issue. The Public Staff conceded that any end office with sufficient line capacity is capable of serving a huge area, certainly as large as the areas served by BellSouth's tandems, although perhaps inefficiently. The Public Staff stated that the capacity to serve a large area clearly does not make each large capacity end-office switch a tandem switch and that this view comports with the language of the FCC's Rule 51.711(a)(3) and the explanatory language of Paragraph 1090.

The Public Staff argued that it is necessary that the areas served by Intermedia's switches be comparable to the areas served by BellSouth's tandems, in order for traffic delivered to Intermedia for termination to be eligible for tandem switching compensation. The Public Staff remarked that each Intermedia switch could actually serve a third of the geographic area of North Carolina. However, the Public Staff argued that if the tandem switching function is not actually performed by those switches in terminating traffic from BellSouth to Intermedia's customers, Intermedia should not be compensated for tandem switching.

The Public Staff claimed that there is ample evidence in the record to discern whether Intermedia's switches serve comparable areas to BellSouth's local tandem switches. The Public Staff stated that according to the maps filed with BellSouth witness Varner's Supplemental Rebuttal testimony, BellSouth's local tandem switches in the Raleigh LATA serve numerous wire centers. According to the Public Staff, Intermedia's March 6, 2000 filing, made on a confidential basis, indicates that its switch in Raleigh serves only a few of the areas that are served by either of the BellSouth local tandem switches in the Raleigh LATA. Additionally, the Public Staff noted that Intermedia's Charlotte switch serves only a few of the areas that are served by either of BellSouth's local tandem switches in the Charlotte LATA.

Further, the Public Staff contended that Intermedia did not present any evidence regarding new technologies analogous to those suggested by the FCC which would qualify the traffic terminated to those switches as being eligible for tandem compensation.

All Parties appear to agree that Intermedia should receive reciprocal compensation for end-office switching, tandem switching, and common transport if it provides such functions. The Parties also concur that Intermedia provides end-office switching and common transport. The Parties, however, disagree on whether Intermedia should receive reciprocal compensation for tandem switching.

The pertinent authority governing the issue of reciprocal compensation for tandem switching is found in FCC Rule 51.711(a)(3) and Paragraph 1090 of the FCC's First Report and Order.

Rule 51.711(a)(3) states:

Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.

Paragraph 1090 of the First Report and Order states:

We find that the "additional costs" incurred by a LEC when transporting and terminating a call that originated on a competing carrier's network are likely to vary depending on whether tandem switching is involved. We, therefore, conclude that states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to the end office switch. In such event, states shall also consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate.

The Commission concluded, in *Petition of ICG Telecom Group, Inc. for Arbitration of its Interconnection Agreement with BellSouth Telecommunications, Inc.*, Docket No. P-582, Sub 6, that ICG had met its burden of proof in regard to both geographic coverage and similar functionality.

The Commission concluded in *Petition by ITC^DeltaCom Communications, Inc. (DeltaCom) for Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc.*, Docket No. P-500, Sub 10, that DeltaCom had met its burden of proof that its switches cover comparable areas to that covered by BellSouth's switches and that, for reciprocal compensation purposes, DeltaCom is entitled to compensation at BellSouth's tandem interconnection rate. In the DeltaCom Order, the Commission discussed more extensively its belief that the language in the FCC's Rule 51.711 and the attendant discussion in Paragraph 1090 clearly contemplate that exact duplication of the ILEC's network architecture is not necessary in order for the competing local provider (CLP) to be eligible to receive reciprocal compensation at the tandem switching rate. The Commission also indicated that it believes that the language in the FCC's Order treats geographic coverage as a proxy for equivalent functionality, and that the concept of equivalent functionality is included within the requirement that the equipment utilized by both Parties covers the same basic geographic area.

Based on the exhibits filed by Intermedia on March 6, 2000, including the maps, the description of Intermedia's Nortel DMS 500 switches and associated technology, and the

current listing of Intermedia's customers in North Carolina by location and type of service, the Commission believes that Intermedia has met its burden of proof that its switches cover a comparable geographic area to that covered by BellSouth's switches, and that, for reciprocal compensation purposes, Intermedia is entitled to compensation at BellSouth's tandem interconnection rate.

CONCLUSIONS

The Commission concludes that, for reciprocal compensation purposes, Intermedia should be compensated at BellSouth's tandem interconnection rate.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 3

MATRIX ISSUE NO. 22: Should BellSouth be required to provide nondiscriminatory access to interoffice transmission facilities, including dark fiber, DS1, DS3 and OCn levels, and shared transport, in accordance with, and as defined in, the FCC's UNE Remand Order and should BellSouth's proposed rates be subject to true-up?

POSITIONS OF PARTIES

BELLSOUTH: No. BellSouth agreed that it is required to provide nondiscriminatory access to interoffice transmission facilities and has proposed language which it believes is consistent with Section 51.319(d) of the FCC's Rules promulgated by its UNE Remand Order and with Intermedia's proposed language. BellSouth further believes that the rates it proposed for interoffice transmission facilities are Total Element Long Run Incremental Cost (TELRIC)-based and should not be subject to true-up if later modified by the Commission.

INTERMEDIA: Yes. Intermedia believes that under the FCC's UNE Remand Order, interoffice transport must be provided to CLPs at TELRIC rates. Intermedia argued that the rates proposed by BellSouth should be adopted as interim rates subject to true-up when the Commission establishes permanent rates in Docket No. P-100, Sub 133d.

PUBLIC STAFF: Yes. The Public Staff recommended that the Commission adopt BellSouth's proposed language regarding this issue. The Public Staff further recommended that the Commission approve BellSouth's proposed rates for inclusion in this Agreement, but that the rates be subject to true-up after the Commission establishes rates in the Docket No. P-100, Sub 133d proceeding.

