

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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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: September 6, 2000

INTERMEDIA COMMUNICATIONS INC.'S
MOTION FOR RECONSIDERATION AND CLARIFICATION

COMES NOW, INTERMEDIA COMMUNICATIONS INC. ("Intermedia"), through counsel, and files this Motion for Reconsideration and Clarification of the Commission's Order No. PSC-00-1519-FOF-TP issued on August 22, 2000 in the above-captioned proceeding ("FPSC Order"). In support thereof, Intermedia states as follows:

I. BACKGROUND

On August 22, 2000, the Commission issued the FPSC Order. On page 70 of the FPSC Order, it was specified that reconsideration may be requested by "any party adversely affected by the Commission's final action in this matter" within fifteen (15) days of the issuance of the Order

in the form required by Rule 25-22.060, Florida Administrative Code. This Motion for Reconsideration is timely filed on September 6, 2000, fifteen days from the issuance of the FPSC Order.

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II. APPLICABLE LEGAL STANDARD

As stated by this Commission in *Global NAPS*, Order No. PSC-00-1511-FOF-TP in Docket No. 991267-TP (Issued August 21, 2000), a motion for reconsideration must identify a point of fact or law that was overlooked, or that the Commission failed to consider in rendering its Order. See *Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So. 2d 889 (Fla. 1962); and *Pingree v. Quaintance*, 394 So. 2d 161 (Fla. 1st DCA 1981). Matters that have already been considered should not be reargued, *Sherwood v. State*, 111 So. 2d 96 (Fla. 3rd DCA 1959), and the motion must be based on specific factual matters set forth in the record and susceptible to review, *Stewart*, 294 So. 2d at 317.

Rule 25-22.060(2), Florida Administrative Code, specifies that a motion for reconsideration must contain “a concise statement of the grounds for reconsideration, and the signature of counsel, if any.”

III. DISCUSSION

A. To avoid fundamental error the Commission must reconsider its refusal to accord Intermedia reciprocal compensation at the tandem interconnection rate (Arbitration Issue 3)

To avoid fundamental error, the Commission must reconsider its refusal to accord Intermedia reciprocal compensation at the tandem interconnection rate. There are four separate and independent reasons why the Commission must reconsider its decision, each involving the failure to apply the correct legal standard: (i) the Commission erroneously based its determination on the language contained in Paragraph 1090 of the FCC’s First Report and Order in Docket 96-98¹ instead of on the unequivocal and clear wording of a binding rule promulgated

¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Interconnection between Local Exchange Carriers and* (continued...)

by the FCC in that proceeding; (ii) the Commission erroneously required Intermedia to make a showing of tandem switch functionality that is not required under applicable law; (iii) the Commission erroneously found that Intermedia could not be accorded the tandem interconnection rate if it had only one local switch serving each local calling area; and (iv) the Commission erroneously failed to take into account Intermedia's uncontroverted showing as to the geographic areas actually served by its voice switches in Jacksonville, Orlando and Miami/Fort Lauderdale.

1. The Commission's reliance on Paragraph 1090 of the FCC's First Report and Order in Docket 96-98 was erroneous as a matter of law

The Commission revealed its failure to apply the required legal standard with regard to its determination of Arbitration Issue 3 in its opening discussion when it stated:

In evaluating this issue, we are presented with two criteria set forth in FCC 96-325, ¶ 1090, for determining whether symmetrical reciprocal compensation at the tandem rate is appropriate: similar functionality and comparable geographic areas.

FPSC Order at 13-14 (emphasis supplied). As will be shown below, this approach constitutes fundamental error because it fails to apply the standard required under FCC Rule 51.711(a)(3)², a valid federal rule governing this precise situation that has the full effect of law. This rule by its express terms states the standard for implementing the FCC's intent as discussed in Paragraph 1090 when a regulatory authority must determine whether a carrier other than an incumbent LEC ("ILEC") shall be accorded the tandem interconnection rate. Rather than apply the standard

(...continued)

Commercial Mobile Radio Service Providers, CC Docket No. 95-185, First Report and Order, 11 FCC Rcd 15499 (1996) (*First Report and Order*).

² 47 C.F.R. § 51.711(a)(3) (1999).

required by the rule, however, the Commission mentions the rule chiefly to justify disregarding the testimony of Intermedia witness Carl Jackson as to how the standard must be applied. Thus, the point of law overlooked by the Commission is the requirement that it actually apply the applicable legal standard in making its decision. This failure to actually use the applicable legal standard is egregious and constitutes fundamental error.

