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RECORDS AND
REPORTING

September 8, 2000

Mrs. Blanca S. Bayó
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 991946-TP (ITC^DeltaCom Complaint)

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Motion for Reconsideration, which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Michael P. Goggin
Michael P. Goggin
(22)

cc: All Parties of Record
APP _____
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**CERTIFICATE OF SERVICE
DOCKET NO. 991946-TP**

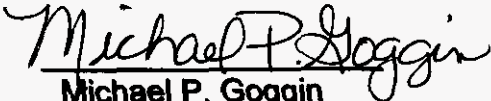
I HEREBY CERTIFY that a true and correct copy of the foregoing was served via
U.S. Mail this 8th day of September, 2000 to the following:

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Michael P. Goggin
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re:) Docket No. 991946-TP
)
 Complaint of ITC^DeltaCom)
 Communications, Inc. Against BellSouth)
 Telecommunications, Inc. for Breach of)
 Interconnection Terms, and Request for)
 Immediate Relief)
 _____) Filed: September 8, 2000

BELLSOUTH TELECOMMUNICATIONS, INC.'S
MOTION FOR RECONSIDERATION

BellSouth Telecommunications, Inc. ("BellSouth") hereby requests that the Commission reconsider its Order No. PSC-00-1540-FOF-TP (the "Order") in this matter. Reconsideration should be granted because the Commission overlooked or failed to consider certain points of fact and law in issuing the order. In particular, it was legal error for the Commission to decide, as a matter of law, that dial-up internet traffic is local exchange traffic, even though the Federal Communications Commission ("FCC") has expressly held otherwise. In addition, the Commission overlooked disputed issues of material fact concerning the parties' understanding of whether reciprocal compensation should be paid for dial-up internet traffic under their interconnection agreement. Finally, even if there were no material facts in dispute, it was error to issue a summary order when differing conclusions or inferences can be drawn from the undisputed facts. In support of its Motion, BellSouth states as follows.

1. On December 17, 1999, ITC^DeltaCom Communications, Inc. ("DeltaCom") filed a request for arbitration under the Telecommunications Act of 1996 seeking a ruling that the terms of its March 1997 interconnection

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agreement between the parties, as amended in August 1997, required the payment of reciprocal compensation for dial-up internet traffic. On May 15, 2000, DeltaCom filed a motion for a summary order on its petition. In its Order, the Commission granted DeltaCom's motion for summary order.

2. In its Order, the Commission noted that the parties' agreement obligated each party to "pay the other for terminating its local traffic on the other's network," and that "local traffic" was defined as "any telephone call that originates in one exchange or LATA and terminates in either the same exchange or LATA, or a corresponding Extended Area Service (EAS) exchange." Order at 2-3. The Commission found that this contract language was clear and unambiguous, and therefore disregarded sworn testimony from BellSouth regarding BellSouth's intent and understanding of how such language in the agreement would be applied in the case of dial-up internet traffic. *Id.* at 10-12. The Commission concluded that "the plain language of the Agreement calls for the payment of reciprocal compensation for all local traffic, including traffic bound for ISPs." *Id.* at 12.

3. 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. *Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So. 2d 889 (Fla. 1962). In this case, the Commission overlooked or failed to consider relevant precedents confirming that dial-up internet traffic is not local exchange traffic, overlooked or failed to consider facts in dispute regarding the intent of the parties as to the manner in which the

reciprocal compensation provisions of the parties' interconnection agreement would apply to internet traffic, and overlooked or failed to consider Florida law regarding the standard for summary orders by improperly issuing a summary order when competing conclusions or inferences could be drawn from the undisputed facts.

The Commission Erred by Ruling, as a Matter of Law, that Internet Traffic Is Local Exchange Traffic.

4. In the past, the Commission has studiously avoided attempting to determine the nature of internet traffic. Local exchange carriers such as DeltaCom and BellSouth have debated the issue before the courts, the FCC and state commissions, arguing either that dial-up internet traffic is local exchange traffic, to which the reciprocal compensation obligations of the Telecommunications Act apply, or that it is interstate access traffic, and thus not subject to reciprocal compensation. This Commission has tried to stay out of the debate, particularly given the FCC's pronouncements on the interstate nature of dial-up internet traffic and the FCC's pending proceeding to establish an inter-carrier compensation mechanism for such traffic. When asked to interpret existing interconnection agreements, the Commission, in all but one prior case¹,