DISCUSSION

The Parties do not dispute that BellSouth must provide unbundled access to interoffice transport at TELRIC-based rates. The Parties do dispute whether the

BellSouth-proposed TELRIC rates should be subject to true-up after the Commission sets permanent prices in Docket No. P-100, Sub 133d for interoffice transport.

BellSouth argued in its Proposed Order that it has agreed to provide nondiscriminatory access to interoffice facilities in accordance with the FCC's UNE Remand Order and that BellSouth has, in fact, proposed the following language to Intermedia, which BellSouth believes is consistent with Section 51.319(d) of the FCC's Rules promulgated by its UNE Remand Order:

"BellSouth shall provide nondiscriminatory access, in accordance with FCC Rule 51.311 and Section 251(c)(3) of the Act, to interoffice transmission facilities on an unbundled basis to Intermedia for the provision of a telecommunications service at the rates set forth in this Attachment.

Interoffice transmission facility network elements include:

- A) Dedicated transport, defined as BellSouth's transmission facilities, including all technically feasible capacity-related services including, but not limited to, DS1, DS3 and OCn levels, dedicated to a particular customer or carrier, that provide telecommunications between wire centers or switches owned by BellSouth, or between wire centers and switches owned by BellSouth and Intermedia;
- B) Dark Fiber transport, defined as BellSouth's optical transmission facilities without attached multiplexing, aggregation, or other electronics; and
- C) Shared transport, defined as transmission facilities shared by more than one carrier, including BellSouth, between end office switches, between end office switches and tandem switches, and between tandem switches, in BellSouth's network.

BellSouth shall:

- A) Provide Intermedia exclusive use of interoffice transmission facilities dedicated to a particular customer or carrier, or shared use of the features, functions, and capabilities of

interoffice transmission facilities shared by more than one customer or carrier;

B) Provide all technically feasible transmission facilities, features, functions, and capabilities that Intermedia could use to provide telecommunications services;

C) Permit, to the extent technically feasible, Intermedia to connect such interoffice facilities to equipment designated by Intermedia, including but not limited to, Intermedia's collocated facilities; and

D) Permit, to the extent technically feasible, Intermedia to obtain the functionality provided by BellSouth's digital cross-connect systems in the same manner that BellSouth provides such functionality to interexchange carriers."

BellSouth argued in its Proposed Order that Intermedia does not oppose BellSouth's proposed rates and that Intermedia witness Jackson on cross-examination admitted that Intermedia is not contesting that BellSouth's proposed rates are, in fact, TELRIC-based. BellSouth stated in its Proposed Order that the only issue Intermedia now contests is whether those rates should be subject to a true-up. As BellSouth witness Varner stated on cross-examination, "The basic point of contention is whether or not these rates, once the Commission approves rates in this arbitration, whether those rates will be subject to true-up or not. We don't agree that those rates would be subject to true-up. That's the issue that's before the Commission." BellSouth argued in its Proposed Order that since its proposed rates are TELRIC-based and are not interim rates, the Commission should not true-up the rates.

Intermedia witness Jackson stated in cross-examination that, "It's my understanding that obviously we believe those ought to be on a TELRIC-based rate schedule or cost basis. I think our point on that is that in the interim until those rates are approved that we're looking for -- if we use those rates, that we would like to have a true-up at the end of that period of time, if should this Commission decide that those rates are well over priced or to your advantage if they were way underpriced. So I think the true-up was the issue from our standpoint at this time." Intermedia commented in its Proposed Order that the Commission has consistently held that interim rates are subject to true-up upon adoption of permanent rates. Intermedia noted that as recently as March 30, 2000, in the Order Setting Procedural Schedules in Docket No. P-100, Sub 133d, the Commission announced that it would adopt interim line sharing rates, subject to true-up upon adoption of permanent rates. Intermedia also stated in its Proposed Order that the Commission's March 13, 2000 Order Adopting Permanent UNE Rates in Docket No. P-100, Sub 133d is another example of the Commission ordering the true-up of interim rates once permanent

rates are established. Intermedia recommended in its Proposed Order that the Commission adopt the rates proposed by BellSouth for interoffice transmission, subject to true-up once the Commission adopts permanent rates in Docket No. P-100, Sub 133d.

The Public Staff stated in its Proposed Order that BellSouth's proposed language on this issue is substantially similar to Intermedia's proposed language in the Agreement. However, the Public Staff stated that BellSouth's proposed language refers to rates for interoffice facilities that are to be included in the Agreement while Intermedia's proposed language does not. The Public Staff stated that in this arbitration, BellSouth has proposed rates for dedicated transport, dark fiber, and shared transport for inclusion in the Agreement for interoffice facilities as shown in BellSouth witness Varner's Exhibit AJV-1. According to the Public Staff, the Parties agree that BellSouth has an obligation under the law to provide Intermedia access to interoffice transmission facilities at TELRIC-based prices, but Intermedia objects to BellSouth's proposed inclusion of rates in the Agreement if those rates are not subject to true-up. The Public Staff stated that BellSouth is seeking the Commission's approval of its proposed rates for interoffice facilities on a permanent basis in this arbitration. The Public Staff stated that BellSouth witness Varner testified that if the Commission approved different rates in its Docket No. P-100, Sub 133d proceeding, then BellSouth and Intermedia could amend their Interconnection Agreement to reflect the rate changes from that time forward. The Public Staff recommended that the Commission adopt BellSouth's proposed language and proposed rates for inclusion in the Agreement, but allow for a true-up of the rates after the Commission establishes rates in the Docket No. P-100, Sub 133d proceeding.

The Commission notes that in its March 30, 2000 Order Setting Procedural Schedules in the UNE docket, the Commission concluded that interoffice transmission facilities including dedicated transport, dark fiber, and shared transport would be considered in Phase I of the Commission's generic UNE proceeding. The Commission also notes that in said Order, the Commission concluded that there was not enough evidence at that point in time for the Commission to know which, if any, of the proposed new UNEs would ultimately be determined to be, in fact, UNEs. Therefore, the Commission found it appropriate to deny requests for the Commission to establish interim rates for any new UNEs, with the exception of line sharing.