As in other disputes, the Commission's key task in determining this issue was to apply the correct legal standard rationally based on competent evidence in the record. Unlike some other disputes, however, the Commission did not have to fashion this legal standard; the FCC already articulated the standard when it promulgated Rule 51.711(a)(3). Nevertheless, the Commission decided to begin its determination not with the Rule, but with the creation of its own standard based on its own interpretation of Paragraph 1090. Thus was born the Commission's "two-prong" standard for demonstrating entitlement to the tandem interconnection rate. This is analogous to a court jumping over a statutory standard to apply its own interpretation of what the statute "should" say based on its legislative history. Both are flat wrong.³ There is no justification for relying on extrinsic language to reach a result contrary to the plain meaning of a rule or statute.⁴ At the bare minimum, a departure from the plain meaning

³ See, e.g., *A.C.L.U. v. FCC*, 823 F.2d 1554, 1568 (D.C. Cir. 1987) (a court should not attempt to interpret a statute by looking beyond its actual wording unless that wording is genuinely ambiguous).

⁴ *Id. at 1568-1569* ("It is clear that a plain reading of an unambiguous statute cannot be eschewed in favor of a contrary reading, suggested only by the legislative history and not by the text itself). See also *Beacon Looms, Inc. v. S. Lichtenberg & Co.*, 552 F. Supp. 1305, 1310 (S.D.N.Y. 1982); *United Airlines Inc. v. CAB*, 569 F.2d 640, 647 (D.C. Cir. 1977) ("[w]e find no mandate in logic or in case law for reliance on legislative history to reach a result contrary to the plain meaning of a statute.")

of the FCC's Rule would require some explanation as to why the legally applicable standard cannot be used. The Commission provided no such explanation.

The fundamental rules of law governing the Commission's use of standards adopted by statute or rule are well established under Florida law. When a rule or a statute is unambiguous and conveys a clear and ordinary meaning, there is no need to resort to other rules of construction, and its plain meaning must be given effect.⁵ In the instant dispute, The FCC's Rule governing the circumstances in which an interconnecting carrier must be paid the tandem interconnection rate is clear and unequivocal. As set forth in 47 C.F.R. Section 51.711(a)(3) the rule is as follows:

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.⁶

There is nothing vague or questionable in this Rule that requires explanation or interpretation: on its face it clearly establishes that geographic comparability of switch serving areas is the *sole criterion* that must be considered when making a determination of whether to accord the tandem interconnection rate. Importantly, the Commission did not even assert that the language of the Rule was vague or required explanation: the Commission simply ignored the express language of the Rule and went instead to the FCC's First Report and Order pursuant to which the Rule was promulgated. It is a fundamental error as a matter of law to "go behind" the clear wording of this

⁵ See, e.g., *Starr Tyme, Inc. v. Cohen*, 659 So.2d 1064, 1067 (Fla. 1995); *Polakoff Bail Bonds v. Orange County*, 634 So.2d 1083, 1084 (Fla. 1994); *Streeter v. Sullivan*, 509 So.2d 268, 270 (Fla. 1987); *Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984). See also *Florida Dept of Business and Professional Regulation v. Investment Corp. of Palm Beach*, 747 So.2d 374, 382-83 (Fla. 1999).

⁶ 47 C.F.R. § 51.71(a)(3).

Rule to look for a further explanation, because it has the effect of substituting this Commission's judgment for the judgment and intention of the expert administrative agency entrusted by statute with the rulemaking authority in this instance. Unless its application produces a result obviously in violation of the intent of the rule itself, the FCC Rule 51.711(a)(3) is entitled to be read literally and this Commission should adhere to its plain meaning.⁷

In sum, the Commission committed fundamental error when it used the language of Paragraph 1090 of the FCC's First Report and Order in Docket 96-98 to create a "two-prong" test rather than to follow the simple and straightforward standard created by the plain wording of the rule. In creating its own standard under Paragraph 1090, this Commission overlooked the well-established requirements under Florida law that rule standards must be given effect according to the plain meaning of the words used to create the standard, and that any deviation from that standard must be based on ambiguity or some grave – and *articulated* -- concern justifying the deviation. To avoid fundamental, reversible error, this Commission must reconsider.⁸

⁷ See, e.g., *In re Application of Bascomb Memorial Broadcasting Foundation*, 11 FCC Rcd 4649 (1996); *KMC, Inc. v. FCC*, 600 F.2d 546, 549 (D.C. Cir. 1979).

