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November 12, 1998

BY HAND DELIVERY

Ms. Blanca Bayo, Director
Division of Records and Reporting
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket Nos. 981008-TP

Dear Ms. Bayo:

Enclosed for filing on behalf of e.spire Communications, Inc. are an original and fifteen copies of the following documents in the above captioned docket:

1. The Direct Testimony of James C. Falvey, ~~12708-98~~
2. The Direct Testimony of Kevin A. Cummings; and ~~12709-98~~
3. Notice of Intent to Seek Classification. ~~12710-98~~

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely,

Norman H. Horton, Jr.
Norman H. Horton, Jr.

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cc: James C. Falvey, Esq.
Parties of Record

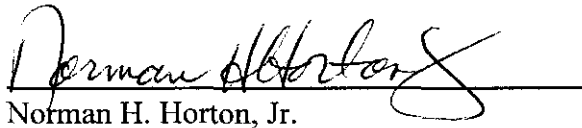
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Direct Testimony of James C. Falvey, the Direct Testimony of Kevin A. Cummings and e.spire's Notice of Intent to Seek Confidential Classification was provided this 12th day of November, 1998, by hand delivery (*) and/or regular U.S. mail to:

Beth Keating, Esq.*
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Nancy B. White, Esq.
BellSouth Telecommunications, Inc.
150 South Monroe Street, Ste. 400
Tallahassee, FL 32301


Norman H. Horton, Jr.

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for Arbitration)
Concerning Complaint of)
American Communications Services)
Of Jacksonville, Inc. d/b/a e.spire)
Communications, Inc. and ACSI)
Local Switched Services, Inc. d/b/a)
e.spire Communications, Inc.)
against BellSouth Telecommunications,)
Inc. Regarding Reciprocal Compensation)
For Traffic Terminated to Internet)
Service Providers)

Docket No. 981008-TP

DIRECT TESTIMONY

OF

JAMES C. FALVEY

ON BEHALF OF

e.spire COMMUNICATIONS, INC.

AND ITS SUBSIDIARIES

Dated: November 12, 1998

DOCUMENT NUMBER-DATE
12708 NOV 12 88
FPSC-RECORDS/REPORTING

1 **Q. PLEASE STATE YOUR NAME, TITLE AND BUSINESS ADDRESS FOR**
2 **THE RECORD.**

3 A. My name is James C. Falvey. I am Vice President – Regulatory Affairs for
4 e.spire Communications, Inc. (“e.spire”), which formerly was known as American
5 Communications Services, Inc. My business address is 133 National Business
6 Parkway, Suite 200, Annapolis Junction, Maryland 20701.

7 **Q. PLEASE DESCRIBE YOUR PROFESSIONAL EXPERIENCE AND**
8 **BACKGROUND.**

9 A. Prior to joining e.spire as Vice President – Regulatory Affairs in 1996, I practiced
10 law as an associate with the Washington, D.C. law firm of Swidler and Berlin for
11 two and a half years. In the course of my practice, I represented competitive local
12 exchange providers, competitive access providers, cable operators and other
13 common carriers before state and federal regulatory authorities. Prior to my
14 employment at Swidler and Berlin, I was an associate in the Washington Office of
15 Johnson & Gibbs, where I practiced antitrust litigation for three years. I
16 graduated from Cornell university in 1985 with honors and received my law
17 degree from the University of Virginia School of Law in 1990. I am admitted to
18 practice law in the District of Columbia and Virginia.

19 **Q. HAVE YOU PREVIOUSLY TESTIFIED BEFORE THIS COMMISSION?**

20 A. Yes, I have.

21 **Q. HAVE YOU PREVIOUSLY TESTIFIED BEFORE OTHER STATE**
22 **COMMISSIONS?**

1 A. Yes, I have. I have testified before the state commissions in Alabama, Georgia,
2 Kentucky, Louisiana, Mississippi, South Carolina and Tennessee.

3 **Q. ON WHOSE BEHALF ARE YOU TESTIFYING IN THIS PROCEEDING?**

4 A. I am testifying on behalf of e.spire and its Florida operating subsidiaries, namely
5 American Communication Services of Jacksonville, Inc. d/b/a e.spire
6 Communications, Inc., and ACSI Local Switched Services, Inc. d/b/a e.spire
7 Communications, Inc. e.spire, through its operating subsidiaries, provides a full
8 range of local and long distance telecommunications services in Florida.

9 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

10 A. The purpose of my testimony is to explain the process by which e.spire began
11 billing BellSouth for reciprocal compensation as well as the basis for e.spire's
12 belief that BellSouth must compensate it for terminating ISP traffic.

13 **Q. ARE YOU TESTIFYING TO MATTERS OF LAW IN THIS**
14 **PROCEEDING?**

15 A. No, I am not. Although I am an attorney, the purpose of my testimony is to
16 explain a portion of the factual predicate for the legal arguments that e.spire will
17 make in this docket. I note, however, that in order to explain the basis for
18 e.spire's belief that it is entitled to compensation for terminating ISP traffic, I will
19 need to reference some legal decisions.

20 **Q. WHAT IS THE CONTRACTUAL BASIS FOR E.SPIRE'S CLAIM THAT**
21 **BELLSOUTH SHOULD PAY IT RECIPROCAL COMPENSATION?**

1 A. On July 25, 1996, e.spire and BellSouth entered into an Interconnection
2 Agreement for the state of Florida. This Interconnection Agreement was filed
3 with the Commission on August 20, 1996. On December 12, 1996, the
4 Commission approved the Interconnection Agreement by Order No. PSC-96-
5 1509-FOF-TP. Hereinafter, I will refer to the approved Interconnection
6 Agreement as the "Agreement." A copy of the relevant portions of the
7 Agreement are appended to my testimony marked as Exhibit No. JCF-1.

8 Section VI(A) of the Agreement provides as follows for the exchange of
9 local traffic:

10 A. Exchange of Traffic

11 The Parties agree . . . that local interconnection is defined as the
12 delivery of local traffic to be terminated on each party's local
13 network so that customers of either party have the ability to reach
14 customers of the other party, without the use of access codes or
15 delay in the processing of a call. The Parties further agree that the
16 exchange of traffic on BellSouth's Extended Area Service ("EAS")
17 shall be considered local traffic and compensation for the
18 termination of such traffic shall be pursuant to the terms of this
19 section.
20

21 Attachment B of the Agreement defines "local traffic" as "telephone calls
22 that originate in one exchange and terminate in either the same exchange, or a
23 corresponding Extended Area Service ("EAS") exchange." This definition does
24 not discriminate among types of end users, nor does it exclude calls from end
25 users to other end users in the same local calling area that happen to be ISPs.

26 Section VI(B) of the Agreement provides that e.spire and BellSouth
27 initially will compensate each other through a "bill and keep" arrangement,

1 whereby each party would transport and terminate the other's local traffic without
2 charge. Section VI(B) provides for a transition to reciprocal compensation as
3 follows:

4 Compensation

5 The Parties agree that BellSouth will track the usage for both
6 companies for the period of the Agreement. BellSouth will
7 provide copies of such usage reports to [e.spire] on a monthly
8 basis. For purposes of this Agreement, the Parties agree that there
9 will be no cash compensation exchanged by the parties during the
10 term of this Agreement unless the difference in minutes of use for
11 terminating local traffic exceeds 2 million minutes per state on a
12 monthly basis. In such an event, the Parties will thereafter
13 negotiate the specifics of a traffic exchange agreement which will
14 apply on a going-forward basis.

15
16 The Agreement does not contain a rate per minute for reciprocal
17 compensation, however, pursuant to the terms of the Agreement, e.spire may elect
18 to replace any of the material terms of the Agreement, including rates, with the
19 corresponding provision of any other local interconnection agreement that
20 BellSouth enters with another carrier. Section XXII(A) of the Agreement, which
21 grants e.spire "most favored nation" status, states:

22 If as a result of any proceeding before any Court, Commission or
23 the FCC, any voluntary agreement or arbitration proceeding
24 pursuant to the Act, or pursuant to any applicable federal or state
25 law, BellSouth becomes obligated to provide interconnection,
26 number portability, unbundled access to network elements or any
27 other services related to interconnection, whether or not presently
28 covered by this Agreement, to another telecommunications carrier
29 operating within a state within the BellSouth territory at rates or on
30 terms and conditions more favorable to such carrier than the
31 comparable provisions of this Agreement, then [e.spire] shall be
32 entitled to add such network elements and services, or substitute
33 such more favorable rates, terms or conditions for the relevant
34 provisions of this Agreement, which shall apply to the same states

1 as such other carrier and such substituted rates, terms or conditions
2 shall be deemed to have been effective under this Agreement as of
3 the effective date thereof to such other carrier.
4

5 **Q. WHY DO YOU BELIEVE THAT CALLS PLACED TO ISPS FIT THIS**
6 **DEFINITION?**

7 A. There are a number of reasons why I believe that calls terminated by e.spire to
8 ISPs fit the contractual definition of "local" traffic.

9 First, while this matter is more appropriate for legal briefing, the FCC has
10 repeatedly ruled that ISPs are end users that may order their inbound services
11 under local exchange tariffs. Indeed, e.spire's ISP customers all ordered service
12 from e.spire pursuant to e.spire's applicable local exchange tariffs. Specifically,
13 the FCC has stated that "[a]s a result of the decisions the Commission made in the
14 *Access Charge Reconsideration Order*, ISPs may purchase services from
15 incumbent LECs under the same intrastate tariffs available to end users." *In re*
16 *Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, ¶ 342 (1997).
17 The FCC also has noted that

18 ISPs do pay for their connections to incumbent LEC networks by
19 purchasing services under state tariffs. Incumbent LECs also
20 receive incremental revenue from Internet usage through higher
21 demand for second lines by consumers, usage of dedicated lines by
22 ISPs, and subscriptions to incumbent LEC Internet access services.
23 To the extent that some intrastate rate structures fail to compensate
24 incumbent LECs adequately for providing service to customers
25 with high volumes of incoming calls, incumbent LECs may
26 address their concerns with state regulators. *Id.* at ¶¶ 345-46.
27

1 In addition, the FCC has consistently viewed dial-up calls to ISPs as consisting of
2 two components: “telecommunications” and “information.” For instance, the
3 FCC stated in the Universal Service Order that “[w]e agree with the Joint Board’s
4 determination that Internet access consists of more than one component.
5 Specifically, we recognize that Internet access includes a network component,
6 which is the connection over a LEC network from a subscriber to an Internet
7 Service Provider, in addition to the underlying information service.” *In the*
8 *Matter of Federal-State Joint Board on Universal Service*, Report and Order, CC
9 Docket No. 96-45 ¶ 83 (rel. May 8, 1997). The FCC also observed that “[w]hen
10 a subscriber obtains a connection to an Internet service provider via voice grade
11 access to the public switched network, that connection is a telecommunications
12 service and it is distinguishable from the Interstate service provider’s service
13 offering.” *Id.* at ¶ 789. Thus, in a switched communications system, the service
14 termination point generally is the point at which the common carrier service ends
15 and user-provided service begins, *i.e.*, the interface point between the
16 communications system equipment and the user equipment, under applicable
17 tariffs.

18 This view of ISP calls was reinforced by Congress in the 1996 Act where
19 it carefully defined “telecommunications” as something distinct from
20 “information services.” 47 U.S.C. §§ 153(48), 153(20). Indeed, the FCC has
21 observed that “Congress intended ‘telecommunications service’ and ‘information
22 service’ to refer to separate categories of services” despite the appearance from

1 the end user's perspective that it is a single service because it may involve
2 telecommunications components. *Federal-State Board on Universal Service*,
3 Report to Congress, Docket 96-45, FCC 98-67 ¶ 58 (rel. April 10, 1998).

4 Second, a call placed over the public switched network normally is
5 considered "terminated" when it is delivered to the exchange bearing the called
6 telephone number. Call termination occurs when a connection is established
7 between the caller and the telephone exchange service to which the dialed number
8 is assigned, answer supervision is returned, and a call record is generated. This is
9 true whether the call is received by a voice grade phone, a fax machine, an
10 answering machine, or, as in this case, an ISP modem. Indeed, the FCC has
11 defined call termination for purposes of reciprocal compensation obligations as
12 "the switching of traffic . . . at the terminating carrier's end office switch . . . and
13 delivery of that traffic from that switch to the called party's premises." *In the*
14 *Matter of Implementation of the Local Competition Provisions of the*
15 *Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶
16 1040 (1996). There is no question that e.spire provided terminating switching
17 services and terminated the calls to the ISP premises.

18 Third, I note that the customers originating the calls to the ISPs over
19 BellSouth's local network order service from BellSouth pursuant to local
20 exchange tariffs. Moreover, BellSouth bills the calls placed by its customers to
21 ISPs as "local" calls.

1 Fourth, BellSouth routes calls placed by its end users to ISPs served by
2 e.spire over the trunk groups expressly reserved for the exchange of "local"
3 traffic. Separate trunk groups are available for interexchange calls, and BellSouth
4 uses them to transmit access services traffic. When BellSouth routes calls to
5 e.spire over the "local" traffic trunk groups, e.spire completes the traffic in good
6 faith per BellSouth's instructions, and justifiably expects to be compensated for
7 the service.

8 Finally, BellSouth's refusal to compensate e.spire for terminating ISP
9 traffic is inconsistent with BellSouth's own treatment of such traffic. BellSouth
10 itself treats calls to ISPs as "intrastate" when compiling cost studies and making
11 jurisdictional separations. BellSouth should not be able to reclassify traffic
12 jurisdictionally on a unilateral basis for its own benefit in each situation.

13 **Q. DOES THE FCC'S RECENT ORDER REGARDING THE GTE DSL**
14 **TARIFF HAVE ANY IMPACT ON THIS PROCEEDING?**

15 A. No. The GTE DSL tariff order was limited to a dedicated service, and
16 specifically did not address dial-up calls. All of e.spire's traffic constitutes dial-
17 up traffic and is therefore not impacted by this order.