In this arbitration docket, the Parties agree that BellSouth must provide unbundled access to interoffice transport at TELRIC-based rates. Therefore, the Commission believes that it is reasonable and appropriate for the interoffice transport rates agreed to by the Parties in this arbitration proceeding to be considered interim and subject to true-up if the Commission adopts different permanent prices for interoffice transport in its generic UNE proceeding. The Commission finds it appropriate to accept the recommendation of Intermedia and the Public Staff by adopting BellSouth's proposed language and proposed rates for interoffice transport for inclusion in the Interconnection Agreement, but allowing

for a true-up of the rates if the Commission adopts different permanent prices for interoffice transport in Phase I of its generic UNE proceeding in Docket No. P-100, Sub 133d. --

CONCLUSIONS

The Commission concludes that it is appropriate to adopt BellSouth's proposed language and proposed rates for interoffice transport for inclusion in the Interconnection Agreement, but allow for a true-up of the rates if the Commission adopts different permanent prices for interoffice transport in Phase I of its generic UNE proceeding in Docket No. P-100, Sub 133d.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 4

MATRIX ISSUE NO. 31: For purposes of compensation, how should IntraLATA Toll Traffic be defined?

POSITIONS OF PARTIES

BELLSOUTH: IntraLATA Toll Traffic should be defined as any telephone call that is not local or switched access per the Parties' Agreement.

INTERMEDIA: IntraLATA Toll Traffic should be defined broadly, to include not merely the use of one type of equipment, such as analog circuit switches, but should also encompass nonlocal traffic that is carried over facilities that employ new technologies, such as data or frame relay traffic over packet switching equipment. The Act makes no distinction between voice and data traffic. In the FCC's Advanced Services Order in CC Docket No. 98-147, the FCC clearly states that "for purposes of determining the interconnection obligation of carriers, the Act does not draw a regulatory distinction between voice and data services." (Paragraph 47). ILECs have the same obligations to competing carriers with respect to data traffic, including frame relay traffic, as they do for voice traffic.

PUBLIC STAFF: The definitions propounded by both BellSouth and Intermedia are insufficient in themselves in determining whether they include or exclude frame relay traffic. Both definitions lack specificity and clarity. Due to an insufficient record, the Public Staff recommends that the Commission not adopt either Party's proposal.

DISCUSSION

BellSouth's proposed language for inclusion in the Interconnection Agreement is as follows:

IntraLATA Toll Traffic is defined as any telephone call that is not local or switched access per this Agreement. (Proposed Interconnection Agreement, Attachment 3, §6.7.1).

In the Proposed Interconnection Agreement, Attachment 3, Section 6 deals with interconnection compensation. On cross-examination, witness Varner testified that a "telephone call" is defined as "a basic voice connection between two customers". Therefore, under BellSouth's definition, only voice traffic would be considered as intraLATA toll traffic. Witness Varner testified that BellSouth defines intraLATA toll traffic in this manner to exclude data services, such as frame relay, from this definition. Further, witness Varner stated that what is considered as local and toll for frame relay is stated in the part of the Agreement that deals with frame relay.

In the Proposed Interconnection Agreement, Attachment 3, Section 6.7.2, the Parties have agreed that they will compensate each other for intraLATA toll traffic originated by one Party and terminated on the other Party's network. Consequently, as stated in BellSouth's Proposed Order, the effect of adopting BellSouth's proposed language would be to exclude nonvoice intraLATA traffic from reciprocal compensation obligations. Further discussion on BellSouth's proposal that frame relay traffic be excluded from the requirements of reciprocal compensation is, subsequently, provided in the Evidence and Conclusions for Finding of Fact No. 7 — Matrix Issue No. 37.

Intermedia's proposed language for inclusion in the Interconnection Agreement is as follows:

IntraLATA Toll Traffic is defined as all basic intraLATA message services calls other than Local Traffic. (Proposed Interconnection Agreement, Attachment 3, §6.7.1).

In its Post-Hearing Brief, Intermedia stated that BellSouth seeks to define intraLATA toll traffic in a manner that specifically excludes messaging or data, and only includes voice traffic. Intermedia argued that the law makes no distinction between voice and data for interconnection purposes. Intermedia witness Jackson testified that Intermedia's definition would ensure that toll traffic cannot be limited to traffic that uses one type of equipment, such as analog circuit switches, but will include nonlocal traffic carried over facilities that employ new technologies, such as packet switching. In support of its position, Intermedia relies upon the FCC's August 7, 1998, Advanced Services Order in Docket No. 98-147, which states in pertinent part:

We agree with ALTS that the interconnection obligations of section 251 of the Act apply equally to facilities and equipment used to provide data transport functionality and voice functionality. . . . For purposes of determining the interconnection obligation of carriers, the Act does not draw a regulatory distinction between voice and data services. In particular, the Commission drew no such distinction in the *Local Competition Order*, when it required incumbent LECs to offer interconnection with competitors for the transmission and routing of telephone exchange and exchange access traffic. Thus, the interconnection obligations of incumbent LECs apply to packet-switched as well as circuit-switched services. . . . We therefore grant the ALTS request that we declare that the interconnection obligations of sections 251(a) and 251(c)(2) apply to incumbents' packet-switched telecommunications networks and the telecommunications services offered over them. (Paragraphs 46, 47, and 48).

During cross-examination, BellSouth witness Varner acknowledged that BellSouth had previously made the argument to the FCC that Congress did not intend for Section 251 to apply to new technology that was deployed after 1996. The FCC rejected BellSouth's argument in the *Advanced Services Order*. Specifically, in the *Advanced Services Order*, the FCC states:

We reject BellSouth's argument that Congress intended that section 251(c) not apply to new technology not yet deployed in 1996. Nothing in the statute or legislative history indicates that it was intended to apply only to existing technology. Moreover, Congress was well aware of the Internet and packet-switched services in 1996, and the statutory terms do not include any exemption for those services. (Paragraph 49).