⁸ The Commission's Order in this proceeding should also be reconsidered for the independent reason that it appears to be legally inconsistent with the Commission's decision in the recent *Petition of ICG Telecom Group, Inc. for Arbitration of Unresolved Issues in Interconnection Negotiations with BellSouth Telecommunications, Inc.*, Docket No. 990691-TP, Order No. PSC-00-0128-FOF-TP (issued June 14, 2000). In the ICG decision, the Commission appeared to apply 47 C.F.R. Section 51.711(a)(3) and not Paragraph 1090 of the FCC's First Report and Order. The Commission simply declined to grant the tandem interconnection rate to ICG because ICG was a startup serving no customers, and therefore arguably did not "serve" a geographic area comparable to one of BellSouth's tandems.

2. The Commission's requirement that Intermedia's demonstrate similar switch functionality was erroneous as a matter of law

In its Order, the Commission discussed at length the question of whether Intermedia's switch actually performed a function similar to that of a tandem switch, and concluded:

As mentioned above, neither do we find sufficient evidence in the record indicating that Intermedia's switch is performing similar functions to that of a tandem switch. Therefore, we are unable to find that Intermedia should be compensated at the tandem rate based on similar functionality as well.

FPSC Order at 15. However, as stated above, the law applicable to this situation is FCC Rule 51.711(a)(3) – which contains *no mention whatsoever* of a required showing of similar switch functionality -- and not the language set forth in Paragraph 1090 of the FCC's First Report and Order. Since the Commission had to “go behind” the plain wording of the FCC's rule to obtain the “switch functionality” requirement, it was error to require a showing of similar switch functionality. To exalt the ambiguous language of the FCC's First Report and Order above the clear and unequivocal language of the rule it promulgated is erroneous as a matter of law.

Moreover, even if it were correct to apply the language in Paragraph 1090 to the exclusion of the clear – and *single* -- requirement of the FCC's rule, the Commission mistakenly interprets Paragraph 1090 as requiring a “two-pronged” showing in all cases. Even Paragraph 1090 sets forth in its last sentence a separate and distinct treatment for carriers whose voice switches cover a geographic area comparable to that covered by a single ILEC tandem. It states in that case that the tandem interconnection rate should be paid, without mentioning any requirement of an additional showing of switch functionality. This showing of geographic comparability is in fact *a proxy* for the showing of similar switch functionality.⁹

⁹ This is in fact the same conclusion reached by the North Carolina Utilities Commission in a recent arbitration involving BellSouth and DeltaCom. The NCUC stated:

(continued...)

This reading of the FCC's First Report and Order is made even more definite by the fact that the rule promulgated by the FCC and attached to that First Report and Order required only a showing of geographic comparability, and did not mention switch functionality at all.

Accordingly, it was error to apply the language of Paragraph 1090 to the exclusion of the Commission's Rule in the first place, and it was a separate and independent error to require a showing of similar switch functionality whether under Rule 51.711(a)(3) (which makes no mention of switch functionality) or under Paragraph 1090 (which sets up geographic comparability as a proxy for a showing of similar switch functionality). As noted above (see prior footnote), the FCC's rule and the language in Paragraph 1090 of its First Report and Order are not inconsistent if they are interpreted correctly.

(...continued)

After careful and extensive review of the FCC's Rule 51.711 and the attendant decision in Paragraph 1090, the Commission believes that the language in the FCC's Order clearly contemplates that exact duplication of the ILEC's network architecture is not necessary in order for the CLP [i.e., ALEC] to be eligible to receive reciprocal compensation at the tandem switching rate. *Further, we believe 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.* We further believe that the Rule and the Order language are not, for this reason, in conflict in the manner described by BellSouth and the Public Staff.

In the Matter of Petition by ITC DeltaCom Communications, Inc. For Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1009, Docket No. P-500, Sub 10, Recommended Arbitration Order (rel. Apr. 20, 2000) (emphasis supplied).

3. It was fundamental error for this Commission to determine that Intermedia could not be entitled to compensation at the tandem interconnection rate due to the fact that it has only one local switch in each local calling area

The Commission also expressly found that Intermedia could not be performing a tandem function, and therefore, could not be entitled to compensation at the tandem interconnection rate, because it “has only one local switch in each local calling area.” FPSC Order at 14. This is fundamental error, since Rule 51.711(a)(3) on its face clearly states that tandem interconnection rate compensation shall be paid when “*the switch*” of a carrier other than an ILEC serves a geographic area comparable to the area served by the ILEC’s tandem switch.” 47 C.F.R. Section 51.711(a)(3). The FCC’s Rule does not refer to “the switches,” but rather clearly requires that the tandem interconnection rate must be paid even in instances where the interconnecting carrier other than an ILEC has only *one switch*. In fact, as the Commission is aware, implementing a single, large, expensive, multifunctional switch to cover a large calling area is the network architecture most typical of new competitive carriers. Not only does this erroneous determination that *more than one* switch is needed to obtain the tandem rate have the effect of ignoring the plain language of the FCC’s rule, but it essentially means that it will be virtually impossible for any competitive carrier to obtain the tandem interconnection rate in Florida unless it mirrors the antiquated, legacy network design of the incumbent carrier.