18 **Q. DID E.SPIRE INCUR COSTS IN TERMINATING THIS TRAFFIC FOR**
19 **BELLSOUTH?**

20 A. Yes. In fact, e.spire has incurred, and continues to incur, substantial costs related
21 to the provision of transport and termination for this traffic. e.spire, like other
22 CLECs, has invested a great deal of money in the development of facilities that

1 are capable of handling this traffic. Since e.spire, like other LECs, is prohibited
2 from charging ISPs switched access charges, if e.spire is not compensated for
3 transport and termination of this traffic under the reciprocal compensation
4 provisions of its Agreement with BellSouth, e.spire will not be compensated at
5 all. Effectively, e.spire will be forced to provide free transport and termination of
6 ISP traffic to BellSouth's customers. This would be an impossible situation for
7 e.spire, and an unjustifiable windfall for BellSouth. Obviously, such an outcome
8 is not only unfair and inequitable, but also anticompetitive.

9 **Q. HAS E.SPIRE CONTACTED BELLSOUTH CONCERNING ITS**
10 **OBLIGATION TO COMPENSATE E.SPIRE FOR TERMINATING**
11 **BELLSOUTH LOCAL TRAFFIC?**

12 **A.** Yes, it has. By correspondence dated November 14, 1997, e.spire informed
13 BellSouth that e.spire had not yet received any usage reports from BellSouth as
14 required by the Agreement. A copy of that correspondence is appended to my
15 testimony marked as Exhibit No. JCF-2. e.spire informed BellSouth that it would
16 begin to bill BellSouth for reciprocal compensation based upon e.spire's reports
17 of local traffic differentials in each state beginning with the month in which the
18 differential exceeded 2 million MOUs. e.spire proposed an amendment to the
19 Agreement setting the termination rate for Florida at \$0.009 per minute pursuant
20 to the most favored nations provision of the Agreement. Pursuant to the
21 correspondence and the Agreement, this rate would be effective from the date that
22 the monthly usage exceeded 2 million minutes. The reciprocal compensation rate

1 of \$0.009 per minute is contained in the Partial Interconnection Agreement
2 between MFS and BellSouth. A copy of the relevant portion of the MFS
3 Interconnection Agreement is appended to my testimony marked as Exhibit No.
4 JCF-3.

5 BellSouth did not respond to e.spire's November 14, 1997 letter. e.spire
6 then wrote to BellSouth again on the subject by letter dated December 23, 1997,
7 and again by letter dated January 8, 1998. Copies of these letters are appended to
8 my testimony marked as Exhibit No. JCF-4. These letters reiterated the terms of
9 the Agreement and informed BellSouth that e.spire would take legal action if
10 BellSouth continued to breach the Agreement.

11 **Q. WHAT WAS BELLSOUTH'S RESPONSE TO E.SPIRE'S**
12 **CORRESPONDENCE CONCERNING RECIPROCAL COMPENSATION?**

13 A. BellSouth did not respond to e.spire's correspondence until January 8, 1998. A
14 copy of BellSouth's response is appended to my testimony as Exhibit No. JCF-5.
15 In its response, BellSouth conceded that it had failed to provide e.spire with the
16 required usage reports and agreed to use e.spire's reports. BellSouth also stated
17 that it would not pay the bills submitted by e.spire because it does not believe that
18 ISP traffic is "local traffic." Moreover, BellSouth proposed a rate of \$0.002 for
19 terminating local traffic.

20 **Q. DID YOU REPLY TO BELLSOUTH'S JANUARY 8, 1998 LETTER?**

21 A. Yes, I did. On March 17, 1998, I wrote BellSouth once again. A copy of that
22 letter is appended to my testimony as Exhibit No. JCF-6.

1 Q. DID YOU ATTEMPT TO NEGOTIATE A RECIPROCAL
2 COMPENSATION RATE WITH BELLSOUTH?

3 A. Yes, I did. I began the negotiation with a rate proposal which was the lowest
4 e.spire would accept, given that e.spire is entitled to that amount under the most
5 favored nations provision of the Agreement. BellSouth only responded to this
6 proposal six weeks later, and never responded to e.spire with a serious rate
7 proposal that met or exceeded the amount to which e.spire is entitled.

8 Q. HAS THERE BEEN A DECISION IN FLORIDA THAT ADDRESSES THE
9 SAME OR SIMILAR ISSUES THAT ARE RAISED IN THIS
10 PROCEEDING?

11 A. Yes, in fact quite recently. On September 15, 1998, the Florida Commission
12 issued a decision which specifically addressed the issue of "whether ISP traffic
13 should be treated as local or interstate for purposes of reciprocal compensation . .
14 ." *In re: Complaint of WorldCom Technologies, Inc. against BellSouth*
15 *Telecommunications, Inc. for Breach of Florida Partial Interconnection*
16 *Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996*
17 *and Request for Relief*, Docket No. 971478-TO, Order No. PSC-98-1216-FOF-
18 TP, Florida Public Service Commission, at 3 (Sept. 15, 1998) (appended hereto as
19 Exhibit No. JCF-7. Looking at the language of the WorldCom/BellSouth
20 Interconnection Agreement, the Commission said:

21 Upon review of the language of the agreement, and the evidence
22 and testimony presented at hearing, we find that the Agreement
23 defines local traffic in such a way that ISP traffic clearly fits the
24 definition. . . . There is no ambiguity, and there are no specific

1 exceptions for ISP traffic. Since there is no ambiguity in the
2 language of the agreement, we need not consider any other
3 evidence to determine the parties' obligations under the agreement.
4 *Id.* at 5.
5

6 After reviewing all of the arguments, the Commission further stated,
7 "while there is some room for interpretation, we believe the current law weighs in
8 favor of treating the traffic as local, regardless of jurisdiction, for purposes of the
9 Interconnection Agreement. *Id.* at 15. Moreover, the Commission noted, among
10 other things, that BellSouth rates the traffic of its own ISP customers as local
11 traffic, and that "[i]t would hardly be just for BellSouth to conduct itself in this
12 way while treating WorldCom differently." *Id.* Predictably, BellSouth has
13 appealed the Commission's decision, *see BellSouth v. WorldCom Technologies,*
14 *Inc., et al.*, Case No. 4:98 CV 352-WS (N.D. Fla. 1998).

15 BellSouth is doing to e.spire the same thing that it did to WorldCom, and
16 with just as little justification. The Commission already has found that the law
17 favors treating ISP traffic as local traffic, regardless of jurisdiction, for purposes
18 of the Interconnection Agreement. The language in the e.spire/BellSouth
19 Agreement is very clear and does not exclude ISP traffic from the definition of
20 local traffic. Importantly, the definition of "local traffic" interpreted by the
21 Commission in the *WorldCom* decision (Section 1.40) is essentially identical to
22 the definition included in the Agreement between e.spire and BellSouth.

23 In addition, Section XXX of the Agreement contains a standard "entire
24 agreement" clause which specifies that the written language of the Agreement
25 contains the entire agreement between the parties and requires that any

1 modifications to the Agreement be made in writing and signed by a duly
2 authorized representative of the parties. Thus, to the extent that BellSouth relies
3 on extrinsic evidence to demonstrate that ISP traffic should not be included within
4 the definition of "local traffic," e.spire believes that such evidence is not relevant
5 because the language of the Agreement is unambiguous. Therefore, e.spire
6 respectfully submits that the Commission should conclude that ISP traffic is local
7 traffic under the Agreement.

8 **Q. HAVE ANY OTHER JURISDICTIONS ISSUED DECISIONS FINDING**
9 **THAT ISP TRAFFIC IS LOCAL TRAFFIC SUBJECT TO RECIPROCAL**
10 **COMPENSATION UNDER E.SPIRE'S INTERCONNECTION**
11 **AGREEMENT WITH BELLSOUTH?**

12 A. Yes. On October 19, 1998, the Hearing Officer presiding over the
13 e.spire/BellSouth complaint before the Georgia Public Service Commission
14 issued an Initial Decision in favor of e.spire. *e.spire Communications, Inc. v.*
15 *BellSouth Telecommunications, Inc. Regarding Reciprocal Compensation for*
16 *Traffic Terminated to Internet Service Providers*, Docket No. 9281-U, Initial
17 Decision of the Hearing Officer, Georgia Public Service Commission (Oct. 19,
18 1998)(appended hereto as Exhibit No. JCF-8. In this Initial Decision, the Hearing
19 Officer found, among other things, that ISP traffic is local traffic subject to
20 reciprocal compensation, *Id.* at 16-19, that the language of the e.spire/BellSouth
21 Agreement is unambiguous, *Id.* at 19-21, and that e.spire is contractually entitled
22 under the most favored nation clause in its Agreement (Section XXII.A) to collect

1 the \$0.0087 per minute rate adopted from the interconnection agreement between
2 BellSouth and another carrier, *Id.* at 22. Notably, this is consistent with the
3 decisions of at least 23 other states that have determined that termination of calls
4 placed to ISPs are subject to the payment of reciprocal compensation.

5 **Q. IS YOUR AGREEMENT WITH BELLSOUTH IN FLORIDA THE SAME**
6 **AS THE AGREEMENT FOR GEORGIA?**

7 A. Yes, the Interconnection Agreements between BellSouth and e.spire for Florida
8 and Georgia is a single, regionwide agreement.

9 **Q. ULTIMATELY, WHAT RELIEF ARE YOU SEEKING FROM THE**
10 **COMMISSION?**

11 A. e.spire requests that the Commission: (1) determine, as a matter of law, that calls
12 terminated to ISPs should be subject to reciprocal compensation under the
13 e.spire/BellSouth Interconnection Agreement; (2) enforce the “most favored
14 nation” provision of the e.spire/BellSouth Interconnection Agreement by ordering
15 a rate for reciprocal compensation of \$0.009; (3) order payment of all outstanding,
16 overdue bills for reciprocal compensation plus interest; (4) require payment of
17 attorneys’ fees pursuant to the express language of the Agreement; and (5) require
18 the recovery of the costs of implementing the Traffic Master systems, as awarded
19 in Georgia.

20 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

21 A. Yes, it does.

**INTERCONNECTION AGREEMENT
BETWEEN ACSI AND BELLSOUTH**

E.17 BellSouth will provide and update an electronic copy of their Switch Network ID Database with a complete list of features and functions by switch, i.e., NPA/NXXs, rate centers, *etc.*

F. Local Number Assignment

ACSI will assign telephone numbers to its customers using at least one NXX per BellSouth tariffed local exchange metropolitan area; provided, that sufficient quantities of numbering resources are made available to ACSI.

G. Cross-Connection to Other Collocators

Where one Party collocates in the wire center of the other Party, the Party operating the wire center shall allow the Party collocated at the wire center to directly interconnect to any other entity which maintains a collocation facility at that same wire center. The Party operating the wire center shall enable such interconnection by effecting a cross-connection between those collocation facilities, as jointly directed by the Party collocated at the wire center and the other collocated entity. For each such cross-connection, the Party operating the wire center shall charge the otherwise applicable standard tariff or contract special access cross-connect rate to the collocated Party. No other charges shall apply for such cross-connection. ACSI reserves its right to petition for state commission arbitration of the pricing of such cross-connections.

VI. LOCAL TRAFFIC EXCHANGE

A. Exchange of Traffic

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

B. Compensation

With the exception of the local traffic specifically identified in subsection (C) hereafter, each party agrees to terminate local traffic originated and routed to it by the other party. The Parties agree that BellSouth will track the usage for both companies for the period of the Agreement. BellSouth will provide copies of such usage reports to ACSI on a monthly basis. For purposes of this Agreement, the Parties agree that there will be no cash compensation exchanged by the parties

during the term of this Agreement unless the difference in minutes of use for terminating local traffic exceeds 2 million minutes per state on a monthly basis. In such an event, the Parties will thereafter negotiate the specifics of a traffic exchange agreement which will apply on a going-forward basis.

C. Transit Traffic

If either party provides intermediary tandem switching and transport services for the other party's connection of its end user to a local end user of: (1) a CLEC other than ACSI; (2) an ILEC other than BellSouth; or (3) another telecommunications company such as a wireless telecommunications service provider, the party performing the intermediary function will bill a \$0.002 per minute charge. However, BellSouth agrees that ACSI may cross-connect directly to such third Parties at the POI. In such an event, tariffed cross-connection non-recurring charges will apply, and no transitting charge will apply.

VII. MEET-POINT BILLING ARRANGEMENTS

Both Parties hereto provide interexchange access transport services to IXCs and other access service customers. Pursuant to the terms of this Agreement, ACSI will interconnect at selected BellSouth switches of its choosing for the purposes of providing certain Switched Access Services. On such occasions, a portion of the access transport service will be provided by each of the Parties hereto. This section establishes arrangements intended to enable each of the Parties hereto to serve and bill their mutual Switched Access Service customers, on an accurate and timely basis. The arrangements discussed in this section apply to the provision of both interLATA and intraLATA Switched Access Services. It is understood and agreed that ACSI is not obligated to provide any of its Switched Access Service(s) through any specific access tandem switch or access tandem provider, and may at its sole discretion, with due notice to those affected, modify its serving arrangements on its own initiative.

A. Applicability of OBE Guidelines

Meet-point billing (MPB) arrangements shall be established between the Parties to enable ACSI to provide, at its option, Switched Access Services to third Parties via specified LEC switches, in accordance with the Meet-Point Billing guidelines adopted by and contained in the Ordering and Billing Forum's MECAB and MECOD documents, except as modified herein. These arrangements are intended to be used to provide Switched Access Service that originates and/or terminates on an ACSI-provided Exchange Service, where the transport component of the Switched Access Service is routed through specified BellSouth switches.