Nevertheless, witness Varner contended that while the parts of Section 251 dealing with interconnection do apply to voice and data services, other parts of Section 251 do not apply to advanced services, such as the unbundling requirements of Section 251. Witness Varner further opined that reciprocal compensation is different than interconnection.

Intermedia believes that the FCC made it clear that intraLATA toll traffic includes both voice and data traffic, and that no legal distinction can be made between them. In its Proposed Order, Intermedia stated that the Act and the FCC's *Advanced Services Order* provide no basis for a distinction between voice and data traffic. Thus, Intermedia contended that Intermedia's proposed definition is appropriate as it includes data messaging in the category of intraLATA toll traffic, and does not distinguish between voice and data traffic.

The Public Staff stated that it is unclear from the evidence what the importance is of including or excluding frame relay traffic in the definition of intraLATA toll traffic. The

Public Staff asserted that BellSouth has not explained the need for excluding frame relay traffic from the definition, nor has Intermedia attempted to explain why frame relay traffic should be included. The Public Staff concluded that the definitions propounded by both BellSouth and Intermedia are insufficient in themselves to determine whether they include or exclude frame relay traffic. Due to an insufficient record, the Public Staff recommended that the Commission not adopt either Party's proposed definition.

The basic difference between the positions of BellSouth and Intermedia on this issue appears to center on whether frame relay traffic is included or excluded in the definition of intraLATA toll traffic for purposes of compensation. The Commission agrees with the Public Staff that neither Party has adequately explained why their respective proposed definition for intraLATA toll traffic is appropriate. Furthermore, neither Party's proposed definition is sufficiently clear in its composition to determine whether it includes or excludes frame relay traffic. Consequently, neither Party's proposed definition should be adopted.

CONCLUSIONS

The Commission declines to adopt either the definition proposed by BellSouth or by Intermedia. Furthermore, due to an insufficient record, the Commission declines to develop an alternative definition. Instead, the Commission encourages the Parties to continue to negotiate an appropriate definition that would be consistent with the Commission's conclusions set forth in the Evidence and Conclusions for Finding of Fact No. 7.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 5

MATRIX ISSUE NO. 32: How should "Switched Access Traffic" be defined?

POSITIONS OF PARTIES

BELLSOUTH: Switched Access Traffic should be defined in accordance with BellSouth's access tariff and should include IP telephony.

INTERMEDIA: Switched Access Traffic should be defined as telephone calls requiring local transmission or switching services for the purpose of the origination or termination of Telephone Toll Service, including Feature Groups A, B, and D, 800/888 access, and 900 access (and their successors or similar Switched Exchange Access Services).

PUBLIC STAFF: The Commission should not object to an agreement by BellSouth and Intermedia to specifically define switched access traffic in the Agreement as it has been specified in BellSouth's Access Tariff. Further, the Commission should decline to require a definition of switched access traffic that specifically includes IP telephony.

DISCUSSION

BellSouth witness Varner stated that because switched access traffic is already defined in BellSouth's Access Tariff, there is no need for an additional definition in the Interconnection Agreement. Because Intermedia insisted upon such a definition, however, BellSouth proposed the following language:

Switched Access Traffic is as defined in the BellSouth Access Tariff. Additionally, IP Telephony traffic will be considered switched access traffic.

Witness Varner, under cross-examination, stated that there is nothing in this local Interconnection Agreement that discusses, determines, or affects the way in which BellSouth engages in a joint provision of access service so it is really a definition without a purpose. However, he stated that BellSouth would be willing to put the same definition of switched access traffic that is in the tariff into the Agreement.

Witness Varner explained that it is important to include IP telephony in the definition to avoid confusion. Due to the increasing use of IP technology mixed with traditional analog and digital technology to transport long distance telephone calls, BellSouth believes that it is important to specify that such traffic is switched access traffic rather than local traffic.

Intermedia witness Jackson testified that the essential difference between the Parties is that Intermedia believes that "switched access traffic" should be defined in the Parties' agreement. Intermedia argued that BellSouth's tariff language changes from time to time, and referring to its tariff allows BellSouth to define this crucial term any way it wishes, perhaps in ways that Intermedia may consider adverse.

In addition, Intermedia stated that it does not believe that it is appropriate for BellSouth to attempt unilaterally to assign a regulatory status to "IP Telephony." In its Post-Hearing Brief, Intermedia stated that the treatment of IP telephony should not be determined on a piecemeal basis, from state to state, agreement to agreement, but should await a determination from the FCC.

The Public Staff stated that it does not think the Commission should object to an arrangement by BellSouth and Intermedia to specifically define switched access traffic in the Agreement as it has been specified in BellSouth's Access Tariff. The Public Staff stated that even though it does not necessarily disagree with BellSouth's position that toll calls completed using the technology embodied in IP telephony should be treated similarly to other toll traffic with respect to switched access, the Commission should decline to require a definition of switched access traffic that specifically includes IP telephony. The Public Staff maintained that this issue is best addressed in a setting in which all

interexchange carriers (IXCs) and other affected carriers have notice and in which the procedures for determining billable minutes are fully explored.

On April 27, 2000, upon the request of the Commission Staff, BellSouth filed a letter with attached tariff pages which provided a description of Switched Access Service and associated Feature Groups as defined in BellSouth's intrastate Access Services Tariff. This letter with attached tariff pages is hereby allowed in evidence in this proceeding as a late-filed exhibit.

Also, on April 27, 2000, Intermedia filed a letter in response to BellSouth's filing which stated that the Access Services Tariff which BellSouth cited did not include a definition of switched access traffic, and, therefore, the only clear option is Intermedia's suggested language for the definition of switched access traffic. This letter is hereby allowed in evidence in this proceeding as a late-filed exhibit.