In fact, not only does the Rule 51.711(a)(3) refer to the “switch” of an interconnecting carrier other than the ILEC, but Paragraph 1090 of the FCC’s First Report and Order *also* talks in these terms. There is simply no basis anywhere for the Commission’s finding that the FCC intended to restrict payment of reciprocal compensation at the tandem interconnection rate to carriers with more than one switch in a given local calling area. It is not based on applicable law and is clearly erroneous.

Such a result is also fundamentally at odds with the intent of the FCC in this situation, as demonstrated by the language in Paragraph 1090 of FCC's the First Report and Order in Docket No. 96-98, which contemplated that competitive carriers using new and innovative technologies might perform a function *similar to* the function performed by the ILEC tandem switch. The FCC did not require that competitors mirror the ILEC network architecture or function, nor did it require –anywhere – that the interconnecting carrier must have more than one switch to obtain compensation at this rate. To find otherwise is fundamental error that substitutes this Commission's interpretation for the FCC's authority.¹⁰

4. It was fundamental error for the Commission to refuse to credit Intermedia's uncontroverted showing that the geographic coverage area of each of its voice switches is geographically comparable to the area served by one of BellSouth's tandems

The Commission also made a fundamental error in its refusal to accord proper credit to Intermedia's uncontroverted showing that the serving areas of its switches in Florida are each geographically comparable to the serving area of a single BellSouth tandem switch. The Commission had this to say about Intermedia's map evidence:

In support of its position, Intermedia provides as evidence, maps depicting the local calling areas of Intermedia's switches overlaid against the local calling areas served by BellSouth's tandem switches.

These maps indicate that Intermedia has established local calling areas that are comparable to those of BellSouth. We have difficulty, however, assessing from these maps whether Intermedia's switch actually serves these areas.

¹⁰ In fact, not only does the Rule 51.711(a)(3) refer to the "switch" of an interconnecting carrier other than the ILEC, but Paragraph 1090 of the FCC's First Report and Order also talks in these terms. There is simply no basis anywhere for the finding that the FCC intended to restrict payment of reciprocal compensation at the tandem interconnection rate to carriers with more than one switch in a given local calling area. Since there

We find the evidence of record insufficient to determine if the second, geographic criterion is met. We are unable to reasonably determine if Intermedia is actually serving the areas they have designated as local calling areas.

FPSC Order at 15. This treatment by the Commission is erroneous because it fails properly to take into account other relevant and uncontroverted evidence presented by Intermedia as part of its showing of geographic comparability.

In the Rebuttal Testimony of Carl Jackson, for example, it is stated that:

Intermedia has existing, ubiquitous facilities in Florida. As one of the First ALECs to provide competitive services to the citizens of Florida, *Intermedia has customers in virtually all parts of the State.*

Rebuttal Testimony of Carl Jackson at 13 (emphasis supplied). Mr. Jackson added to this statement during his cross examination by BellSouth's attorney:

Q. Now it is my understanding from your prior comment and from testimony that the blue area [*i.e.*, on Intermedia's Fort Lauderdale switch coverage map] designates areas that are served by Intermedia and the white area designates areas that are within BellSouth's calling areas but are not served by Intermedia, is that correct?

A. That would be basically correct, yes. The blue area is Intermedia's serving area, so all of that area that is outlined, all of South Florida to – well, I can't really – it looks like Boca maybe, and then it narrows down some. There is some what in there. But, yes, all the way up through Boca in that area is all Intermedia's serving area in blue.

Q. Okay. But the white, Intermedia doesn't serve customers in the white area?

A. To my knowledge, no, we are not currently serving that area.

Q. Okay. Now, I'm not going to go through each one of these CLLI codes for each one, there is probably 20 or more within the blue area. But confining my question to just the blue area, is it your testimony from your own personal knowledge or from any other knowledge, Mr. Jackson, that Intermedia is serving customers today in each one of these particular calling areas on this map?