XV. RESPONSIBILITIES OF THE PARTIES

- A. BellSouth and ACSI agree to treat each other fairly, non-discriminatorily, and equally for all items included in this Agreement or related to the support of items included in this Agreement.
- B. ACSI and BellSouth will work cooperatively to minimize fraud associated with third-number billed calls, calling card calls, or any other services related to this Agreement. The Parties fraud minimization procedures are to be cost effective and implemented so as not to unduly burden or harm one Party as compared to the other.
- C. ACSI and BellSouth agree to promptly exchange all necessary records for the proper billing of all traffic.
- D. ACSI and BellSouth will review engineering requirements on a quarterly basis and establish forecasts for trunk utilization, POI trunks, MPB arrangements, E-911, EISCC facility requirements, quantities of DNCF, loops and other services provided under this Agreement. New trunk groups will be implemented as dictated by engineering requirements for both BellSouth and ACSI. BellSouth and ACSI are required to provide each other the proper call information (e.g., originated call party number and destination call party number) to enable each company to bill in a complete and timely manner.
- E. The Parties will cooperate by exchanging technical information in order to identify and explore potential solutions to enable ACSI to establish unique rate centers, or to assign a single NXX code across multiple rate centers.
- F. ACSI and BellSouth will work jointly and cooperatively in developing and implementing common manual and/or electronic interfaces (including, for example, data elements, data format, and data transmission) from which to place service orders and trouble reports involving the provision of loops, DNCF, directory assistance, directory listings, E-911, and other services included in this Agreement. To the extent reasonable, ACSI and BellSouth will utilize the standards established by industry fora, such as OBF.
- G. BellSouth will support ACSI requests related to central office (NXX) code administration and assignments in an effective and timely manner. ACSI and BellSouth will comply with code administration requirements as prescribed by the FCC, the state commissions, and accepted industry guidelines.
- H. BellSouth shall not impose a cross-connect fee on ACSI where ACSI accesses 911 or E-911, reciprocal traffic exchange trunks, and network platform services, through a collocation arrangement at the BellSouth Wire Center.

- I. Notwithstanding any other provision of this Agreement, it is mutually understood and agreed that both Parties hereto reserve the right to establish each of the following, consistent with generally accepted industry standards.
 1. Rate centers (location and area within)
 2. Points of interchange (including meet points)
 3. Switching entity designation and supporting data (including inbound route choice)
 - a. end office
 - b. homing/homed to tandem
 4. Association of routing point(s) with end offices, POIs, *etc.*
 5. Published rate center and locality designations.

XVI. NETWORK DESIGN AND MANAGEMENT

- A. The Parties agree to work cooperatively to install and maintain reliable interconnected telecommunications networks, including but not limited to, maintenance contact numbers and escalation procedures. BellSouth agrees to provide public notice of changes in the information necessary for the transmission and routing of services using its local exchange facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.
- B. The interconnection of all networks will be based upon accepted industry/national guidelines for transmission standards and traffic blocking criteria.
- C. The Parties will work cooperatively to apply sound network management principles by invoking appropriate network management controls to alleviate or prevent network congestion.
- D. For network expansion, the Parties agree to review engineering requirements on a quarterly basis and establish forecasts for trunk utilization. New trunk groups will be added as reasonably warranted.
- E. ACSI and BellSouth will exchange appropriate information (*e.g.*, maintenance contact numbers, network information, information required to comply with law enforcement and other security agencies of the Government) to achieve desired reliability. In addition, ACSI and BellSouth will cooperatively plan and implement coordinated repair procedures to ensure customer trouble reports are resolved in a timely and appropriate manner.

XXII. MOST FAVORABLE PROVISIONS

- A. If as a result of any proceeding before any Court, Commission, or the FCC, any voluntary agreement or arbitration proceeding pursuant to the Act, or pursuant to any applicable federal or state law, BellSouth becomes obligated to provide interconnection, number portability, unbundled access to network elements or any other services related to interconnection, whether or not presently covered by this Agreement, to another telecommunications carrier operating within a state within the BellSouth territory at rates or on terms and conditions more favorable to such carrier than the comparable provisions of this Agreement, then ACSI shall be entitled to add such network elements and services, or substitute such more favorable rates, terms or conditions for the relevant provisions of this Agreement, which shall apply to the same states as such other carrier and such substituted rates, terms or conditions shall be deemed to have been effective under this Agreement as of the effective date thereof to such other carrier.
- B. If the more favorable provision is a result of the action of an appropriate regulatory agency or judicial body, whether commenced before or after the effective date of this Agreement, the Parties agree to incorporate such order in this Agreement as of its effective date. In the event BellSouth files and receives approval for a tariff offering to provide any substantive service of this Agreement in a way different than that provided for herein, the Parties agree that the Companies shall be eligible for subscription to said service at the rates, terms and conditions contained in tariffs as of the effective date of the tariff.
- C. In the event that BellSouth provides interconnection and/or temporary number portability arrangements via tariff or has or enters into an interconnection and/or temporary number portability agreement with another entity, BellSouth will permit ACSI an opportunity to inspect such tariff or agreement and, upon ACSI's request, BellSouth will immediately offer ACSI an agreement on the same material terms with effect from the date BellSouth first made such tariff effective or entered into such arrangement and for the remainder of the term of this Agreement. The other items covered by this Agreement and not covered by such tariff or agreement shall remain unaffected and as to such items this Agreement shall remain in effect.
- D. In the event that BellSouth is required by an FCC or a state commission decision or order to provide any one or more terms of interconnection or other matters covered by this Agreement that individually differ from any one or more corresponding terms of this Agreement, ACSI may elect to amend this Agreement to reflect all of such differing terms (but not less than all) contained in such decision or order, with effect from the date ACSI makes such election. The other items covered by this Agreement and not covered by such decision or order shall remain unaffected and as to such items this Agreement shall remain in effect.

ATTACHMENT B

DEFINITIONS

1. "Access Service Request" or "ASR" means an industry standard form used by the Parties to add, establish, change or disconnect trunks for the purposes of interconnection.

2. "Advanced Intelligent Network" or "AIN" means a network switching and architecture concept that centralizes intelligence in databases and application processors internal to the network rather than in central office switching systems. AIN enables the network to complete interactions (or actions) regarding routing, signaling and information quickly and accurately. The AIN concept permits intelligent database systems and application processors to be either centralized or distributed throughout one network.

3. "Advanced Intelligent Network Features" or "AIN/IN Features" refers to the replacement or enhancement of electronic switching and electronic network hardware and software functions via the use of distributed network based processors and Common Channel Interoffice Signaling (CCIS/SS7). For example, SCPs and STCs are part of the advanced intelligent network. AIN also features a "service creation environment" which permits the end user or reseller to create, and modify, in near real time, their own network routing instructions for calls to their facilities, creating, in effect a user customized virtual network.

4. "Affiliate" means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term "own" means to own an equity interest (or equivalent thereof) or more than 10 percent.

5. "American National Standards Institute" or "ANSI" is a private, non-profit organization representing more than 1,300 corporations, 30 government agencies, 20 institutions and 250 trade, labor, consumer, technical and professional organizations which sets voluntary standards for the United States (U.S.). ANSI has established an Information Infrastructure Standards Panel. ANSI is appointed by the U.S. State Department as a representative of the U.S. to the ITU's International Standards Organization.

6. "Automated Report Management Information System" or "ARMIS" means the most current ARMIS 4308 report issued by the FCC.

7. "Automatic Number Identification" or "ANI" is a telecommunications carrier signaling parameter that identifies, through industry standard network interfaces and formats (either SS7/CCIS (preferred), or in band signalling (predecessor technology), the billing number of the calling party. This functionality is also known and referred to as "Calling Party Number" or "CPN." This term is not to be limited by "Called Party Identification" service, another product that is frequently required by call centers.

8. "Bell Communications Research" or "BellCore" means an organization owned jointly by the RBOC that conducts research and development projects for them.

standard signalling arrangements including repeat loop start, loop reverse battery, or ground start seizure and disconnect in one direction (toward the end office switch), and repeat ringing in the other direction (toward the end user).

a. "ISDN link/loop/circuit" is an ISDN link which provides a 2-wire ISDN digital circuit connection that will support digital transmission of two 64 Kbps clear channels and one 16 Kbps data channel (2B+D), suitable for provision of BRI-ISDN service. ISDN links shall be provisioned by least cost planning methodologies sufficient to insure industry standard interface, performance, price, reliability and operational characteristics are functionally transparent and are equal to or better than dedicated copper pairs. All things being equal, "Broadband ISDN" is preferred to CO-based ISDN circuits. Unless specifically identified and priced as "fractional" these circuits are assumed to be fully available.

b. "4-Wire DS-1 Digital Grade Links" will support full duplex transmission of isochronous serial data at 1.544 Mbps, and provide the equivalent of 24 voice grade channels. Unless specifically identified and priced as "fractional" these circuits are assumed to be fully available.

46. "Local Exchange Carrier" or "LEC" means any carrier that provides local common carrier telecommunications services to business and/or residential subscribers within a given LATA and interconnects to other carriers for the provision of alternative telecommunications products or services, including, but not limited to toll, special access, and private line services. This includes the Parties to this Agreement. The term "Incumbent-LEC" or "I-LEC" is sometimes used to refer to the dominant LEC for a particular locality (such as BellSouth). Such Incumbent-LECs include both Bell Operating Companies ("BOCs") and non-BOC LECs, which are often referred to as "Independent-LECs." By contrast, new entrants into the local exchange market are sometimes referred to as "Competitive LECs" or "CLECs," or sometimes as "Alternative LECs" or "ALECs."

47. "Local Exchange Routing Guide" or "LERG" means a BellCore Reference customarily used to identify NPA-NXX routing and homing information, as well as network element and equipment designations.

48. "Local Traffic" means telephone calls that originate in one exchange and terminate in either the same exchange, or a corresponding Extended Area Service ("EAS") exchange. The terms Exchange, and EAS exchanges are defined and specified in Section A3. of BellSouth's General Subscriber Service Tariff.

49. "Local Interconnection" means (1) the delivery of local traffic to be terminated on each Party's local network so that end users of either Party have the ability to reach end users of the other Party without the use of any access code or substantial delay in the processing of the call; (2) the LEC unbundled network features, functions, and capabilities set forth in this Agreement; and 3) Service Provider Number Portability sometimes referred to as temporary telephone number portability to be implemented pursuant to the terms of this Agreement.

EXHIBIT No. ____ (JCF-2)



American Communications Services, Inc.
121 National Business Parkway, Suite 100
Annapolis Junction, Maryland 20701
301-617-4200, FAX 301-617-4279
www.acsi.net

November 14, 1997

Mr. Pat Finlan
BellSouth Telecommunications
675 W. Peachtree Street
Room 34591
Atlanta, Georgia 30375

Dear Pat:

I am writing to summarize our recent discussions concerning reciprocal compensation for local traffic.

As you know, ACSI and BellSouth entered into an Interconnection Agreement on July 25, 1996 which included the following provision concerning reciprocal compensation for local traffic:

With the exception of the local traffic specifically identified in subsection (C) hereafter, each party agrees to terminate local traffic originated and routed to it by the other party. The Parties agree that BellSouth will track the usage for both companies for the period of the Agreement. BellSouth will provide copies of such usage reports to ACSI on a monthly basis. For purposes of this Agreement, the Parties agree that there will be no cash compensation exchanged by the parties during the term of this Agreement unless the difference in minutes of use for terminating local traffic exceeds 2 million minutes per state on a monthly basis. In such an event, the Parties will thereafter negotiate the specifics of a traffic exchange agreement which will apply on a going-forward basis. Interconnection Agreement Section VI(B).

The key to triggering the transition from "bill and keep" to reciprocal usage-based compensation is the reports that were to be issued by BellSouth on local traffic differentials pursuant to Section (VI)(B) of the Interconnection Agreement. These reports were to have indicated the point at which the state-by-state differential for local traffic minutes exceeded 2,000,000 minutes on a monthly basis. This, in turn, was to trigger a negotiation of usage-based rates to permit the immediate exchange "on a going forward basis" of usage-based compensation based on the difference between local traffic originated and terminated to ACSI end users. As you know, ACSI has never received such reports from BellSouth.¹

¹ To the extent that BellSouth is cooperative in moving quickly to usage-based reciprocal compensation - including retroactive compensation, if necessary - ACSI will have no interest in protesting BellSouth's failure to issue such reports.

Mr. Pat Finlen
November 14, 1997
Page 2

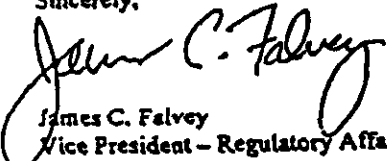
Accordingly, ACSI intends to begin billing BellSouth based upon ACSI's reports of local traffic differentials. ACSI will elect reciprocal compensation rates on a state-by-state basis which BellSouth has agreed to with other parties, or negotiate other rates. ACSI will begin billing BellSouth for local traffic differentials based on ACSI's traffic reporting system. If BellSouth develops its own reporting system, BellSouth will have the capability to compare its reports to ACSI's.

As we have discussed, an amendment to the ACSI/BellSouth Interconnection Agreement is necessary in light of the current imbalance in traffic. A proposed amendment is attached. ACSI anticipates that Schedule A, listing state specific reciprocal compensation rates, will be amended from time to time to add additional states. Please review the attached amendment and call me with your comments at your earliest convenience.

The Interconnection Agreement calls for usage-based compensation to be implemented "on a going forward basis." ACSI will bill BellSouth in each state beginning with the first month in which the local traffic differential exceeded 2 million minutes. ACSI's initial bill for reciprocal compensation for local traffic for Alabama and Georgia is attached hereto. The minutes billed are limited to local minutes for ACSI customers in Alabama and Georgia in October 1997. ACSI has calculated the difference between local traffic minutes originating by and terminating to ACSI end users and applied the rates in Schedule A to those minutes. ACSI is gathering and synthesizing data for earlier months, as well, and, will forward these bills shortly. As ACSI accumulates customers and minutes in other states, ACSI will also provide bills for these states.

I look forward to working with BellSouth in the transition to usage-based reciprocal compensation. Thank you for your attention to this matter.

Sincerely,


James C. Falvey
Vice President - Regulatory Affairs

cc: Stephen M. Klimacek,
Riley Murphy,
James Sudham

AMENDMENT

TO

INTERCONNECTION AGREEMENT BETWEEN ACSI AND
BELLSOUTH TELECOMMUNICATIONS DATED JULY 25, 1996

Pursuant to this Agreement (the "Agreement"), American Communications Services, Inc., on behalf of its local exchange operating subsidiaries (collectively "ACSI") and BellSouth Telecommunications, Inc. ("BellSouth") hereinafter referred to collectively as the "Parties" hereby agree to amend that certain Interconnection Agreement between the Parties dated July 25, 1996 ("Interconnection Agreement").