There is only a fine distinction between switched access *traffic* and switched access *service*. Generally, switched access service is ordered from the tariff and switched access traffic is what one sends over the switched access service. The tariff pages submitted by BellSouth are clearly to provide "switched access service." Even though it is unclear from the record what the importance is of having a definition of switched access traffic contained in the Parties' local Interconnection Agreement, the definition offered by Intermedia would seem to be more appropriate since it appears to list the same services as those listed in BellSouth's intrastate Access Tariff under its Switched Access Service Section.

Both Intermedia and the Public Staff expressed reservations about whether IP telephony should be included in a definition of switched access traffic in this proceeding. Intermedia was of the opinion that such a definition should await a determination from the FCC; the Public Staff believes that the Commission should decline to require such a definition until the issue is more fully addressed in a setting involving all affected parties. The Commission believes that due to the considerable uncertainty as to how this type of telephony should be defined, the Commission should decline to require a definition of switched access traffic that specifically includes IP telephony at this time.

CONCLUSIONS

The Commission concludes that the definition of "switched access traffic" as proposed by Intermedia should be included in the Agreement. Further, the Commission declines to require a definition of switched access traffic that specifically includes IP telephony at this time.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 6

MATRIX ISSUE NO. 33: Should BellSouth and Intermedia be liable to each other for lost switched access revenues due to lost or damaged billing data?

POSITIONS OF PARTIES

BELLSOUTH: No and if yes, then no cap. BellSouth argued that since this issue deals with switched access revenues, it is not appropriate for arbitration under Section 252 of TA96. BellSouth stated that Interconnection Agreements arbitrated under Section 252 should govern local interconnection terms and conditions, not switched access issues. However, BellSouth is willing to accept Intermedia's proposed language with one exception: BellSouth does not wish to place a cap on the liabilities of the Parties.

INTERMEDIA: Yes. Intermedia maintained that the Parties' Interconnection Agreement should provide that each Party is liable to the other for lost or damaged billing data. Intermedia argued that the Parties' liability should be capped at \$10,000 per episode.

PUBLIC STAFF: No. The Public Staff argued that because the Parties must negotiate and settle this issue should it arise, there is already a mechanism in place to resolve disputes. The Public Staff stated that there is not a need for a liability cap as proposed by Intermedia.

DISCUSSION

The only area of contention between the Parties concerning this issue is whether there should or should not be a cap on the liabilities of the Parties. As Intermedia described in its Brief, BellSouth and Intermedia provide services jointly to third parties, and as a result, each Party must be responsible for the maintenance of billing records that will allow the other Party to obtain any revenues due to it for providing that service. Intermedia further explained that occasionally, mistakes in compiling this billing information occur and that Intermedia originally proposed that the Parties be mutually liable for lost or damaged billing data, however, that liability should be limited by a cap. Intermedia stated in its Brief that BellSouth has refused to limit liability. Intermedia concluded in its Brief that this issue is an area ripe for disagreement that could escalate into an issue before the Commission and that putting a liability cap of \$10,000 per episode on lost or damaged billing data is prudent in these circumstances.

BellSouth witness Varner stated in his rebuttal testimony that BellSouth has advised Intermedia that it is agreeable to Intermedia's proposed language, except that BellSouth does not wish to place a cap on the liabilities of the Parties. BellSouth argued in its Proposed Order that its switched access revenues are substantial and that it must rely on accurate information from CLPs such as Intermedia in order to accurately bill the

appropriate IXCs and vice-versa. BellSouth witness Vamer stated on cross-examination that a Party would lose switched access revenues due to lost or damaged billing records when the data, for whatever reason, was not available for the Party to properly bill the customer. BellSouth stated in its Proposed Order that Intermedia's proposed cap of \$10,000 is unreasonable since BellSouth's switched access revenues in North Carolina amount to millions of dollars annually. Therefore, BellSouth recommended that the Commission reject Intermedia's proposed cap of \$10,000, as unreasonable.

Intermedia argued in its Proposed Order that this issue involves the general terms and conditions of the Parties' Interconnection Agreement. Intermedia stated that the losses at issue here would occur when one Party causes the other Party's billing data either to be lost or damaged, and the other Party is unaware of its customers having incurred the corresponding charges. Intermedia maintained in its Proposed Order that once the billing period has passed, the billing party generally cannot recover the lost charges from its customers. Intermedia stated that in this proceeding it has proposed a means for recovering at least a part of the estimated damages lost from the negligent party. Intermedia recommended that the Commission conclude that each Party should be liable to the other for losses it causes the other Party to incur by losing or damaging billing data but that liability for such losses under the Parties' Interconnection Agreement shall be capped at \$10,000 per episode. Intermedia argued in its Proposed Order that although its choice for a cap of \$10,000 per episode is somewhat arbitrary, BellSouth has not suggested a better one. Intermedia argued that its proposal would minimize both Parties' exposure to unlimited and unquantifiable losses. Intermedia witness Jackson stated on cross-examination that Intermedia has not been as wedded to the actual dollar amount of the cap as it was to coming up with a reasonable cap based on good business practice to ensure that no Party is overly damaged for issues that may be beyond the Party's control. Intermedia witness Jackson also clarified on cross-examination that the situation that is described in this issue is limited to situations where cooperative efforts between the Parties to reconstruct the billing data have failed for whatever reason.

The Public Staff argued in its Proposed Order that there is no need for a liability cap. The Public Staff argued that since the Parties must negotiate and settle the issue should it arise, there is already a mechanism in place to resolve disputes. The Public Staff maintained that it is equitable to require the liable party to provide adequate compensation for damages it has caused. The Public Staff recommended that the Commission decline to require the inclusion of a liability cap for lost or damaged switched access revenues.