A. *It is my understanding that we are serving, and in talking with our people internally, that we are serving customers throughout this blue area. That doesn't mean that I have way over towards the far left by the green line a customer out in the swamp someplace. But where the population centers are, yes, we are serving customers throughout that region. And I have collocations in this area, as well, with end user customers there.*

I can tell you that we serve customers throughout the area and have collocations throughout the area and serve Miami as a – and Fort Lauderdale and Boca with one switch, with collocations, with direct trunks to a number of offices and whatnot.

Tr. at 316-318 (emphasis supplied). Mr. Jackson also noted that Intermedia served areas that went *beyond* BellSouth's local calling areas, into areas served by other ILECs. Tr. at 319. In response to a question posed by Commissioner Jaber, Mr. Jackson stated that "I'm serving customers throughout this blue footprint. And as [I] mentioned, in a lot of cases well outside the BellSouth area." Tr. at 321. Mr. Jackson also noted that Intermedia serves "thousands of access lines" in South Florida, and has a number of collocations there. Tr. at 320. Mr. Jackson also testified that Intermedia has 17 collocations in Florida, 11 of the collocations in BellSouth territory, and 6 outside.

Based on this uncontroverted evidence in the record, the Commission must determine that each of Intermedia's switches serve a geographic area comparable to that of a single BellSouth tandem. Mr. Jackson testified that the blue areas on the coverage maps represented areas in which Intermedia is *actually serving customers*. In fact, Mr. Jackson was queried by Commissioner Jaber as to whether Intermedia's maps show "places where you could provide service, or areas where you were currently providing service." Tr. at 320. Mr. Jackson replied that Intermedia was *actually serving customers* throughout the areas in the blue "footprint," and that only in a small number of instances were there facilities in place with no customers. Tr. at

321. This sworn testimony is uncontroverted in the record – BellSouth did not even attempt to produce any proof that Intermedia doesn't serve customers in the blue areas on the maps presented – and it is entitled to credence under law. Since the standard is only *comparability*, and not equivalence (*see* Tr. at 366), the Commission should have found Intermedia's switch coverage in each instance to be geographically comparable to a single BellSouth tandem, whether or not Intermedia's coverage coincided with BellSouth's or made incursions into the territory of another ILEC.¹¹

The applicable Rule does not state that Intermedia must have any particular number of customers, or that they must be arranged in any particular fashion throughout the switch service area, or that the *density* of the customers served by Intermedia in any given area is comparable to that served by BellSouth. The *only* requirement is that Intermedia's switch serve a comparable geographic area – and this standard was *unequivocally* met in the uncontroverted evidence presented by Intermedia's witness.¹² BellSouth did not present any contrary evidence, nor did the Commission find that Intermedia's evidence concerning the areas served by its switch and the areas in which actual customers were being served was not entitled to credence.

¹¹ BellSouth's cross-examination of Mr. Jackson on the geographical comparability issue did not serve to call into question the accuracy of Intermedia's showing on the geographic service area of its switches. BellSouth's cross examination was focused on whether Intermedia served customers in every single small subdivision covered by BellSouth's tandem switch. But this is entirely irrelevant to the question at hand. To require that Intermedia have customers in every single tiny subdivision served by the ILEC prior to being accorded tandem interconnection rate treatment is at odds with the express language of the FCC rule, which requires only geographic *comparability*, not precise equivalence. In fact, Intermedia's switch coverage area could be *comparable* whether it is somewhat smaller or somewhat larger.

¹² Even if the Commission is correct in its view, expressed in the recent ICG Decision, that a carrier's switch cannot "serve" a geographic area if it does not have any customers at all in that area, this is clearly not the situation at hand. Intermedia has provided clear and uncontradicted evidence, both sworn testimony and maps, that it does in fact have customers in all of the relevant areas, and the Commission may not legally overlook this evidence in arriving at its decision.

Accordingly, it was clear error for the Commission to disregard this evidence and refuse to accord Intermedia the tandem compensation rate pursuant to 47 C.F.R. Section 51.711(a)(3) based on this showing.