NOW THEREFORE, in consideration of the mutual provisions contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, ACSI and BellSouth hereby covenant and agree as follows:

1. Pursuant to Section VI(B) of the Interconnection agreement, the parties agreed to transition to a usage-based reciprocal compensation agreement once the difference in minutes of use for terminating local traffic exceeds 2 million minutes per state on monthly basis. The usage-based rate, pursuant to the Agreement, applies on a going forward basis beginning with the month in which the 2 million minutes threshold is met.
2. The parties hereby agree that the rates attached on Schedule A shall apply to all local traffic exchanged between the parties as mutual and reciprocal compensation rates for the transport and termination of local traffic. Schedule A may be revised by Agreement of the Parties.
3. The rates applied in Schedule A shall apply on a state-by-state basis beginning with and including the first month in which the differential exceeds 2 million minutes. Thereafter, the usage-based rate shall apply every month, regardless of the traffic differential.
4. The rate will be applied to the difference between the local traffic minutes originated by and terminated to ACSI end users.
5. The Parties shall exchange monthly local traffic reports on a state-by-state basis. A party that receives to its end users more local traffic than it originates from its end users shall submit a monthly bill showing state-by-state traffic data justifying the monthly bill.

Page 2

6. The Parties will negotiate in good faith to resolve differences in their corresponding local traffic reports.

IN WITNESS WHEREOF, the Parties hereto have caused this Amendment to be executed by their respective duly authorized representatives on the date indicated below.

AMERICAN COMMUNICATIONS
SERVICES, INC.

By: _____

DATE: November 14, 1997

BELLSOUTH
TELECOMMUNICATIONS,
INC.

By: _____

DATE: November 14, 1997

SCHEDULE A

ALABAMA	\$.01 per minute
GEORGIA	\$.0087 per minute
KENTUCKY	\$.008 per minute
MISSISSIPPI	TBD
LOUISIANA	\$.02 per minute
FLORIDA	\$.009 per minute
TENNESSEE	TBD
SOUTH CAROLINA	IBD

BILL NUMBER: 334 BSD-5181 478
INVOICE NUMBER: BSD5181478-97318
BILL DATE: NOVEMBER 14, 1997
PAGE: 1

TO: ATTN: ACCESS BILL VERIFICATION GROUP
BELLSOUTH
600 NORTH 19TH STREET
25TH FLOOR
BIRMINGHAM, AL 35203

BILLING INQUIRES CALL (301)483-7622

DETAIL OF CURRENT CHARGES

OTHER CHARGES AND CREDITS - SEE DETAIL

LOCAL

0.00

USAGE CHARGES - SEE DETAIL

LOCAL

TOTAL CURRENT CHARGES DUE BY DECEMBER 15, 1997

TOTAL AMOUNT DUE

*DETAIL OF USAGE CHARGES FOR OFFICE MTGMALGYDS0
USAGE BILLING CYCLE OCTOBER 1 THRU OCTOBER 31, 1997
LOCAL*

<u>RATE CATEGORY</u>	<u>QUANTITY</u>	<u>RATE</u>	<u>MILES</u>	<u>AMOUNT</u>
TERMINATING		\$0.01		

TOTAL FOR LOCAL USAGE FOR OFFICE MTGMALGYDS0

*DETAIL OF USAGE CHARGES FOR OFFICE BRHMALFCDS0
USAGE BILLING CYCLE OCTOBER 1 THRU OCTOBER 31, 1997
LOCAL*

<u>RATE CATEGORY</u>	<u>QUANTITY</u>	<u>RATE</u>	<u>MILES</u>	<u>AMOUNT</u>
TERMINATING		\$0.01		

TOTAL FOR LOCAL USAGE FOR OFFICE BRHMALFCDS0

*DETAIL OF USAGE CHARGES FOR OFFICE CLMBGAEDDS0
USAGE BILLING CYCLE OCTOBER 1 THRU OCTOBER 31, 1997
LOCAL*

<u>RATE CATEGORY</u>	<u>QUANTITY</u>	<u>RATE</u>	<u>MILES</u>	<u>AMOUNT</u>
TERMINATING		\$0.0087		

TOTAL FOR LOCAL USAGE FOR OFFICE CLMBGAEDDS0

Exhibit 7.0

Reciprocal Local Traffic-Local Call Termination Rate

Local Call Termination Rate

\$0.009 Per Minute of Use

DOCKET NO. 981008-TP
WITNESS: FALVEY
EXHIBIT NO. _____ (JCF-3)
PAGE 1 OF 1

EXHIBIT No. ____ (JCF-4)

ACSI

American Communications Services, Inc.

131 National Business Parkway, Suite 100
Annapolis Junction, Maryland 20701
TEL: 301.617.4200 FAX: 301.617.4279
www.acsi.net

January 8, 1998

VIA FACSIMILE AND FEDERAL EXPRESS

Mr. Pat Finlen
Manager - Interconnection Services
BellSouth Telecommunications
675 W. Peachtree Street
Room 34S91
Atlanta, Georgia 30375

Dear Pat:

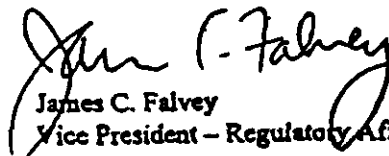
I have not received a response to my letters dated December 28, 1997 and November 14, 1997, which included a proposed amendment to the ACSI/BellSouth Interconnection Agreement ("Agreement") based upon BellSouth's obligations pursuant to Section VI(B) of the Agreement, and ACSI's first two bills for reciprocal compensation.

Enclosed is the third bill for reciprocal compensation, for traffic exchanged during the month of December 1997. If payments are not made on a timely basis, ACSI will charge interest on any late payments. Given the substantial amounts of money owed at this time, interest alone could be significant.

ACSI also still has not received a single report for any of its markets as to the local traffic flowing between our respective networks, as required by the Agreement. Please send such reports directly to my attention. BellSouth's continuing breach of the Agreement in this regard will be an issue if and when ACSI's is forced to file complaints on the issue of reciprocal compensation.

Thank you for your immediate attention to this matter, and I look forward to hearing back from you promptly.

Sincerely,


James C. Falvey
Vice President - Regulatory Affairs

Enclosure

cc: Michael Tanner, Esq.
Riley M. Murphy, Esq.
Peter Fruin, Esq.
Craig Dowdy, Esq.

Stephen M. Klimacek, Esq.
Brad Mutschelknaus, Esq.
Alicia Freysinger, Esq.
Norman Horton, Esq.

BILL NUMBER: 334 BSD-5181 478
 INVOICE NUMBER: BSD5181478-98005
 BILL DATE: JANUARY 5, 1998
 PAGE: 1

TO: ATTN: ACCESS BILL VERIFICATION GROUP
 BELL SOUTH
 600 NORTH 19TH STREET
 25TH FLOOR
 BIRMINGHAM, AL 35203

BILLING INQUIRES CALL (301)483-7622

SWITCHED ACCESS SERVICE

DETAIL OF CURRENT CHARGES

OTHER CHARGES AND CREDITS - SEE DETAIL

LOCAL

0.00

USAGE CHARGES - SEE DETAIL

LOCAL

TOTAL CURRENT CHARGES DUE BY FEBRUARY 15, 1998

TOTAL AMOUNT DUE

DETAIL OF USAGE CHARGES FOR OFFICE MTGMALGYDS0
USAGE BILLING CYCLE DECEMBER 1 THRU DECEMBER 31, 1997
 LOCAL

<u>RATE CATEGORY</u>	<u>QUANTITY</u>	<u>RATE</u>	<u>MILES</u>	<u>AMOUNT</u>
TERMINATING		\$0.01		

TOTAL FOR LOCAL USAGE FOR OFFICE MTGMALGYDS0

DETAIL OF USAGE CHARGES FOR OFFICE BRHMALFCDS0
USAGE BILLING CYCLE DECEMBER 1 THRU DECEMBER 31, 1997
 LOCAL

<u>RATE CATEGORY</u>	<u>QUANTITY</u>	<u>RATE</u>	<u>MILES</u>	<u>AMOUNT</u>
TERMINATING		\$0.01		

TOTAL FOR LOCAL USAGE FOR OFFICE BRHMALFCDS0

DETAIL OF USAGE CHARGES FOR OFFICE CLMBGAEDDS0
USAGE BILLING CYCLE DECEMBER 1 THRU DECEMBER 31, 1997
 LOCAL

<u>RATE CATEGORY</u>	<u>QUANTITY</u>	<u>RATE</u>	<u>MILES</u>	<u>AMOUNT</u>
TERMINATING		\$0.0087		

TOTAL FOR LOCAL USAGE FOR OFFICE CLMBGAEDDS0

BILL NUMBER: 334 BSD-5181 478
INVOICE NUMBER: BSD5181478-98005
BILL DATE: JANUARY 5, 1998
PAGE: 2

DETAIL OF USAGE CHARGES FOR OFFICE NWORLAMODC0
USAGE BILLING CYCLE DECEMBER 1 THRU DECEMBER 31, 1997
LOCAL

<u>RATE CATEGORY</u>	<u>QUANTITY</u>	<u>RATE</u>	<u>MILES</u>	<u>AMOUNT</u>
TERMINATING	[REDACTED]	\$0.02		[REDACTED]
TOTAL FOR LOCAL USAGE FOR OFFICE NWORLAMODC0				[REDACTED]

DETAIL OF USAGE CHARGES FOR OFFICE LSVLKY27DS0
USAGE BILLING CYCLE DECEMBER 1 THRU DECEMBER 31, 1997
LOCAL

<u>RATE CATEGORY</u>	<u>QUANTITY</u>	<u>RATE</u>	<u>MILES</u>	<u>AMOUNT</u>
TERMINATING	[REDACTED]	\$5.008		[REDACTED]
TOTAL FOR LOCAL USAGE FOR OFFICE LSVLKY27DS0				[REDACTED]

ACSI

American Communications Services, Inc.

131 National Business Parkway, Suite 100
Annapolis Junction, Maryland 20701
TEL: 301.617.4200 FAX 301.617.4279
www.acsi.net

December 23, 1997

VIA FACSIMILE AND FEDERAL EXPRESS

Mr. Pat Finlen
Manager - Interconnection Services
BellSouth Telecommunications
675 W. Peachtree Street
Room 34S91
Atlanta, Georgia 30375

Dear Pat:

I have not received a response to my letter dated November 14, 1997, which included a proposed amendment to the ACSI/BellSouth Interconnection Agreement ("Agreement") based upon BellSouth's obligations pursuant to Section VI(B) of the Agreement, and an initial bill for reciprocal compensation for the month of October 1997.

I am therefore writing to reiterate my request that BellSouth comply with Section VI(B) of the Agreement by agreeing to the Amendment and beginning to make reciprocal compensation payments. ACSI is also gravely concerned that - more than a month after bringing this issue to BellSouth's attention - ACSI has still not received a single report for any of its markets as to the local traffic flowing between our respective networks. This breach of Section VI(B) of the Agreement will be aggressively pursued if BellSouth does not immediately begin payment on ACSI's reciprocal compensation bills.

ACSI hereby reiterates its request for the rates stated in the Amendment attached to my November 14 letter based on BellSouth's contractual requirements in Section VI(B). ACSI also reiterates its request for these rates based upon its "Most Favorable Provisions" clause, Section XXII(A) of the Agreement.

In addition, ACSI attaches additional bills for local reciprocal compensation for several months not included in the November 14 bill. Section VI(B) of the Agreement expressly provides that reciprocal compensation is due beginning in the first month in which the traffic differential exceeds 2,000,000 minutes.

Mr. Pat Firlen
BellSouth Telecommunications
Page 2

If BellSouth does not respond to these requests made pursuant to the Agreement, ACSI will pursue appropriate legal remedies to enforce the terms and conditions of the Agreement.

Thank you for your immediate attention to this matter, and I look forward to hearing back from you promptly.

Sincerely,


James C. Falvey
Vice President - Regulatory Affairs

Enclosure

cc: Michael Tanner, Esq.
Stephen M. Klimacek, Esq.
Riley M. Murphy, Esq.
Brad Mutschelknaus, Esq.
Peter Fruin, Esq.
Alicia Freysinger, Esq.
Craig Dowdy, Esq.
Norman Horton, Esq.