The Commission notes that Intermedia witness Jackson testified that the situation that is described in this issue is limited to situations where cooperative efforts between the Parties to reconstruct the billing data have failed for whatever reason. Intermedia's proposed language as reflected in Exhibit 1 of BellSouth's Petition for Arbitration filed on December 7, 1999 reads:

"In the event of a loss of data, both Parties shall cooperate to reconstruct the lost data and shall make best efforts to do so within 48 hours. If such reconstruction is not possible, the Parties shall use a reasonable estimate of the lost data, based on twelve (12) months of prior usage data; provided that if twelve (12) months of prior usage data is not available, the Parties shall base the estimate on as much prior usage data that is available; and further provided, however, that if reconstruction is required prior to the availability of at least three (3) months of prior usage data, the Parties shall defer such reconstruction until three (3) months of prior usage data is available. If the estimated billing is not accepted for payment by the affected Access Services Customer(s), the responsible Party shall be liable to the other Party for any resulting lost revenue up to a maximum of \$10,000 in the aggregate in any one (1) month period. Lost revenue may be a combination of revenues that could not be billed to the End Users and associated Access Service revenues. Lost revenue will be calculated by subtracting the amount actually paid by the affected Access Services Customer(s) from the estimated billing derived pursuant to the process set forth in this section." (Proposed Interconnection Agreement, Attachment 3, Section 6.8.6, pages 18-19).

Also, the Commission notes that BellSouth's proposed Interconnection Agreement with Intermedia filed as Exhibit I to its December 7, 1999 Petition for Arbitration has a Liability and Indemnification section [See pages 5-6 of the General Terms and Conditions - Part A].

The Commission believes that it would be more appropriate to adopt Intermedia's proposed language outlined above, but removing the last three sentences referencing lost revenues or the liability cap of \$10,000. The language to be included in the Agreement would require the Parties to make cooperative efforts to reconstruct billing data using their best efforts. Thus, the Commission declines to require the inclusion of a clause requiring liability for lost switched access revenues resulting from lost or damaged billing data.

CONCLUSIONS

The Commission finds it appropriate to adopt Intermedia's proposed language concerning lost switched access revenues due to lost or damaged billing data, but declines to require the inclusion of a clause requiring liability for lost switched access revenues resulting from lost or damaged billing data. Therefore, the Commission finds it appropriate

to require the Parties to delete the last three sentences of Intermedia's proposed language which reference lost revenues or a liability cap of \$10,000.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 7

MATRIX ISSUE NO. 37: Should all framed packet data transported within a VC that originates and terminates within a LATA be classified as local traffic?

POSITIONS OF PARTIES

BELLSOUTH: While BellSouth agrees that all framed packet data transported within a VC that originates and terminates within a LATA should be classified as local traffic for the purposes of establishing interconnection between the Parties, BellSouth contends that frame relay traffic originated and terminated in the LATA should not be subject to reciprocal compensation. BellSouth's rationale is that there is a need to distinguish between voice traffic and frame relay traffic. Voice traffic travels in a connection between at least two points and can be measured in minutes of use, while frame relay utilizes packet switching, where packets or "bursts" of information are sent in groups. Since there is no continuous connection, a minutes of use measurement is inappropriate.

INTERMEDIA: Frame relay and other data traffic originated and terminated within the same LATA should be considered local traffic. Thus, such traffic should be subject to reciprocal compensation. However, the underlying issue of the measurement of such traffic has not been addressed. Thus, the Parties should submit late-filed exhibits outlining their proposals for measurement and compensation of frame relay and other data traffic for reciprocal compensation purposes.

PUBLIC STAFF: The record indicates that both Parties recognize that reciprocal compensation would apply to this traffic. The FCC had clearly recognized that packet switching differs from traditional local circuit switching. See Third Report and Order and Fourth Further Notice of Proposed Rulemaking CC Docket No. 96-98, November 5, 1999, fn. 592. However, there is insufficient information in this record to establish an appropriate mechanism for reciprocal compensation. The Parties (preferably jointly) should be directed to prepare such a mechanism. The proposal(s) should include a description of and basis for the proposal and should reflect that, while intraLATA frame relay circuits can be considered local for the purpose of physical installation and interconnection, the traffic occurring over the facilities can and probably will be both local and intraLATA toll.

DISCUSSION

The Commission notes that Section 251(c) of TA96, which requires reciprocal compensation, does not differentiate between voice and data services. Indeed, the FCC in its August 7, 1998, Advanced Services Order rejected a BellSouth contention that

Section 251(c) does not apply to technology which was not deployed at the time of the enactment of TA96.

BellSouth had conceded that intraLATA traffic transported by frame relay should be classified as local for the purposes of establishing interconnections. BellSouth witness Varner appeared to recognize that local traffic transported via frame relay is subject to reciprocal compensation.

Nevertheless, BellSouth is surely right in its contention that not all such intraLATA traffic is in fact local and that the nature of packet switching is such that application of a straight minutes-of-use arrangement is questionable.

The Commission believes that it is clear that reciprocal compensation should be paid for the local portion of framed packet data transported within a VC that originates and terminates within a LATA. However, there is a dearth of evidence as to what the appropriate design and level for such compensation should be. BellSouth witness Varner speculated as to a "bill and keep" arrangement, but Intermedia made no firm proposal.

CONCLUSIONS

The Commission concludes that reciprocal compensation should be paid for the local portion of framed packet data transported within a VC that originates and terminates within a LATA. BellSouth and Intermedia are directed to propose a mechanism to provide for such compensation. Such proposal should be a joint proposal, if possible, and should include a description of and basis for the proposal. The proposal(s) should take into consideration that, while intraLATA frame relay circuits can be considered local for the purposes of physical installation and interconnection, the traffic occurring over the facilities can and probably will be local and intraLATA toll. Such proposal(s) is/are required to be filed with the Commission no later than July 13, 2000.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 8

MATRIX ISSUE NO. 38: If there are no VCs on a frame relay interconnection facility when it is billed, should the Parties deem the PLCU to be zero?