B. The Commission should reconsider its determination to allow Voice over Internet Protocol (“VOIP”) traffic to be included in the definition of Switched Access Traffic (Arbitration Issue 32)

In the FPSC Order, the Commission adopted the definition of “Switched Access Traffic” proposed by BellSouth, which essentially refers to BellSouth’s Switched Access Service tariff and adds in the concept of IP Telephony, also known as “Voice over Internet Protocol” (“VOIP”). The Commission must reconsider its determination with respect to the inclusion of VOIP as Switched Access Traffic for two principal reasons: (i) the regulatory characterization of VOIP is a matter within the exclusive jurisdiction of the FCC; and (ii) newly-revealed information shows that throughout the litigation of this issue before the Commission, BellSouth was aware of a compromise approach to this issue that it offered to another ALEC while compelling Intermedia – and this Commission – to arbitrate the issue instead of settling it.

1. It was fundamental error for the Commission to define “Switched Access Traffic” to include VOIP, since this is a matter exclusively in the jurisdiction of the FCC

It was fundamental error for the Commission to classify VOIP as Switched Access Traffic for the Parties’ agreement, since the regulatory classification of VOIP, which involves high protocol conversion, is a matter for the FCC to decide *exclusively*. The operative question is not whether Intermedia’s witness can provide “persuasive testimony “ that the inclusion of VOIP in the definition of Switched Access Traffic is improper or contrary to law. *See* FPSC Order at 63. Nor is the proper question whether BellSouth’s witness is persuasive in his arguments.

The correct question is, apart from the merits of the Parties' respective arguments, in which jurisdiction should this decision be made? This is an issue that extends far beyond the confines of this single proceeding. The fact that the FCC has vaguely "suggested" in a long-past report to Congress on an unrelated issue (Universal Service) that VOIP may "lack the characteristics" of information services does not permit a state to usurp the FCC's exclusive jurisdiction over VOIP.¹³

The FCC in the *Second Computer Inquiry*,¹⁴ set forth, *inter alia*, the types of features characteristic of enhanced services, including most prominently the requirement of *high level protocol conversion*. The current state of the law is that VOIP, which *requires* high level protocol conversion, is an *enhanced service*. There is nothing whatsoever to suggest that VOIP is a basic service, or for that matter, Switched Access Traffic. VOIP requires entirely different network equipment, with entirely different cost structures, than switched access traffic, and entirely apart from regulatory considerations, cannot for practical reasons be "lumped into" that category. Current switched access charges are derived from an entirely distinct ILEC cost base designed for routing voice calls and cannot properly be applied to VOIP.

¹³ The FCC's public statements on unrelated issues that vaguely implicate VOIP are not meant to be a guideline for state Commissions to use in the regulatory classification of a service such as VOIP. It should be kept in mind that the FCC *did not* in that statement affirmatively suggest that VOIP is Switched Access Traffic, or in fact affirmatively suggest that it is *anything*: it simply loosely speculated as to whether VOIP is or is not an information service. The Commission should note particularly that some considerable time has passed since that FCC statement, but the FCC has taken no action whatsoever to classify VOIP as Switched Access, or as a basic service. This Commission should not attempt to preempt the FCC's action on this exclusively federal question.

¹⁴ Amendment of Section 64.702 of the Commission's Rules and Regulations (*Second Computer Inquiry*), 7 FCC 2d 384, 421-422, ¶ 99 (1980)

But apart from the practical merits of this classification, the fact remains that it is a classification that for jurisdictional reasons the FCC must determine in its sole discretion. The FCC has made it very clear that it will not permit a state commission to usurp its authority by independently declaring a particular service to be “basic” or “enhanced.” As BellSouth itself established in a similar case, the question of whether a service is “basic” or “enhanced” is a question exclusively within the jurisdiction of the FCC, and a state commission does not have the discretion to make such a determination.¹⁵

Allowing BellSouth to define Switched Access Traffic to include VOIP at the State level is tantamount to a unilateral declaration in Florida that VOIP is not an enhanced service. This is clear error, and must be reconsidered.

2. The Commission must take into account newly-revealed information concerning BellSouth’s treatment of the VOIP issue in its interconnection agreement with e.spire Communications

The Commission must also reconsider its decision to include VOIP in the definition of Switched Access Traffic, based on newly-revealed information. Incredibly, at the same time BellSouth was compelling Intermedia – and this Commission – to go through the process of arbitrating this issue, it had arrived at a suitable compromise in its interconnection negotiations with e.spire Communications (“e.spire”) that could have been applied profitably in this proceeding. But BellSouth inexplicably did not see fit to bring this solution to the attention of the Commission, or to offer it to Intermedia.

¹⁵ See, e.g., *Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation*, 7 FCC Rcd 1619 (1992), *aff’d sub nom. Georgia Public Service Commission v. FCC*, 5 F.3d 1499 (11th Cir., 1993) (Georgia cannot classify voicemail as a basic service because it is an enhanced service subject to the exclusive jurisdiction of the FCC). The Commission should not particularly that this case, in which BellSouth took essentially the opposite position from the one it espouses here (*i.e.*, that this Commission may declare whether VOIP is basic or enhanced), is governing law in the 11th Circuit.