¹ The exception involved a petition brought by Global NAPs seeking to obligate BellSouth to pay reciprocal compensation for the delivery of internet traffic. Order No. PSC-00-0802-FOF-TP. In that case, the Commission decided, based on the same contract language at issue here, that reciprocal compensation must be paid because internet traffic is local, and the parties had not expressly agreed to exempt it from reciprocal compensation obligations. *Id.* at 6-8. In Order No. PSC-00-1511-FOF-TP, the Commission denied BellSouth's motion for reconsideration. BellSouth intends to seek judicial review of these orders. DeltaCom has argued that the result in Global NAPs requires a consistent result in this case. Nevertheless, as the Commission noted in the Global NAPs matter, the outcome in that case does not control the outcome in this matter. Order No. PSC-99-2526-PCO-TP. In any event, two wrongs do not make a right—the Commission should not commit an error of law in this matter merely for the sake of consistency with a prior, albeit erroneous, decision.

has decided merely whether the parties intended, for purposes of their agreement, to pay reciprocal compensation for such traffic, and avoided deciding whether such traffic *is, as a matter of law*, local exchange traffic. See e.g., Order No. PSC-98-1216-FOF-TP. Similarly, in cases in which the parties have sought arbitration of the issue for new interconnection agreements, the Commission has likewise, with one possible exception, avoided deciding whether internet traffic is, as a matter of law, local exchange traffic. Instead, the Commission has simply required that the parties continue to treat internet traffic as they had done under the previous agreement until the FCC ultimately decides the issue. See e.g., Order No. PSC-99-2009-FOF-TP.²

5. In this Order, however, the Commission has decided to change course, for reasons it never adequately explains. In this Order, the Commission has concluded that internet traffic *is local exchange traffic*, and therefore, unless the parties expressly exclude it from the definition of local traffic in an interconnection agreement, reciprocal compensation obligations will apply. Order at 12 (“the Agreement calls for the payment of reciprocal compensation for *all local traffic, including traffic bound for ISPs*”)(*emphasis added*). The Commission reached this conclusion because “[t]he Agreement does not segregate traffic to ISPs from local traffic, nor is it addressed elsewhere in the Agreement.” *Id.* at 11.

² Again, the possible exception involves Global NAPs, (Dkt. No. 991220) where the Commission recently approved a staff recommendation that would require BellSouth to pay reciprocal compensation for internet traffic in the parties’ new interconnection agreement. Although a written order has not yet been issued, and might yet avoid a categorical conclusion with regard to the nature of internet traffic, the staff’s recommendation again proceeded on the erroneous and unsupported assumption that internet traffic is local exchange traffic.

6. The Commission's ruling is remarkable for a number of reasons. First, the Commission decided on the nature of internet traffic without any discussion of its rationale for doing so. The Commission could not have decided that internet traffic falls within the parties' definition of local traffic—i.e. traffic that originates and terminates in the same local calling area—without first concluding that internet traffic is local exchange traffic. Yet, nowhere in its Order does the Commission state a legal or factual basis for its conclusion that internet traffic is local exchange traffic. Instead, the Commission simply assumes that internet traffic is local exchange traffic, and reasons that, therefore, carriers who wish to exempt such traffic from reciprocal compensation obligations must incorporate an express exception for such traffic in the definition of local traffic.

7. Second, it is curious that the Commission would definitively decide the jurisdictional nature of dial-up internet traffic when it has steadfastly refused to do so in prior rulings. Moreover, the Commission recently opened a generic docket, Docket No. 000075, in which it proposes to decide whether internet traffic is local or interstate, and how, if at all, carriers should compensate each other for carrying such traffic on behalf of ISPs. The Commission's decision in this case impinges on that pending docket.

8. Third, and most importantly, the Commission's decision is wrong as a matter of law. In a series of decisions, the FCC has determined that enhanced service providers, including internet service providers, use access service, not local exchange service. *See, e.g. MTS and WATS Market Structure*, CC Dkt. No. 78-72, Memorandum Opinion and Order, 97 FCC 2d 682, 711 (1983).

Moreover, the FCC has repeatedly held that internet traffic is largely interstate in nature and does not terminate at the ISP's server. See, e.g. *Implementation of Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP Bound Traffic*, CC Dkt. No. 99-38, Declaratory Ruling, FCC Order 99--38 (Feb. 26, 1999)³; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Dkt. Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91, Order on Remand, FCC Order 99-413 (Dec. 23, 1999) at 16-24. The Commission ignored these precedents and did not cite any authority to support its apparent conclusion that internet traffic is, as a matter of law, local exchange traffic. In view of these precedents, it was error for this Commission to determine that internet traffic is local exchange traffic. Because the Commission overlooked or failed to consider relevant law in issuing its Order, it should grant this Motion.