POSITIONS OF PARTIES

BELLSOUTH: Yes. BellSouth proposes a PLCU of zero if there are no VCs on a frame relay interconnection facility when it is billed.

INTERMEDIA: No. Intermedia argued that the PLCU on newly installed frame relay interconnection trunks should be 100% until such time as traffic begins to flow over those

trunks (the point at which VCs are turned up on the trunks). Intermedia stated that after the trunks are turned up, the Parties' established cost allocation formula should apply.

PUBLIC STAFF: Yes. The Public Staff recommended that until Intermedia begins to use the frame relay trunks, the PLCU should be deemed to be 0%.

DISCUSSION

BellSouth stated in its Proposed Order that this issue concerns the cost of frame relay interconnection facilities after the facilities are ordered, but before a customer begins to utilize them. BellSouth stated that ordinarily, Intermedia would order facilities, BellSouth would then install the facilities, and then BellSouth would bill Intermedia for the facilities. BellSouth stated that at some future point, Intermedia would begin to use the facilities that it ordered. BellSouth maintained that after traffic begins to flow over the interconnection facilities, Intermedia then advises BellSouth what percentage of the traffic is expected to be local, and BellSouth reimburses Intermedia for a portion of the trunk charges based on the PLCU. BellSouth stated, however, that prior to traffic flowing over these trunks, there are two compelling reasons why the PLCU should be zero: (1) BellSouth's experience indicates that the predominant use of these types of facilities is for interLATA traffic since frame relay is generally used for high speed exchange of large amounts of data; and (2) Intermedia controls when traffic begins to flow over the facilities and BellSouth should not be forced to incur charges until Intermedia begins to flow traffic over the facilities. BellSouth argued in its Proposed Order that it is clear that the appropriate PLCU for frame relay interconnection facilities, where there are no VCs (i.e. there is no traffic flowing over the facilities), should be zero.

BellSouth witness Varner stated in his rebuttal testimony that BellSouth's position is that, if there are no VCs on a frame relay interconnection facility when it is billed, then the PLCU should be zero (and therefore BellSouth would not reimburse Intermedia for any trunk charges) and that Intermedia's position is that the PLCU should be 100% in this situation (and therefore BellSouth would have to reimburse Intermedia for half of the trunk charges). BellSouth witness Varner explained in his rebuttal testimony that once frame relay traffic is flowing over the trunks, Intermedia advises BellSouth of the PLCU (i.e., what percentage of that traffic is local) and BellSouth reimburses Intermedia for a portion of the interconnection trunk charges based on the PLCU. Witness Varner provided an example in his rebuttal testimony wherein if the PLCU is 10%, then BellSouth reimburses Intermedia for 5% of the charges ($PLCU \div 2$).

Intermedia stated in its Proposed Order that this issue involves the cost of interconnection trunks between the Parties' frame relay networks. Intermedia maintained that when it orders frame relay interconnection trunks from BellSouth, Intermedia pays a nonrecurring charge and a recurring charge. Intermedia stated that when traffic begins to flow over these trunks, Intermedia advises BellSouth of the percentage of the traffic which

is local (the PLCU). Intermedia stated that the Parties evenly split the recurring cost associated with local traffic over these trunks and if the PLCU is 100%, each Party is responsible for half the cost; BellSouth would reimburse Intermedia for half the recurring charge for these trunks. Intermedia maintained that there is no cost sharing for interLATA frame relay traffic over these trunks, and Intermedia bears all of this cost. Intermedia stated in its Proposed Order that BellSouth witness Varner's own testimony is that this issue arises under very limited circumstances. Intermedia argued that once traffic begins to flow over these trunks, there is an established formula for cost allocation that is not in dispute. Intermedia maintained that there is no evidence in the record about what percentage of frame relay traffic is local versus interLATA. Intermedia recommended in its Proposed Order that the Commission find that its proposal is the most reasonable resolution of the issues since presumably the period after the trunks are installed but before they are turned up is short and it is reasonable that during this period of time the equal cost sharing arrangement proposed by Intermedia is appropriate.

Intermedia argued in its Brief that it is asking this Commission to find that the Parties should equally share the cost of establishing and maintaining frame relay interconnection arrangements when there is no objective measure of how these expenses should be resolved. Intermedia stated that the frame relay interconnection arrangement benefits BellSouth's customers and Intermedia's customers that want to exchange data traffic. Intermedia maintained that this type of arrangement is made for the exchange of data traffic, and as BellSouth witness Varner conceded during cross-examination, there must be a BellSouth customer on the other end of the connection to make it sensible; therefore, Intermedia asserted that BellSouth, Intermedia, and both Parties' customers benefit from the service. Further, in its Brief, Intermedia argued that in the event an existing arrangement does not have any traffic for a given billing cycle, why should BellSouth be able to nearly double the charge to Intermedia when BellSouth's cost of providing the service to Intermedia remains constant. Intermedia stated that finding that the PLCU should be zero during this time of no traffic would be a windfall to BellSouth solely for maintaining a mutually beneficial interconnection arrangement.

Intermedia witness Jackson stated in his direct testimony that any other conclusion where the PLCU is not 100% could unreasonably impose higher rates on Intermedia, even though BellSouth was not incurring higher costs in providing the facility. During cross-examination, witness Jackson stated that he did not know what the percentages would be between local and interLATA traffic over frame relay but that he would assume that there would be both types of traffic. Further, witness Jackson admitted on cross-examination that it is up to Intermedia and its customer when the circuit is turned up.