In the BellSouth/e.spire interconnection agreement, which was released to the public for the first time a few days ago, BellSouth does not even attempt to refer to its Switched Access Tariff in the definition, but sets forth specific language in the agreement. Moreover, the definition of Switched Access Traffic is *noncommittal* as to whether VOIP is, or is not, Switched Access Traffic:

Switched Access Traffic. Switched Access Traffic is defined as telephone calls requiring local transmission or switching services for the purpose of the origination or termination of Telephone Toll Service. Switched Access Traffic includes the following types of traffic: Feature Group A, Feature Group B, Feature Group C, Feature Group D, toll free access (e.g., 800/877/888), 900 access, and their successors or similar Switched Exchange Access Services. *The Parties have been unable to agree as to whether "Voice-Over-Internet Protocol" transmissions ("VOIP"), which cross LATA boundaries constitute Switched Access Traffic. Notwithstanding the foregoing, and without waiving any rights with respect to either Party's position as to the jurisdictional nature of VOIP, the Parties agree to abide by any effective and applicable FCC rules and orders regarding the nature of such traffic and the compensation payable by the Parties for such traffic, if any.*

BellSouth/e.spire Interconnection Agreement, Attachment 3 (Local Interconnection) at 17, Section 6.9.1 (emphasis supplied). This language also demonstrates BellSouth's concession that the question of how to classify VOIP is a matter within the jurisdiction of the FCC, and not a state commission.

BellSouth's offering of this "work-around" to e.spire, while effectively denying it to Intermedia, and making Intermedia arbitrate the issue at great expense was not only a consummate waste of resources, but it was also discriminatory. Intermedia would have accepted this language if offered, and would accept it now, because it accurately depicts the Parties' positions, and defers the issue to the proper authority for decision.

Accordingly, Intermedia requests that the Commission either strike the language in the Parties' agreement classifying VOIP as Switched Access Traffic, or order that the Parties include

the language BellSouth offered to e.spire voluntarily at the very same time it compelled Intermedia to litigate the issue.

C. Clarification is required to determine, *inter alia*, whether BellSouth must immediately cease all Foreign Exchange Service pursuant to the terms of the Commission's Order (Arbitration Issue 26)

In its determination on Issue 26, the Commission agreed with Intermedia that each carrier should be permitted to establish its own local calling area, and then stated:

Nevertheless, the parties shall be required to assign numbers within the areas to which they are traditionally associated until such time when information necessary for the proper rating of calls to numbers assigned outside of those areas can be provided.

FPSC Order at 48. Intermedia requests the following further clarification on this determination:

- (i) does this apparently reciprocal requirement mean that the unilaterally restrictive language proposed by BellSouth in Attachment 3, Section 1.2.1 of the Parties' draft interconnection agreement in connection with Issue 26 is to be stricken? and
- (ii) does the Commission agree that the Parties should adopt all or part of Intermedia's alternative proposed language that substitutes for Sections 1.2 and 1.2.1 of Attachment 3 to the Parties' draft agreement?
- (iii) does the Commission's stated restriction on assigning numbers for customers physically located outside the calling area traditionally associated with that number require BellSouth to cease all provision of Foreign Exchange Service?

Intermedia calls the Commission's attention to the fact that the pertinent language proposed by BellSouth (and objected to by Intermedia) in Attachment 3, Section 1.2.1 of the Parties' draft agreement is *unilaterally restrictive*, in essence preventing Intermedia from assigning NPA/NXX codes both inside and outside a local calling area, but it does not by its terms restrict BellSouth from doing the same. That BellSouth-proposed language provides in pertinent part as follows:

- 1.2.1. In order for Intermedia to home its NPA/NXXs on a BellSouth Tandem, Intermedia's NPA/NXX(s) must be assigned to an Exchange Rate Center Area served by that BellSouth tandem and as specified by BellSouth.

This language, if implemented, would effectively serve as a unilateral restriction on Intermedia, preventing Intermedia from assigning its NPA/NXX codes both within and without a given Exchange Rate Center Area served by a given tandem. But it does not similarly restrict BellSouth.