The Commission Erred by Concluding that There Were No Disputed Issues of Material Fact

9. The second error in the Commission's Order is in its conclusion that there were no disputed issues of material fact. As the Commission stated, "[t]here are two requisites for granting summary judgment: first, there must be no genuine issue of material fact, and second, one of the parties must be entitled to judgment as a matter of law on the undisputed facts." Order at 11 (citations

³ Although the FCC's Order 99-38 was recently vacated (see *Bell Atlantic Telephone Co. v. Federal Communications Commission*, 206 F. 3d 1 (D.C. Cir. 2000)) that decision does not disturb prior and subsequent rulings by the FCC that internet traffic is interstate access traffic. Moreover, the court did not decide that the FCC's conclusion was incorrect, only that it was not sufficiently explained, a defect the FCC plans to remedy. See TR Daily, "Strickling Believes FCC Can Justify Recip. Comp. Ruling in Face of Remand," March 24, 2000.

omitted). Unfortunately, by ending its analysis of the issues with a determination that the language of the agreement was clear and unambiguous, the Commission failed to acknowledge the ultimate fact issue in dispute; namely, whether the parties mutually agreed to pay reciprocal compensation for dial-up internet traffic under the terms of their agreement.

10. The Commission found that the agreement's language defining local traffic as traffic that originates and terminates in the same local calling area was not ambiguous. The Commission also found that the reciprocal compensation provision, which requires a carrier to pay compensation for local traffic originated on its network and terminated on the other carrier's network, was not unclear or ambiguous. What the Commission ignored, however, were the facts and circumstances leading up to the adoption of that language. For example, the definition of "local traffic" was included in the original agreement, which also contained a bill and keep provision. Thus, when the parties defined the term "local traffic," they mutually agreed that no reciprocal compensation would be paid for any traffic, let alone dial-up internet traffic. Although the parties amended the agreement in August 1997 to add a reciprocal compensation provision, DeltaCom was on notice before the amendment ever took effect that BellSouth did not consider internet traffic to be subject to the payment of reciprocal compensation.

11. BellSouth produced sworn testimony on these issues that demonstrated that the parties did not mutually agree to pay reciprocal compensation for internet traffic under the agreement. *See Affidavit of Jerry*

Hendrix (Attached as Exhibit A to BellSouth Telecommunication Inc.'s Response in Opposition to ITC^DeltaCom Communication Inc.'s Motion for Summary Final Order (Filed May 22, 2000)). Thus, the intent of the parties is a material fact in dispute. In view of this disputed issue of material fact, it was error for the Commission to issue its summary Order. Because the Commission overlooked or failed to consider this disputed material fact, the Commission should grant this Motion.

It Was Improper for the Commission to Issue a Summary Order When Differing Conclusions or Inferences Can Be Drawn From the Undisputed Facts

12. Even if the Commission were correct in concluding that there are no disputed issues of material fact, the issuance of the summary Order was error. As the Commission stated, under Florida law, even when the facts are undisputed, "summary judgment is improper if differing conclusions or inferences can be drawn from the facts." Order at 11. The Commission's conclusion that there are no facts in dispute is based upon two determinations: first, that the relevant provisions of the agreement are clear and unambiguous; and second, that because the language of the contract is unambiguous, the Commission need not consider sworn evidence regarding the manner in which internet traffic should be treated under the agreement—only the plain language of the agreement need be considered.

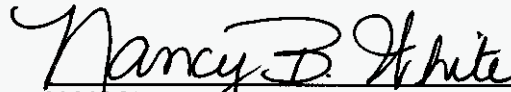
13. Even if the Commission were correct in deciding to limit the facts under consideration to the language of the agreement and to presume that there is no dispute as to the meaning of that language, the Commission's decision to

issue its summary order was error. The plain language of the agreement leads to two different “conclusions or inferences” with respect to the ultimate issue—whether reciprocal compensation should apply to internet traffic. If internet traffic originates and terminates in the same local calling area, as DeltaCom contends, then such traffic falls within the plain language definition of “local traffic” and the reciprocal compensation provision of the contract would apply. If internet traffic is non-local access traffic, as BellSouth and the FCC contend, then such traffic falls outside the plain language definition of local traffic, and the reciprocal compensation provisions of the agreement do not apply. Given these competing conclusions that could be drawn from the “undisputed” facts, particularly in light of the circumstances surrounding execution of the agreement and its subsequent amendment, the Commission’s summary Order was improper. Because the Commission overlooked or failed to consider (or apply) the proper legal standard for summary orders in Florida, the Commission should grant this Motion.

For the reasons stated above, BellSouth respectfully requests that its Motion for Reconsideration be granted, and that DeltaCom’s motion for summary order be denied.

Respectfully submitted this 8th day of September, 2000.

BELLSOUTH TELECOMMUNICATIONS, INC.



NANCY B. WHITE (21)

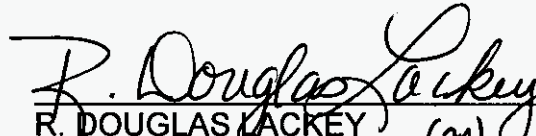
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