BILL NUMBER: 334 BSD-5181 478
INVOICE NUMBER: BSD5181478-97304
BILL DATE: DECEMBER 15, 1997
PAGE: 1

TO: ATTN: ACCESS BILL VERIFICATION GROUP
BELLSOUTH
800 NORTH 19TH STREET
25TH FLOOR
BIRMINGHAM, AL 35203

BILLING INQUIRES CALL (301)483-7622

SWITCHED ACCESS SERVICE

DETAIL OF CURRENT CHARGES

OTHER CHARGES AND CREDITS - SEE DETAIL

LOCAL

0.00

USAGE CHARGES - SEE DETAIL

LOCAL

TOTAL CURRENT CHARGES DUE BY JANUARY 15, 1997

TOTAL AMOUNT DUE

DETAIL OF USAGE CHARGES FOR OFFICE MTGMALGYDS0
USAGE BILLING CYCLE SEPTEMBER 1 THRU SEPTEMBER 30, 1997
LOCAL

<u>RATE CATEGORY</u>	<u>QUANTITY</u>	<u>RATE</u>	<u>MILES</u>	<u>AMOUNT</u>
TERMINATING		\$0.01		

TOTAL FOR LOCAL USAGE FOR OFFICE MTGMALGYDS0

DETAIL OF USAGE CHARGES FOR OFFICE BRHMAJFCDS0
USAGE BILLING CYCLE SEPTEMBER 1 THRU SEPTEMBER 30, 1997
LOCAL

<u>RATE CATEGORY</u>	<u>QUANTITY</u>	<u>RATE</u>	<u>MILES</u>	<u>AMOUNT</u>
TERMINATING		\$0.01		

TOTAL FOR LOCAL USAGE FOR OFFICE BRHMAJFCDS0

DETAIL OF USAGE CHARGES FOR OFFICE MTGMALGYDS0
USAGE BILLING CYCLE AUGUST 1 THRU AUGUST 31, 1997
LOCAL

<u>RATE CATEGORY</u>	<u>QUANTITY</u>	<u>RATE</u>	<u>MILES</u>	<u>AMOUNT</u>
TERMINATING		\$0.01		

TOTAL FOR LOCAL USAGE FOR OFFICE MTGMALGYDS0

BILL NUMBER: 334 BSD-5181 478
INVOICE NUMBER: BSD5181478-87304
BILL DATE: DECEMBER 15, 1997
PAGE: 2

DETAIL OF USAGE CHARGES FOR OFFICE BRHMALFCDS0
USAGE BILLING CYCLE AUGUST 1 THRU AUGUST 31, 1997
LOCAL

<u>RATE CATEGORY</u>	<u>QUANTITY</u>	<u>RATE</u>	<u>MILES</u>	<u>AMOUNT</u>
TERMINATING	[REDACTED]	\$0.01		[REDACTED]
TOTAL FOR LOCAL USAGE FOR OFFICE BRHMALFCDS0				[REDACTED]

DETAIL OF USAGE CHARGES FOR OFFICE MTGMALGYDS0
USAGE BILLING CYCLE JULY 1 THRU JULY 31, 1997
LOCAL

<u>RATE CATEGORY</u>	<u>QUANTITY</u>	<u>RATE</u>	<u>MILES</u>	<u>AMOUNT</u>
TERMINATING	[REDACTED]	\$0.01		[REDACTED]
TOTAL FOR LOCAL USAGE FOR OFFICE MTGMALGYDS0				[REDACTED]

DETAIL OF USAGE CHARGES FOR OFFICE BRHMALFCDS0
USAGE BILLING CYCLE JULY 1 THRU JULY 31, 1997
LOCAL

<u>RATE CATEGORY</u>	<u>QUANTITY</u>	<u>RATE</u>	<u>MILES</u>	<u>AMOUNT</u>
TERMINATING	[REDACTED]	\$0.01		[REDACTED]
TOTAL FOR LOCAL USAGE FOR OFFICE BRHMALFCDS0				[REDACTED]

DETAIL OF USAGE CHARGES FOR OFFICE MTGMALGYDS0
USAGE BILLING CYCLE JUNE 1 THRU JUNE 30, 1997
LOCAL

<u>RATE CATEGORY</u>	<u>QUANTITY</u>	<u>RATE</u>	<u>MILES</u>	<u>AMOUNT</u>
TERMINATING	[REDACTED]	\$0.01		[REDACTED]
TOTAL FOR LOCAL USAGE FOR OFFICE MTGMALGYDS0				[REDACTED]

DETAIL OF USAGE CHARGES FOR OFFICE BRHMALFCDS0
USAGE BILLING CYCLE JUNE 1 THRU JUNE 30, 1997
LOCAL

<u>RATE CATEGORY</u>	<u>QUANTITY</u>	<u>RATE</u>	<u>MILES</u>	<u>AMOUNT</u>
TERMINATING	[REDACTED]	\$0.01		[REDACTED]
TOTAL FOR LOCAL USAGE FOR OFFICE BRHMALFCDS0				[REDACTED]

BILL NUMBER: 706 BSD-6182 438
INVOICE NUMBER: BSD5192438-97304
BILL DATE: DECEMBER 15, 1997
PAGE: 1

TO: ATTN: ACCESS BILL VERIFICATION GROUP
BELLSOUTH
600 NORTH 19TH STREET
25TH FLOOR
BIRMINGHAM, AL 35203

BILLING INQUIRES CALL (301)483-7622

SWITCHED ACCESS SERVICE

DETAIL OF CURRENT CHARGES

OTHER CHARGES AND CREDITS - SEE DETAIL

LOCAL

0.00

USAGE CHARGES - SEE DETAIL

LOCAL

TOTAL CURRENT CHARGES DUE BY JANUARY 15, 1997

TOTAL AMOUNT DUE

DETAIL OF USAGE CHARGES FOR OFFICE CLMBGAEDDS0
USAGE BILLING CYCLE SEPTEMBER 1 THRU SEPTEMBER 30, 1997
LOCAL

<u>RATE CATEGORY</u>	<u>QUANTITY</u>	<u>RATE</u>	<u>MILES</u>	<u>AMOUNT</u>
TERMINATING		\$0.0087		
TOTAL FOR LOCAL USAGE FOR OFFICE CLMBGAEDDS0				

DETAIL OF USAGE CHARGES FOR OFFICE CLMBGAEDDS0
USAGE BILLING CYCLE AUGUST 1 THRU AUGUST 31, 1997
LOCAL

<u>RATE CATEGORY</u>	<u>QUANTITY</u>	<u>RATE</u>	<u>MILES</u>	<u>AMOUNT</u>
TERMINATING		\$0.0087		
TOTAL FOR LOCAL USAGE FOR OFFICE CLMBGAEDDS0				

BILL NUMBER: 504 BSD-5183 490
INVOICE NUMBER: BSD5183490-97304
BILL DATE: DECEMBER 15, 1997
PAGE: 1

TO: ATTN: ACCESS BILL VERIFICATION GROUP
BELLSOUTH
600 NORTH 18TH STREET
25TH FLOOR
BIRMINGHAM, AL 35203

BILLING INQUIRES CALL (301)483-7622

SWITCHED ACCESS SERVICE

DETAIL OF CURRENT CHARGES

OTHER CHARGES AND CREDITS - SEE DETAIL

LOCAL

0.00

USAGE CHARGES - SEE DETAIL

LOCAL

TOTAL CURRENT CHARGES DUE BY JANUARY 15, 1997

TOTAL AMOUNT DUE

DETAIL OF USAGE CHARGES FOR OFFICE NWORLAMODCO
USAGE BILLING CYCLE OCTOBER 1 THRU OCTOBER 31, 1997
LOCAL

<u>RATE CATEGORY</u>	<u>QUANTITY</u>	<u>RATE</u>	<u>MILES</u>	<u>AMOUNT</u>
TERMINATING		\$0.0094		
TOTAL FOR LOCAL USAGE FOR OFFICE NWORLAMODCO				

DETAIL OF USAGE CHARGES FOR OFFICE NWORLAMODCO
USAGE BILLING CYCLE SEPTEMBER 1 THRU SEPTEMBER 30, 1997
LOCAL

<u>RATE CATEGORY</u>	<u>QUANTITY</u>	<u>RATE</u>	<u>MILES</u>	<u>AMOUNT</u>
TERMINATING		\$0.0094		
TOTAL FOR LOCAL USAGE FOR OFFICE NWORLAMODCO				

BILL NUMBER: 334 BSD-5181 478
INVOICE NUMBER: BSD5181478-97349
BILL DATE: DECEMBER 15, 1997
PAGE: 1

TO: ATTN: ACCESS BILL VERIFICATION GROUP
BELLSOUTH
600 NORTH 19TH STREET
25TH FLOOR
BIRMINGHAM, AL 35203

BILLING INQUIRES CALL (301)483-7622

SWITCHED ACCESS SERVICE

DETAIL OF CURRENT CHARGES

OTHER CHARGES AND CREDITS - SEE DETAIL

LOCAL

0.00

USAGE CHARGES - SEE DETAIL

LOCAL

TOTAL CURRENT CHARGES DUE BY JANUARY 15, 1997

TOTAL AMOUNT DUE

DETAIL OF USAGE CHARGES FOR OFFICE MTGMALGYDS0
USAGE BILLING CYCLE NOVEMBER 1 THRU NOVEMBER 30, 1997
LOCAL

<u>RATE CATEGORY</u>	<u>QUANTITY</u>	<u>RATE</u>	<u>MILES</u>	<u>AMOUNT</u>
TERMINATING		\$0.01		

TOTAL FOR LOCAL USAGE FOR OFFICE MTGMALGYDS0

DETAIL OF USAGE CHARGES FOR OFFICE BRHMALFCDS0
USAGE BILLING CYCLE NOVEMBER 1 THRU NOVEMBER 30, 1997
LOCAL

<u>RATE CATEGORY</u>	<u>QUANTITY</u>	<u>RATE</u>	<u>MILES</u>	<u>AMOUNT</u>
TERMINATING		\$0.01		

TOTAL FOR LOCAL USAGE FOR OFFICE BRHMALFCDS0

DETAIL OF USAGE CHARGES FOR OFFICE CLMBGAEDS0
USAGE BILLING CYCLE NOVEMBER 1 THRU NOVEMBER 30, 1997
LOCAL

<u>RATE CATEGORY</u>	<u>QUANTITY</u>	<u>RATE</u>	<u>MILES</u>	<u>AMOUNT</u>
TERMINATING		\$0.0087		

TOTAL FOR LOCAL USAGE FOR OFFICE CLMBGAEDS0

BILL NUMBER: 334 BSD-5181 478
INVOICE NUMBER: BSD5181478-97349
BILL DATE: DECEMBER 15, 1997
PAGE: 2

DETAIL OF USAGE CHARGES FOR OFFICE NWORLAMODC0
USAGE BILLING CYCLE NOVEMBER 1 THRU NOVEMBER 30, 1997
LOCAL

<u>RATE CATEGORY</u>	<u>QUANTITY</u>	<u>RATE</u>	<u>MILES</u>	<u>AMOUNT</u>
TERMINATING	[REDACTED]	\$0.02		[REDACTED]
TOTAL FOR LOCAL USAGE FOR OFFICE NWORLAMODC0				[REDACTED]

EXHIBIT No. ____ (JCF-5)

© **BELLSOUTH**

BellSouth Telecommunications, Inc.
Room 34531 BellSouth Center
675 West Peachtree Street, N.E.
Atlanta, Georgia 30375

January 8, 1998

Mr. James C. Falvey
American Communications Services, Inc.
Suite 100
131 National Business Parkway
Annapolis Junction, Maryland 20701

Dear Mr. Falvey,

This is in response to your proposed amendment to the Interconnection Agreement, and the billing of BellSouth for terminating local traffic on American Communications Services, Inc. (ACSI) network.

Section VI. Paragraph C. of the Interconnection Agreement provides that "the Parties agree that there will be no cash compensation exchanged by the parties during the term of this Agreement *unless the difference in minutes of use for terminating local traffic exceeds 2 million minutes per state on a monthly basis.*" (Emphasis added) Negotiation of a rate for terminating local traffic is to commence once the difference in terminating local traffic exceeds the 2 million threshold. The issue is what is being classified as terminating local traffic.

By letter dated August 12, 1997, BellSouth advised the Competitive Local Exchange Carrier industry that it considers ISP traffic to be jurisdictionally interstate interexchange, not local, and thus BellSouth will not pay reciprocal compensation for this traffic. Moreover, the ACSI-BellSouth Interconnection Agreement defines a local call as one where the dialer does not have to enter an "access code or experience delay in processing a call" (Section VI. Paragraph A and Section V. Paragraph A1). With ISP traffic, an access code (password) is invariably required to access the ISP network.

BellSouth agrees with ACSI that it was to track usage between the parties and to provide ACSI with copies of such usage reports, and that it has failed to provide these reports. Because of the absence of such reports BellSouth agrees to use ACSI's usage reports for determining the local traffic differentials.

Mr. James C. Falvey
American Communications Services, Inc.
Page 2

However, during our meeting in November, you indicated that ACSI used combined trunks for its traffic. In order to ensure the 2 million minute threshold has been reached, BellSouth would like to audit the process used by ACSI to jurisdictionalize its traffic between local and interexchange on these combined trunks. Obviously, to the extent ACSI is categorizing ISP traffic as local traffic, BellSouth's position is that it should not be counted toward the 2 million minute threshold. Until such time as BellSouth is assured the 2 million minute threshold does not contain interexchange usage, and a mutually agreed upon compensation rate has been determined, BellSouth will not pay the bills rendered by ACSI for reciprocal compensation of terminating local traffic.

In the event BellSouth determines, as a result of the audit, that the 2 million minute threshold has been reached, BellSouth's proposed rate for terminating local traffic would be \$0.002. This is the same rate called for in your Interconnection Agreement for transit traffic (Section VI. Paragraph D). This rate is also used in numerous other CLEC agreements. BellSouth proposes to pay this rate on a going-forward basis only.

We look forward to your response.

Sincerely,



Pat Finlen
Manager-Interconnection Services

cc: Jerry Hendrix, Director-Interconnection Services
Stephen M. Klimacek, Senior Attorney - Legal

ACSI

American Communications Services, Inc.

March 17, 1998

131 National Business Parkway, Suite 100
Annapolis Junction, Maryland 20701
TEL: 301.617.4200 FAX: 301.617.4279
www.acsi.net

Mr. Pat Finlen
Manager - Interconnection Services
BellSouth Telecommunications
675 W. Peachtree Street
Room 34S91
Atlanta, Georgia 30375

Dear Pat:

I am writing to provide the bill for January reciprocal compensation and to dispute statements in your letter of January 8, 1998.

I will not take the time here to dispute the definition of local traffic. Thirteen state commissions and the FCC support ACSI's definition; no commission supports BellSouth's. If ACSI does not change its position as to the definition of local traffic, ACSI will be filing its first of several complaints on this issue shortly.

I must take issue with your statement that "during our meeting in November, you [I] indicated that ACSI used combined trunks for its traffic." At our meeting, I specifically indicated that I could not speak to such issues at that time but would provide additional information at the appropriate time. Although ACSI has established a sound process to distinguish local traffic, an audit of ACSI's process would be premature until such time as BellSouth concedes that it owes ACSI for all local traffic. Given BellSouth's admitted failure to report local minutes, ACSI reserves the right to object to the extent and nature of such an audit.

In your letter of January 8, you failed to respond to ACSI's repeated request for the rates in ACSI's proposed Amendment attached to my letter dated November 14, 1997. These are rates established by BellSouth with other carriers in each state. Moreover, your proposed rate of \$0.002 ignores ACSI's repeated Most Favorable Provisions request pursuant to Section XXII(A) of ACSI's Interconnection Agreement. BellSouth's failure to recognize this repeated request represents an additional breach of ACSI's Interconnection Agreement.

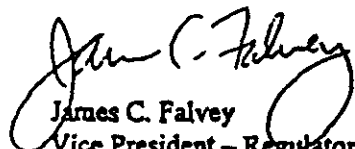
Again, ACSI applies these rates to the differential of local minutes, beginning with the month in which BellSouth exceeded the 2 million minute differential threshold in each state. ACSI takes strong exception to BellSouth's suggestion that it will "pay this rate on a going-forward basis only," as the Interconnection Agreement plainly applies the rate beginning with the month in which the 2 million minute differential is reached.