However, it would appear from the Commission's present determination, ostensibly applicable to both parties, that the Commission agrees in principle that at least the part of BellSouth's proposed language set forth above should be stricken, or fundamentally re-written.¹⁶ It appears possible that the Commission agrees in large part with Intermedia as to the disposition of this BellSouth-proposed language, but Intermedia requests that the Commission confirm its intention in this respect.

In addition, Intermedia seeks clarification from the Commission as to whether its reciprocal requirement that both parties refrain from assigning numbers both inside and outside the areas with which they are traditionally associated means not only that Intermedia must not

¹⁶ Intermedia's proposed language to replace BellSouth's language reads (in pertinent part) as follows:

Intermedia must establish at a minimum a single Point of Presence, Interface and Interconnection with BellSouth within the LATA for the delivery of traffic originated by Intermedia. Each party here to is free to define its own local calling area, subject to state commission approval where required. Each party also is free to assign local numbers allocated for their use anywhere within their own defined local calling area provided that such number assignment is consistent with all generally applicable rules and regulations governing assignment of local telephone numbers. However, in the event that Intermedia establishes a POI at a BellSouth tandem switch other than one where Intermedia-assigned NXXs are "homed," Intermedia will be responsible to self-provision interoffice transport required to deliver traffic originating from the tandem switch serving customers to which numbers utilizing such NXXs are allocated to the tandem switch to which such NXXs are homed or to purchase such interoffice transport from BellSouth pursuant to Attachment 2 at Intermedia's option.

(continued...)

assign numbers in a calling area for a customer physically located outside that calling area, but that *BellSouth* must also refrain from doing so. If the answer to this is “yes,” BellSouth is required to immediately cease all provision of Foreign Exchange Service, in order to avoid discriminatory treatment of Intermedia.

BellSouth Florida General Subscriber Service Tariff, Section A.9 (“Foreign Exchange Service and Foreign Central Office Service”) defines Foreign Exchange Service as follows:

A9.1.1.A Foreign Exchange service is exchange service furnished to a subscriber from an exchange other than the one from which the subscriber would normally be served, allowing subscribers to have local presence and two-way communications in an exchange different from their own.

Since Foreign Exchange Service, a traditional BellSouth tariffed service, offers *precisely* what BellSouth has proposed Intermedia be restricted from doing, *viz.*, assigning NPA/NXX codes so as to give a remotely located customer the “appearance” of being local to a designated local calling area (although without these services it would otherwise require a toll call to reach him), it would seem from the Commission’s Order that BellSouth must also desist from offering both services.

Clarification is needed here: if BellSouth can continue to offer Foreign Exchange services, assigning numbers as it sees fit to entities located outside of the traditional calling area with which the number is associated, while Intermedia is restricted from offering equivalent services, this would be anticompetitive, and discriminatory on its face. This also potentially has

(...continued)

significant impact on the manner in which local telecommunications is offered by all carriers in the State of Florida.¹⁷

IV. REQUEST FOR RELIEF

WHEREFORE, Intermedia respectfully requests that this Commission reconsider and clarify its Order in the respects indicated, thereby:

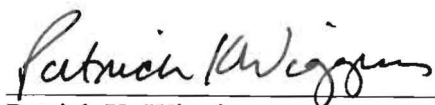
- (i) Granting Intermedia reciprocal compensation at the tandem interconnection rate;
- (ii) Adopting Intermedia's definition for Switched Access Traffic, or at a minimum, striking the reference to Internet Protocol Telephony traffic from the definition of Switched Access Traffic in the Parties' interconnection agreement;
- (iii) Clarifying the status of BellSouth's proposed language in the Parties' draft agreement that unilaterally restricts Intermedia; and
- (iv) Clarifying the status of BellSouth Foreign Exchange Service in light of the requirements set forth in the Commission's Order.

Filed this 6th day of September, 2000.

¹⁷ The Commission should be aware that, despite BellSouth's complaint that, without additional restrictive language in the Parties' agreement, it cannot tell how to rate its customers' calls to Intermedia customers located outside the local calling area with NPA/NXX codes within the local calling area, BellSouth has never offered Intermedia any information that would allow Intermedia to charge its customers tolls for calls to BellSouth Foreign Exchange customers. To both Intermedia and to Intermedia's customers, calls to Foreign Exchange customer numbers located in the same calling area as the originating caller "appear" to be local. As far as Intermedia knows, BellSouth has been charging Intermedia reciprocal compensation for Intermedia customer calls completed to these numbers.

Respectfully submitted,

INTERMEDIA COMMUNICATIONS INC.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by Hand Delivery or by Federal Express overnight delivery(*) this 6th day of September, 2000 to the following:

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