The Public Staff argued in its Proposed Order that the uncontested evidence in this case is that most of the traffic carried over frame relay trunks is not local. The Public Staff maintained that it would, therefore, be unrealistic for the Commission to adopt the position advocated by Intermedia. The Public Staff stated that, in effect, Intermedia appears to be

seeking more favorable terms when no traffic is being carried over the trunks than when traffic does flow. The Public Staff argued that Intermedia controls the use of the trunks and can alleviate the situation. Therefore, the Public Staff recommended that the Commission conclude that until Intermedia begins to use the frame relay trunks, the PLCU should be deemed to be 0%.

Although there is no specific evidence in the record of the percentage of local traffic which typically flows over frame relay interconnection facilities, the Commission believes that the record of evidence generally supports BellSouth's contention that the predominant use of these types of facilities is for interLATA traffic since frame relay is generally used for high speed exchange of large amounts of data. Additionally, the Commission agrees with BellSouth that it is up to Intermedia when traffic begins to flow over these facilities. Based on this, the Commission believes that it is not reasonable for BellSouth to be expected to reimburse Intermedia during this time when no traffic is flowing over the facilities. Adopting Intermedia's position that the PLCU should be 100% during this time would obligate BellSouth to reimburse Intermedia for 50% of the facilities although there is no traffic flowing over the facilities. Therefore, the Commission finds that it is appropriate for the PLCU for frame relay interconnection facilities, where there are no VCs (i.e. there is no traffic flowing over the facilities), to be zero.

CONCLUSIONS

The Commission concludes that when there are no VCs on a frame relay interconnection facility when it is billed, the Parties should deem the PLCU to be zero.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 9

MATRIX ISSUE NO. 45: Should the Interconnection Agreement specifically state that the Agreement does not address or alter either Party's provision of Exchange Access Frame Relay Service or InterLATA Frame Relay Service?

DISCUSSION

Since the filing of Proposed Orders by BellSouth and Intermedia, BellSouth filed a letter with the Commission on May 2, 2000, stating that the Parties have resolved this issue. The Parties agreed that the language that had been suggested by BellSouth in the Proposed Interconnection Agreement, Attachment 3, Section 7.9.6, should be stricken. The Parties have requested that this issue be withdrawn from this arbitration.

CONCLUSIONS

The Commission acknowledges that this issue has been resolved by the Parties. Consequently, the Commission finds it appropriate to allow the Parties' request that the matter be withdrawn from arbitration.

IT IS, THEREFORE, ORDERED as follows:

1. That BellSouth and Intermedia shall prepare and file a Composite Agreement in conformity with the conclusions of this Order not later than July 28, 2000. Such Composite Agreement shall be in the form specified in paragraph 4 of Appendix A in the Commission's August 19, 1996 Order in Docket Nos. P-140, Sub 50, and P-100, Sub 133, concerning arbitration procedure (Arbitration Procedure Order).
2. That BellSouth and Intermedia shall file a proposed mechanism to provide that reciprocal compensation is paid for the local portion of framed packet data transported within a VC that originates and terminates within a LATA no later than July 13, 2000.
3. That, not later than July 13, 2000, a party to the arbitration may file objections to this Order consistent with paragraph 3 of the Arbitration Procedure Order.
4. That, not later than July 13, 2000, any interested person not a party to this proceeding may file comments concerning this Order consistent with paragraphs 5 and 6, as applicable, of the Arbitration Procedure Order.
5. That, with respect to objections or comments filed pursuant to decretal paragraphs 3 or 4 above, the party or interested person shall provide with its objections or comments an executive summary of no greater than one and one-half pages, single-spaced or three pages, double-spaced containing a clear and concise statement of all material objections or comments. The Commission will not consider the objections or comments of a party or person who has not submitted such executive summary or whose executive summary is not in substantial compliance with the requirements above.
6. That parties or interested persons submitting Composite Agreements, objections or comments shall also file those Composite Agreements, objections or comments, including the executive summary required in decretal paragraph 5 above, on an MS-DOS formatted 3.5-inch computer diskette containing noncompressed files created or saved in WordPerfect format.

7. That the exhibits filed by Intermedia on March 6, 2000, in response to the Commission's February 29, 2000 Order, and BellSouth's reply of March 10, 2000, to Intermedia's exhibits be, and the same are hereby, admitted in evidence as late-filed exhibits.

8. That the description of Switched Access Service and associated Feature Groups as defined in BellSouth's intrastate Access Services Tariff filed in a letter from BellSouth on April 27, 2000, and the response of Intermedia to this letter, be, and the same are hereby, admitted in evidence in this proceeding as late-filed exhibits.

ISSUED BY ORDER OF THE COMMISSION.

This the 13th day of June, 2000.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount
Gail L. Mount, Deputy Clerk

Appendix A

GLOSSARY OF ACRONYMS
Docket No. P-55, Sub 1178

| | |
|--------------|---|
| Act | Telecommunications Act of 1996 |
| ALTS | Association for Local Telecommunications Services |
| BellSouth | BellSouth Telecommunications, Inc. |
| CLP | Competing Local Provider |
| Commission | North Carolina Utilities Commission |
| DeltaCom | ITC^DeltaCom Communications, Inc |
| ESP | Enhanced Service Provider |
| FCC | Federal Communications Commission |
| GTE | GTE South Incorporated |
| ICG | ICG Telecom Group, Inc. |
| ILEC | Incumbent Local Exchange Company (Carrier) |
| Intermedia | Intermedia Communications, Inc. |
| IP | Internet Protocol |
| ISP | Internet Service Provider |
| IXC | Interexchange Carrier |
| LATA | Local Access and Transport Area |
| LEC | Local Exchange Company (Carrier) |
| PLCU | Percent Local Circuit Use |
| Public Staff | Public Staff-North Carolina Utilities Commission |
| Sprint | Sprint Communications Company, L.P. |
| TA96 | Telecommunications Act of 1996 |
| TELRIC | Total Element Long Run Incremental Cost |
| UNE | Unbundled Network Element |
| US LEC | US LEC of North Carolina Inc. |
| VC | Virtual Circuit |