Mr. Pat Finlen
BellSouth Telecommunications
Page 2

Finally, the definition of "Local Traffic" is contained in Attachment B, Paragraph 118 of the Interconnection Agreement. Your attempt to rely upon other sections of the Agreement represents a deliberate misinterpretation of those sections in order to circumvent the plain language of ACSI's contract.

If BellSouth does not begin paying the attached and previous bills, ACSI will take legal action, including demand for interest, attorneys fees, and penalties, as applicable. Thank you for your continuing attention to this matter.

Sincerely,


James C. Falvey
Vice President - Regulatory Affairs

Enclosure

cc: Michael Tanner, Esq.
Riley M. Murphy, Esq.
Peter Fruin, Esq.
Craig Dowdy, Esq.
John Selent, Esq.

Stephen M. Klimacek, Esq.
Brad Mutschelknaus, Esq.
Alicia Freysinger, Esq.
Norman Horton, Esq.

BILL NUMBER: 334 BSD-5181 478
 INVOICE NUMBER: BSD5181478-98070
 BILL DATE: MARCH 11, 1998
 PAGE: 1

TO: ATTN: ACCESS BILL VERIFICATION GROUP
 BELLSOUTH
 600 NORTH 19TH STREET
 25TH FLOOR
 BIRMINGHAM, AL 35203

BILLING INQUIRES CALL (301)483-7622

SWITCHED ACCESS SERVICE

DETAIL OF CURRENT CHARGES

OTHER CHARGES AND CREDITS - SEE DETAIL
 LOCAL 0.00
 USAGE CHARGES - SEE DETAIL
 LOCAL [REDACTED]
 TOTAL CURRENT CHARGES DUE BY APRIL 15, 1998 [REDACTED]
TOTAL AMOUNT DUE [REDACTED]

DETAIL OF USAGE CHARGES FOR OFFICE MTGMALGYDS0
 USAGE BILLING CYCLE JANUARY 1 THRU JANUARY 31, 1998
 LOCAL

<u>RATE CATEGORY</u>	<u>QUANTITY</u>	<u>RATE</u>	<u>MILES</u>	<u>AMOUNT</u>
TERMINATING	[REDACTED]	\$0.01		[REDACTED]
TOTAL FOR LOCAL USAGE FOR OFFICE MTGMALGYDS0				[REDACTED]

DETAIL OF USAGE CHARGES FOR OFFICE BRHMALFCDS0
 USAGE BILLING CYCLE JANUARY 1 THRU JANUARY 31, 1998
 LOCAL

<u>RATE CATEGORY</u>	<u>QUANTITY</u>	<u>RATE</u>	<u>MILES</u>	<u>AMOUNT</u>
TERMINATING	[REDACTED]	\$0.01		[REDACTED]
TOTAL FOR LOCAL USAGE FOR OFFICE BRHMALFCDS0				[REDACTED]

DETAIL OF USAGE CHARGES FOR OFFICE CLMBGAEDDS0
 USAGE BILLING CYCLE JANUARY 1 THRU JANUARY 31, 1998
 LOCAL

<u>RATE CATEGORY</u>	<u>QUANTITY</u>	<u>RATE</u>	<u>MILES</u>	<u>AMOUNT</u>
TERMINATING	[REDACTED]	\$0.0087		[REDACTED]
TOTAL FOR LOCAL USAGE FOR OFFICE CLMBGAEDDS0				[REDACTED]

BILL NUMBER: 334 BSD-5181 478
INVOICE NUMBER: BSD5181478-98070
BILL DATE: MARCH 11, 1998
PAGE: 2

DETAIL OF USAGE CHARGES FOR OFFICE NWORLAMODC0
USAGE BILLING CYCLE JANUARY 1 THRU JANUARY 31, 1998
LOCAL

<u>RATE CATEGORY</u>	<u>QUANTITY</u>	<u>RATE</u>	<u>MILES</u>	<u>AMOUNT</u>
TERMINATING	[REDACTED]	\$0.02		[REDACTED]
TOTAL FOR LOCAL USAGE FOR OFFICE NWORLAMODC0				[REDACTED]

DETAIL OF USAGE CHARGES FOR OFFICE LSVLKY27DS0
USAGE BILLING CYCLE JANUARY 1 THRU JANUARY 31, 1998
LOCAL

<u>RATE CATEGORY</u>	<u>QUANTITY</u>	<u>RATE</u>	<u>MILES</u>	<u>AMOUNT</u>
TERMINATING	[REDACTED]	\$0.08		[REDACTED]
TOTAL FOR LOCAL USAGE FOR OFFICE LSVLKY27DS0				[REDACTED]

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of WorldCom Technologies, Inc. against BellSouth Telecommunications, Inc. for breach of terms of Florida Partial Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996, and request for relief.

DOCKET NO. 971478-TP
ORDER NO. PSC-98-1216-FOF-TP
ISSUED: September 15, 1998

Complaint of Teleport Communications Group Inc./TCG South Florida against BellSouth Telecommunications, Inc. for breach of terms of interconnection agreement under Section 252 of the Telecommunications Act of 1996, and request for relief.

DOCKET NO. 980184-TP

Complaint of Intermedia Communications, Inc. against BellSouth Telecommunications, Inc. for breach of terms of Florida Partial Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 and request for relief.

DOCKET NO. 980495-TP

Complaint by MCI Metro Access Transmission Services, Inc. against BellSouth Telecommunications, Inc. for breach of approved interconnection agreement by failure to pay compensation for certain local traffic.

DOCKET NO. 980499-TP

The following Commissioners participated in the disposition of this matter: -

JULIA L. JOHNSON, Chairman

ORDER NO. PSC-98-1216-FOF-TP
DOCKET NOS. 971478-TP, 980184-TP, 980495-TP, 980499-TP
PAGE 2

J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA
E. LEON JACOBS, JR.

FINAL ORDER RESOLVING COMPLAINTS

APPEARANCES:

Floyd R. Self, Messer, Caparello & Self, P.A., 215 South
Monroe Street, Post Office Box 1876, Tallahassee, FL
32302-1876.

On behalf of Worldcom Technologies, Inc.

Kenneth A. Hoffman and John R. Ellis, Rutledge, Ecenia,
Underwood, Purnell and Hoffman, P.A., Post Office Box
551, Tallahassee, FL 32302-0551.

On behalf of Teleport Communications Group, Inc./TCG
South Florida.

Donna Canzano and Patrick Knight Wiggins, Wiggins &
Villacorta, P.A., 2145 Delta Boulevard, Suite 200,
Tallahassee, FL 32303.

On behalf of Intermedia Communications, Inc.

Thomas K. Bond, 780 Johnson Ferry Road, Suite 700,
Atlanta, GA 30342.

On behalf of MCI Telecommunications Corporation

Ed Rankin, 675 West Peachtree Street, Suite 4300,
Atlanta, Georgia 30375-0001.

On behalf of BellSouth Telecommunications, Inc.

Charles J. Pellegrini, Florida Public Service Commission,
Division of Legal Services, 2540 Shumard Oak Boulevard,
Tallahassee, FL 32399-0850.

On behalf of the Commission Staff.

CASE BACKGROUND

ORDER NO. PSC-98-1216-FOF-TP
DOCKET NOS. 971478-TP, 980184-TP, 980495-TP, 980499-TP
PAGE 3

MFS Communications Company, Inc. (MFS), and BellSouth Telecommunications, Inc. (BellSouth), entered into a Partial Florida Interconnection Agreement pursuant to the Telecommunications Act of 1996 (Act) on August 26, 1996. The Commission approved the Agreement in Order No. PSC-96-1508-FOF-TP, issued December 12, 1996, in Docket No. 961053-TP. The Commission approved an amendment to the Agreement in Order No. PSC-97-0772-FOF-TP, issued July 1, 1997, in Docket No. 970315-TP. On November 12, 1997, WorldCom Technologies, Inc. (WorldCom), filed a Complaint Against BellSouth and Request for Relief, alleging that BellSouth has failed to pay reciprocal compensation for local telephone exchange service traffic transported and terminated by WorldCom's affiliate, MFS, to Internet Service Providers (ISPs). The complaint was assigned Docket No. 971478-TP. BellSouth filed its Answer and Response on December 22, 1997. In Order No. PSC-98-0454-PCO-TP, issued March 31, 1998, the Commission directed that the matter be set for hearing.

Teleport Communications Group, Inc./TCG South Florida (TCG), and BellSouth entered into an Interconnection Agreement pursuant to the Act on July 15, 1996. The Commission approved the Agreement in Order No. PSC-96-1313-FOF-TP, issued October 29, 1996, in Docket No. 960862-TP. On February 4, 1998, TCG filed a Complaint for Enforcement of Section IV.C of its Interconnection Agreement with BellSouth, also alleging that BellSouth has failed to pay reciprocal compensation for local telephone exchange service traffic transported and terminated by TCG to ISPs. The complaint was assigned Docket No. 980184-TP. BellSouth filed its Answer and Response on February 25, 1998.

MCImetro Access Transmission Services, Inc. (MCIm), and BellSouth entered into an Interconnection Agreement pursuant to the Act on April 4, 1997. The Commission approved the Agreement in Order Nos. PSC-97-0723-FOF-TP, issued June 19, 1997, and PSC-97-0723A-FOF-TP, issued June 26, 1997, in Docket No. 960846-TP. On February 23, 1998, MCIm filed a Complaint against BellSouth, which was assigned Docket No. 980281-TP. Among other things, MCIm also alleged in Count 13 that BellSouth has failed to pay reciprocal compensation for local telephone exchange service traffic transported and terminated by MCIm to ISPs. On April 6, 1998, MCIm filed a separate Complaint embodying the complaint set forth in Count 13 of the first Complaint. The separate complaint was assigned Docket No. 980499-TP.

Intermedia Communications, Inc. (Intermedia), and BellSouth entered into an interconnection Agreement pursuant to the Act on July 1, 1996. The Commission approved the Agreement in Order No. PSC-96-1236-FOF-TP, issued October 7, 1996, in Docket No. 960769-TP. The Commission approved an amended Agreement in Order No. PSC-97-1617-FOF-TP, issued December 30, 1997, in Docket No. 971230-TP.

ORDER NO. PSC-98-1216-FOF-TP
DOCKET NOS. 971478-TP, 980184-TP, 980495-TP, 980499-TP
PAGE 4

On April 6, 1998, Intermedia filed a Complaint against BellSouth alleging that BellSouth has failed to pay reciprocal compensation for local telephone exchange service traffic transported and terminated by Intermedia to ISPs. That complaint was assigned Docket No. 980495-TP.

On March 9, 1998, GTE Florida Incorporated (GTEFL) filed a petition to intervene in this proceeding. By Order No. PSC-98-0476-PCO-TP, we denied GTEFL's petition. Subsequently, on May 6, 1998, GTEFL filed a petition to be permitted to file a brief. We denied that petition at the commencement of the hearing in these complaint dockets.

By Order No. PSC-98-0561-PCO-TP, issued April 21, 1998, the four complaints were consolidated for hearing purposes. The hearing was held on June 11, 1998.

DECISION

This case is about BellSouth's refusal to pay reciprocal compensation for the transport and termination of ISP traffic under the terms of its interconnection agreements with WorldCom, Teleport, Intermedia, and MCI. In a letter dated August 12, 1997, BellSouth notified the complainants that it would not pay compensation for the termination of ISP traffic, because "ISP traffic is jurisdictionally interstate" and "enjoys a unique status, especially [as to] call termination." The case is primarily a contract dispute between the parties, and that is the foundation of our decision below. As TCG stated in its brief, "This is a contract dispute in which the Commission must decide whose meaning is to be given to the term 'Local Traffic' in the Agreement."

Accordingly, in this decision we only address the issue of whether ISP traffic should be treated as local or interstate for purposes of reciprocal compensation as necessary to show what the parties might reasonably have intended at the time they entered into their contracts. Our decision does not address any generic questions about the ultimate nature of ISP traffic for reciprocal compensation purposes, or for any other purposes.

While there are four complainants in the consolidated case, their arguments contain many common threads. Also, BellSouth's position on each issue is the same, and its brief addresses all four together. For the sake of efficiency, we will address the main themes in our discussion of the WorldCom-BellSouth agreement. We will address the particular language of the other agreements separately.

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DOCKET NOS. 971478-TP, 980184-TP, 980495-TP, 980499-TP
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The WorldCom-BellSouth Agreement

On August 26, 1996, MFS (now WorldCom) and BellSouth entered into a Partial Interconnection Agreement, which we approved in Order No. PSC-96-1508-FOF-TP. WorldCom witness Ball testified on the pertinent provisions of that Agreement. Section 1.40 of the Agreement defines local traffic as:

[C]alls between two or more Telephone Exchange service users where both Telephone Exchange Services bear NPA-NXX designations associated with the same local calling area of the incumbent LEC or other authorized area [such as EAS]. Local traffic includes traffic types that have been traditionally referred to as "local calling" and as "extended area service (EAS)." All other traffic that originates and terminates between end users within the LATA is toll traffic. In no event shall the Local Traffic area for purposes of local call termination billing between the parties be decreased.

Section 5.8.1 provides that:

Reciprocal Compensation applies for transport and termination of Local Traffic (including EAS and EAS-like traffic) billable by BellSouth or MFS which a Telephone Exchange Service Customer originates on BellSouth's or MFS's network for termination on the other Party's network.

The question presented for decision is, as it is in the other complaints, whether, under the WorldCom - BellSouth Florida Partial Interconnection Agreement, the parties are required to compensate each other for transport and termination of traffic to Internet Service Providers; and if they are, what relief should the Commission grant? The issue is whether the traffic in question, ISP traffic, is local for purposes of the agreements in question.

According to witness Ball, the language of the WorldCom-BellSouth Agreement itself makes it clear that the parties owe each other reciprocal compensation for the traffic in question. He stated that "if a BellSouth customer utilizes a BellSouth telephone exchange service that has a local NPA-NXX and they call a WorldCom customer that buys a WorldCom telephone exchange service that has a WorldCom NPA-NXX, that's local traffic." Witness Ball explained that this is what happens when a BellSouth local customer calls a WorldCom customer that happens to be an ISP. He pointed out that

ORDER NO. PSC-98-1216-FOF-TP
DOCKET NOS. 971478-TP, 980184-TP, 980495-TP, 980499-TP
PAGE 6

there is no exclusion for any type of customer based on what business the customer happens to be in. Witness Ball noted that where exceptions were needed for certain types of traffic, they were expressly included in the Agreement. He argued that WorldCom understood ISP traffic to be local, and if BellSouth wanted to exclude ISP calls, it was BellSouth's obligation to raise the issue at the time the Agreement was negotiated.

Witness Ball stated that "the Agreement is entirely clear and unambiguous" on the treatment of ISP traffic as local; but if we determine that the Agreement is ambiguous on this point, the ambiguities should be resolved by considering:

- (1) the express language of the Telecommunications Act of 1996;
- (2) relevant rulings, decisions and orders of this Commission;
- (3) relevant rulings, decisions and orders of the FCC interpreting the Act;
- (4) rulings, decisions and orders from other, similarly situated state regulatory agencies; and
- (5) the custom and usage in the industry.

BellSouth witness Hendrix agreed that the contract did not specify whether ISP traffic was included in the definition of local traffic. Witness Hendrix argued, however, that it was WorldCom's obligation to raise the issue in the negotiations. In fact, the record shows that while BellSouth and the complainants all reached a specific agreement on the definition of local traffic to be included in the contracts, none of them raised the particular question of what to do with ISP traffic.

According to BellSouth, all the complainants assumed that BellSouth agreed to include ISP traffic as local. BellSouth asserts that it cannot be forced to pay reciprocal compensation just because it did not "affirmatively except ISP traffic from the definition of 'local traffic'" in negotiating the Agreement. BellSouth argues that the existing law at the time the contracts were negotiated "reflects that it was unreasonable for the Complainants to blithely assume that BellSouth agreed with their proposed treatment of ISP traffic."

It appears to us from our review of the record, however, that BellSouth equally assumed, and implied in its brief and testimony at the hearing, that the complainants in fact knew ISP traffic was

ORDER NO. PSC-98-1216-FOF-TP
DOCKET NOS. 971478-TP, 980184-TP, 980495-TP, 980499-TP
PAGE 7

interstate in nature. In its brief, BellSouth states that "parties to a contract are presumed to enter into their Agreement with full knowledge of the state of the existing law, which in turn is incorporated into and sheds light on the meaning of the parties' Agreement." BellSouth witness Hendrix asserted that the FCC had explicitly found that ISPs provide interstate services. Therefore, witness Hendrix argued, there was no need for BellSouth to believe ISP traffic would be subject to reciprocal compensation. The result of this misunderstanding, BellSouth asserts, was that the parties never had an express meeting of the minds on the scope of the definition of local traffic.

Discussion

Upon review of the language of the agreement, and the evidence and testimony presented at the hearing, we find that the Agreement defines local traffic in such a way that ISP traffic clearly fits the definition. Since ISP traffic is local under the terms of the Agreement, then, a priori, reciprocal compensation for termination is required under Section 5.8 of the Agreement. There is no ambiguity, and there are no specific exceptions for ISP traffic. Since there is no ambiguity in the language of the agreement, we need not consider any other evidence to determine the parties' obligations under the agreement. Even if there were an ambiguity in the language of the agreement, however, the other evidence and argument presented at the hearing leads to the same result: the parties intended to include ISP traffic as local traffic for purposes of reciprocal compensation under their agreement.

Local vs. Interstate Traffic

The first area to explore is the parties' basis for considering ISP traffic to be jurisdictionally local or interstate. BellSouth witness Hendrix contended that for reciprocal compensation to apply, "traffic must be jurisdictionally local." He argued that ISP traffic is not jurisdictionally local, because the FCC "has concluded that enhanced service providers, of which ISPs are a subset, use the local network to provide interstate services." He added that they do so just as facilities-based interexchange carriers and resellers use the local network to provide interstate services. He stated that "[t]he FCC stated in Paragraph 12 in an order dated February 14, 1992, in Docket Number 92-18, that:

Our jurisdiction does not end at the local switch, but continues to the ultimate termination of the call. The key to jurisdiction is the nature of the communication itself, rather than the physical location of the technology.

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Further, according to Witness Hendrix, in its April 10, 1998, Report to Congress (CC Docket No. 96-45), "the FCC indicated that it does have jurisdiction to address whether ALECs that serve ISPs are entitled to reciprocal compensation." We will discuss that report in more detail below.

BellSouth does acknowledge in its brief that the "FCC has not held that ISP traffic is local traffic for purposes of the instant dispute before the Commission." Nor has the FCC "held that ISPs are end users for all regulatory purposes." We agree with this assessment. The FCC has not yet decided whether ISP traffic is subject to reciprocal compensation. While the FCC has determined that ISPs provide interstate services, it appears that the FCC may consider these services severable from telecommunications services, as we explain below. No FCC order delineates exactly for what purposes the FCC intends ISP traffic to be considered local. By the same token, the FCC has not said that ISP traffic cannot be considered local for all regulatory purposes. It appears that the FCC has largely been silent on the issue. This leads us to believe the FCC intended for the states to exercise jurisdiction over the local service aspects of ISP traffic, unless and until the FCC decided otherwise. Even Witness Hendrix agreed that the FCC intended ISP traffic to be treated as though local. He did not expound on what exactly that meant.

BellSouth contends in its brief that there is no dispute that an Internet transmission may simultaneously be interstate, international and intrastate. BellSouth also contends that the issue should be resolved in pending proceedings before the FCC. Those proceedings include one the FCC initiated in response to a June 29, 1997, letter from the Association for Local Telecommunications Services (ALTS). ALTS requested clarification from the FCC that ISP traffic is within the FCC's exclusive jurisdiction. ALTS has also asked the FCC for a ruling on the treatment of ISP traffic as local.

Regardless of what the FCC ultimately decides, it has not decided anything yet, and we are concerned here with an existing interconnection agreement, executed by the parties in 1996. Our finding that ISP traffic should be treated as local for purposes of the subject interconnection agreement is consistent with the FCC's treatment of ISP traffic at the time the agreement was executed, all pending jurisdictional issues aside.

Termination

In its brief, BellSouth places considerable emphasis on the point of termination for a call. The basic question is whether or not ISP traffic terminates at the ALEC premises. Witness Hendrix testified that "call termination does not occur when an ALEC,

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serving as a conduit, places itself between BellSouth and an ISP." "[I]f an ALEC puts itself in between BellSouth's end office and the Internet service provider, it is acting like an intermediate transport carrier or conduit, not a local exchange provider entitled to reciprocal compensation." "Thus, the call from an end user to the ISP only transits through the ISP's local point of presence; it does not terminate there. There is no interruption of the continuous transmission of signals between the end user and the host computers." BellSouth states in its brief that "the jurisdictional boundaries of a communication are determined by its beginning and ending points, and the ending point of a call to an ISP is not the ISP switch, but rather is the database or information source to which the ISP provides access."

MCIm contends in its brief that BellSouth witness Hendrix' testimony that a call to an ISP terminates not at the local telephone number, but rather at a distant Internet host misunderstands the nature of an Internet call. MCIm witness Martinez contended that the ability of Internet users to visit multiple websites at any number of destinations on a single call is a clear indication that the service provided by an ISP is enhanced service, not telecommunications service. According to MCIm, this does not alter the nature of the local call. While BellSouth would have one believe that the call involved is not a local call, MCIm points out that in the case of a rural customer using an IXC to connect with an ISP, the call "is suddenly two parts again: a long distance call, for which BellSouth can charge access, followed by an enhanced service."

BellSouth argues in its brief that "in interpreting the language of a contract, words referring to a particular trade will be interpreted by the courts according to their widely accepted trade meaning." We agree, but it appears to us that BellSouth then chooses to ignore the industry standard definition of the word "termination." The other parties provided several examples of industry definitions on this point.

WorldCom witness Ball stated that "[s]tandard industry practice is that a call is terminated essentially when it's answered; when the customer that is buying the telephone exchange service that has the NPA-NXX answers the call by--whether it's a voice grade phone, if it's a fax machine, an answering machine or, in the case of an ISP, a modem."

TCG witness Kouroupas testified that the standard industry definition of "service termination point" is:

Proceeding from a network toward a user terminal, the last point of service rendered by a commercial carrier under applicable

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tariffs.... In a switched communications system, the point at which common carrier service ends and user-provided service begins, i.e. the interface point between the communications systems equipment and the user terminal equipment, under applicable tariffs.

Witness Kouroupas further explained that "A call placed over the public switched telecommunications network is considered 'terminated' when it is delivered to the telephone exchange bearing the called telephone number." Call termination occurs when a connection is established between the caller and the telephone exchange service to which the dialed telephone number is assigned, answer supervision is returned, and a call record is generated. This is the case whether the call is received by a voice grade phone, a fax machine, an answering machine, or in the case of an ISP, a modem. Witness Kouroupas contended that this is a widely accepted industry definition.

MCIm argues in its brief that:

a "telephone call" placed over the public switched telephone network is "terminated" when it is delivered to the telephone exchange service premise bearing the called telephone number... specifically, in its Local Competition Order (Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, FCC 96-325 (rel. Aug. 8, 1996), ¶1040), the FCC defined terminations "for purposes of section 251(b)(5), as the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises." MCIm terminates telephone calls to Internet Service Providers on its network. As a communications service, a call is completed at that point, regardless of the identity or status of the called party.

Witness Martinez testified that "[w]hen a BellSouth customer originates a telephone call by dialing that number, the telephone call terminates at the ISP premises, just as any other telephone call terminates when it reaches the premises with the phone number that the end user dialed."

Severability

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Recent FCC documents have described Internet traffic as calls with two severable parts: a telecommunications service part, and an enhanced service part. In the May 1997 Universal Service Order at ¶789, the FCC stated:

When a subscriber obtains a connection to an Internet service provider via voice grade access to the public switched network, that connection is a telecommunications service and is distinguishable from the Internet service provider's offering.

In that Report, the FCC also stated that ISPs "generally do not provide telecommunications." (¶ 15, 55) WorldCom argues in its brief that:

The FCC's determination that ISPs do not provide telecommunications was mandated by the 1996 Act's express distinction between telecommunications and information services. "Telecommunications" is "The transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. Section 153(48). By contrast, "information services" is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. Sec. 153(20)

WorldCom adds that:

[t]he FCC recognized that the 1996 Act's distinction between telecommunications and information services is crucial. The FCC noted that "Congress intended 'telecommunications service' and 'information service' to refer to separate categories of services" despite the appearance from the end user's perspective that it is a single service because it may involve telecommunications components. (Report to Congress, ¶156, 58) [Emphasis supplied by WorldCom]

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BellSouth argues that the complainants misinterpret the FCC's decision. BellSouth points out that this passage is only discussing whether or not ISPs should make universal service contributions. That is true; but the passage is nevertheless as significant an indication of how the FCC may view ISP traffic as the passages BellSouth has cited.

In its brief, BellSouth claims that the FCC "specifically repudiated" the two-part theory. BellSouth cites the FCC's Report to Congress, CC Docket No., 96-45, April 10, 1998, ¶220. There the FCC stated:

We make no determination here on the question of whether competitive LECs that serve Internet service providers (or Internet service providers that have voluntarily become competitive LECs) are entitled to reciprocal compensation for terminating Internet traffic. That issue, which is now before the [FCC], does not turn on the status of the Internet service provider as a telecommunications carrier or information service provider.
[emphasis supplied by BellSouth]

BellSouth claims that this means the FCC believes the distinction is "meaningless in the context of the FCC's pending reciprocal compensation decision." The other parties point out, however, that it is not at all clear what the FCC means in this passage. It appears to us that the FCC is talking here about the status of the provider, not about the severability of the telecommunications service from the information service. Indeed, in the same report, the FCC brought up the severability notion, as discussed above.

BellSouth also argues that the severability theory is contradicted by the FCC's description of Internet service in its Non-Accounting Safeguards Order (Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-149 (released Dec. 24, 1996), note 291), where the FCC states:

The Internet is an interconnected global network of thousands of interoperable packet-switched networks that use a standard protocol...to enable information exchange. An end user may obtain access to the Internet from an Internet service provider, by using dial-up or dedicated access to connect to the Internet service provider's processor. The

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Internet service provider, in turn, connects the end user to an Internet backbone provider that carries traffic to and from other Internet host sites.

BellSouth claims that the significance of this is that calls to ISPs only transit through the ISP's local point of presence. Thus, the call does not terminate there. In support of this conclusion, BellSouth mentions several other services, such as Asynchronous Transfer Mode (ATM) technology, that use packet switching. BellSouth makes the point that the jurisdictional nature of a call is not changed through the conversion from circuit switching to packet switching.

BellSouth also discussed an example where an end user made a long-distance call to access voice mail. In that case the call was an interstate call, and the FCC found that it did not lose that interstate character upon being forwarded to voice mail. Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation, 7 FCC Rcd 1619 (1992), aff'd, Georgia Public Service Commission v. FCC, 5 F.3d 1499 (11th Cir. 1993). We do not comprehend BellSouth's point. By that logic, if a local call is used to access an information service, it follows that the entire transmission would be local. In yet another case cited by BellSouth, the FCC found that interstate foreign exchange service was interstate service, and thus came under the FCC's jurisdiction. New York Telephone Co. -- Exchange System Access Line Terminal Charge for FX and CCSA Service, Memorandum Opinion and Order, 76 FCC 2d 349 (1980). Once again, it is difficult to discern BellSouth's point. We do not find this line of argument at all persuasive.

BellSouth further argues that "[t]he FCC has long held that the jurisdiction of a call is determined not by the physical location of the communications facilities or the type of facilities used, but by the nature of the traffic that flows over those facilities." This, too, is a perplexing argument in light of BellSouth's claims that the distant location of the host accessed over the Internet makes ISP traffic interstate, and that the nature of ISP traffic as either telecommunications or information service is irrelevant.

As mentioned above, witness Hendrix did admit that "the FCC intended for ISP traffic to be 'treated' as local, regardless of jurisdiction." He emphasized the word treated, and explained that the FCC "did not say that the traffic was local but that the traffic would be treated as local."

FRSC Treatment

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BellSouth dismisses Commission Order No. 21815, issued September 5, 1989, in Docket No. 880423-TP, Investigation into the Statewide Offering of Access to the Local Network for the Purpose of Providing Information Services, as an interim order. In that order, the Commission found that end user access to information service providers, which include Internet service providers, is by local service. In the proceeding, BellSouth's own witness testified that:

[C]onnections to the local exchange network for the purpose of providing an information service should be treated like any other local exchange service. (Order 21815, p. 25)

The Commission agreed with BellSouth's witness. The Commission also found that calls to ISPs should be viewed as jurisdictionally intrastate local exchange calls terminating at an ISP's location in Florida. BellSouth's position, as stated in the Order, was that:

calls should continue to be viewed as local exchange traffic terminating at the ESP's [Enhanced Service Provider's] location. Connectivity to a point out of state through an ESP should not contaminate the local exchange. (Order, p. 24) (ISPs are a subset of ESPs.)

In this case, Witness Hendrix claimed that Order 21815 was only an interim order that has now been overruled. He could not identify any Commission order establishing a different policy; nor could he specify the FCC order that supposedly overrules the Florida Commission order. Further, and most importantly, BellSouth admitted that this definition had not been changed at the time it entered into its Agreements.

It is clear that the treatment of ISP traffic was an issue long before the parties' Agreement was executed. We found, in Order No. 21815, as discussed above, that such traffic should be treated as local. Both WorldCom and BellSouth clearly were aware of this decision, and we presume that they considered it when they entered into their Agreement.

Intent of Parties

In determining what was the parties' intent when they executed their contract, we may consider circumstances that existed at the time the contract was entered into, and the subsequent actions of the parties. As WorldCom argues in its brief, "the intent of the parties is revealed not just by what is said, but by an analysis of all the facts and circumstances surrounding the disputed issue."

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In James v. Gulf Life Insur. Co., 66 So.2d 62, 63 (Fla. 1953) the Florida Supreme Court cited with favor Contracts, 12 Am.Jur. § 250, pages 791-93, as a general proposition concerning contract construction in pertinent part as follows:

Agreements must receive a reasonable interpretation, according to the intention of the parties at the time of executing them, if that intention can be ascertained from their language ... Where the language of an agreement is contradictory, obscure, or ambiguous, or where its meaning is doubtful, so that it is susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes a rational and probable agreement must be preferred ... An interpretation which is just to both parties will be preferred to one which is unjust.

In the construction of a contract, the circumstances in existence at the time the contract was made should be considered in ascertaining the parties' intention. Triple E Development Co. v. Floridagold Citrus Corp., 51 So.2d 435, 438, rehg. den. (Fla. 1951). What a party did or omitted to do after the contract was made may be properly considered. Vang Agnew v. Fort Myers Drainage Dist., 69 F.2d 244, 246, rehg. den., (5th Cir.). Courts may look to the subsequent action of the parties to determine the interpretation that they themselves place on the contractual language. Brown v. Financial Service Corp., Intl., 489 F.2d 144, 151 (5th Cir.) citing LaLew v. Codomo, 101 So.2d 390 (Fla. 1958).

As noted above, Section 1.40 of the Agreement defines local traffic. The definition appears to be carefully drawn. Local traffic is said to be calls between two or more service users bearing NPA-NXX designations within the local calling area of the incumbent LEC. It is explained that local traffic includes traffic traditionally referred to as "local calling" and as "EAS." No mention is made of ISP traffic. Therefore, nothing in Section 1.40 sets ISP traffic apart from local traffic. It is further explained that all other traffic that originates and terminates between end users within the LATA is toll traffic.

As evidence of its intent, BellSouth argues that the interpretation of a contract must be one consistent with reason, probability, and the practical aspect of the transaction between the parties. BellSouth contends that it was "economically

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irrational for it to have agreed to subject ISP traffic to payment of reciprocal compensation." BellSouth claims it "had no rational economic reason to have agreed to pay reciprocal compensation for the ISP traffic, because...such assent would have likely guaranteed that BellSouth would lose money on every customer it serves who subscribed to an ISP served by a complainant."

In an example provided by BellSouth, a BellSouth residential customer subscribes to an ISP that is served by an ALEC. The customer uses the Internet for two hours per day. This usage would generate a reciprocal compensation payment to the ALEC of \$36.00 per month, assuming a 1 cent per minute reciprocal compensation rate. A Miami BellSouth customer pays \$10.65 per month for residential service. Thus, BellSouth would pay \$25.35 per month more to the ALEC than it receives from its customer. BellSouth claims that this unreasonable result is proof that it never intended to include ISP traffic as local for reciprocal compensation purposes.

Not all parties receive reciprocal compensation of 1 cent per minute. The MCIm Agreement specifies a rate of \$0.002 per minute, not \$0.01. In this case, using BellSouth's example, the total reciprocal compensation would be \$7.20. MCIm points out in its brief that the contract containing the \$0.01 rate is one to which BellSouth agreed. They argue that "[w]hether BellSouth agreed to this rate because they mistakenly thought that a rate five times higher than cost would give it some competitive advantage, or whether BellSouth agreed to it without thinking at all, it is not the Commission's role to protect BellSouth from itself."

In support of its position that ISP traffic was intended to be treated as local in the Agreement, WorldCom points out that BellSouth charges its own ISP customers local business line rates for local telephone exchange service that enables the ISP's customers within the local calling area to connect with the ISP by means of a local call. Such calls are rated and billed as local, not toll.

MCIm also points out that BellSouth treats calls to ISPs that are its customers as local calls. BellSouth also offers its own ISP customers service out of its local exchange tariffs. MCIm asserts that while it treats its own customers one way, BellSouth would have ISP customers of the ALECs treated differently.

Besides BellSouth's treatment of its own ISP customers' traffic, there is nothing in the parties' agreements that addresses the practical aspect of how to measure the traffic. As TCG points out in its brief, BellSouth failed to take any steps to develop a tracking system to separately account for ISP traffic. The TCG contract was entered into in July 1996, but BellSouth did not

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attempt to identify ISP traffic until May or June of 1997. If the agreement did in fact exclude ISP traffic from the definition of local traffic, and thus the reciprocal compensation provisions of the agreement, it would be necessary to develop a tracking system. The evidence indicates that the tracking system currently used by BellSouth is based on identifying the seven-digit number associated with an ISP. Absent that, as BellSouth witness Hendrix conceded, BellSouth must rely on estimates.

Intermedia also points out in its brief that:

If ISP traffic is not local as BellSouth contends, it would have been imperative for the parties to develop a system to identify and measure ISP traffic, because there is no ready mechanism in place for tracking local calls to ISPs. The calls at issue are commingled with all other local traffic and are indistinguishable from other local calls. If BellSouth intended to exclude traffic terminated to ISPs from other local traffic, it would have needed to develop a way to measure traffic that distinguishes such calls from all other types of local calls with long holding times, such as calls to airlines and hotel reservations, and banks. In fact, there is no such agreed-upon system in place today.

This is perhaps the most telling aspect of the case. BellSouth made no effort to separate out ISP traffic from its own bills until the May-June 1997 time frame. WorldCom argues in its brief that BellSouth's "lack of action is especially glaring given Mr. Hendrix's acknowledgment that there are transport and termination costs associated with calls terminating at an ISP." Prior to that time, BellSouth may have paid some reciprocal compensation for ISP traffic. Witness Hendrix admitted, "We may have paid some, I will not sit here and say that we did not pay any." The other parties made no effort to separate out ISP traffic, and based on their position that the traffic should be treated as local, this is as one would expect. In some cases the contracts were entered into more than a year before this time period.

It appears from the record that there was little, if any, billing of reciprocal compensation by the ALECs until just before BellSouth began to investigate the matter. It was the receipt of the bills for considerable amounts of reciprocal compensation that triggered BellSouth's investigation of the matter, and its decision to begin removing ISP traffic from its own bills. If these large bills were never received, would BellSouth have continued to bill

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the ALECs for reciprocal compensation on ISP traffic? There would have been no reason for BellSouth to investigate, and therefore no reason for them to start separating their own traffic. Under the circumstances, we have difficulty concluding that the parties all knew that ISP traffic was interstate, and should be separated out before billing for reciprocal compensation on local traffic, as BellSouth contends.

Impact on Competition

The potential impact of BellSouth's actions on local competition is perhaps the most egregious aspect of the case. As witness Hendrix testified, The Telecommunications Act of 1996 "established a reciprocal compensation mechanism to encourage local competition." He argued that "The payment of reciprocal compensation for ISP traffic would impede local competition." We are more concerned with the adverse effect that BellSouth's refusal to pay reciprocal compensation could have on competition. We agree with this assessment by TCG witness Kouroupas:

As competition grows, the smaller, leaner ALECs may well win other market segments from ILECs. If each time this occurs the ILEC, with its greater resources overall, is able to fabricate a dispute with ALECs out of whole cloth and thus invoke costly regulatory processes, local competition could be stymied for many years.

Conclusion

We think the question of whether ISP traffic is local or interstate can be argued both ways. While it appears that the FCC may believe Internet usage is an interstate service, it also appears that it believes that it is not a telecommunications service. The FCC itself seems to be leaning toward the notion of severability of the information service portion of an Internet call from the telecommunications portion, which is often a local call. Further, the FCC has allowed ISPs to purchase local service for provision of Internet services, without ever ruling on the extent to which the "local" characterization should apply. Indeed, as recently as April, 1998, the FCC itself indicated that a decision has not been made as to whether or not reciprocal compensation should apply. Thus, while there is some room for interpretation, we believe the current law weighs in favor of treating the traffic as local, regardless of jurisdiction, for purposes of the Interconnection Agreement. We also believe that the language of the Agreement itself supports this view. We therefore conclude on the basis of the plain language of the Agreement and of the effective law at the the time the Agreement was executed, that the

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parties intended that calls originated by an end user of one and terminated to an ISP of the other would be rated and billed as local calls; else one would expect the definition of local calls in the Agreement to set out an explicit exception.

Even if we assume for the sake of discussion that the parties' agreements concerning reciprocal compensation can be said to be ambiguous or susceptible of different meanings, the parties' conduct at the time of, and subsequent to, the execution of the Agreement indicates that they intended to treat ISP traffic as local traffic. None of the parties singled ISP traffic out for special treatment during their negotiations. BellSouth concedes that it rates the traffic of its own ISP customers as local traffic. It would hardly be just for BellSouth to conduct itself in this way while treating WorldCom differently. Moreover, BellSouth made no attempt to separate out ISP traffic from its bills to the ALECs until it decided it did not want to pay reciprocal compensation for ISP traffic to the ALECS. BellSouth's conduct subsequent to the Agreement was for a long time consistent with the interpretation of Section 1.40 urged by WorldCom. A party to a contract cannot be permitted to impose unilaterally a different meaning than the one shared by the parties at the time of execution when it later becomes enlightened or discovers an unintended consequence.

BellSouth states in its brief that "the Commission must consider the extant FCC orders, case law, and trade usage at the time the parties negotiated and executed the Agreements." We have. By its own standards, BellSouth is found wanting. The preponderance of the evidence shows that BellSouth is required to pay WorldCom reciprocal compensation for the transport and termination of telephone exchange service local traffic that is handed off by BellSouth to WorldCom for termination with telephone exchange service end users that are Internet Service Providers or Enhanced Service Providers under the terms of the WorldCom and BellSouth Florida Partial Interconnection Agreement. Traffic that is terminated on a local dialed basis to Internet Service Providers or Enhanced Service Providers should not be treated differently from other local dialed traffic. We find that BellSouth must compensate WorldCom according to the parties' interconnection agreement, including interest, for the entire period the balance owed is outstanding.

The Teleport/TCG South Florida-BellSouth Agreement

Local traffic is defined in Section 1.D. of the Agreement between BellSouth and TCG as:

any telephone call that originates and terminates in the same LATA and is billed by

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the originating party as a local call, including any call terminating in an exchange outside of BellSouth's service area with respect to which BellSouth has a local interconnection arrangement with an independent LEC, with which TCG is not directly interconnected.

This Agreement was entered into by the parties on July 15, 1996, and was subsequently approved by the Commission in Docket No. 960862-TP. Under TCG's prior Agreement with BellSouth, ISP traffic was treated as local.

The TCG Agreement states in Section IV.B and part of I.C:

The delivery of local traffic between parties shall be reciprocal and compensation will be mutual according to the provisions of this Agreement.

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

No exceptions have been made to the definition of local traffic to exclude ISP traffic. The facts surrounding this Agreement, and the arguments made by the parties, are essentially the same as the WorldCom Agreement, and we will not reiterate them here. Our decision is the same. The preponderance of the evidence shows that BellSouth is required to pay TCG reciprocal compensation for the transport and termination of telephone exchange service local traffic that is handed off by BellSouth to TCG for termination with telephone exchange service end users that are Internet Service Providers or Enhanced Service Providers under the terms of the TCG and BellSouth Florida Partial Interconnection Agreement. Traffic that is terminated on a local dialed basis to Internet Service Providers or Enhanced Service Providers should not be treated differently from other local dialed traffic. We find that BellSouth must compensate TCG according to the parties' interconnection agreement, including interest, for the entire period the balance owed is outstanding.

The MCI-BellSouth Agreement

The Agreement between MCI and BellSouth defines local traffic in Attachment IV, Subsection 2.2.1. That subsection reads as follows:

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The parties shall bill each other reciprocal compensation at the rates set forth for Local Interconnection in this Agreement and the Order of the FPSC. Local Traffic is defined as any telephone call that originates in one exchange and terminates in either the same exchange, or a corresponding Extended Area (EAS) exchange. The terms Exchange and EAS exchanges are defined and specified in Section A3 of BellSouth's General Subscriber Service Tariff.

MCI witness Martinez testified that no exception to the definition of local traffic was suggested by BellSouth. MCI argues in its brief that "[i]f BellSouth wanted a particular exception to the general definition of local traffic, it had an obligation to raise it."

The facts surrounding this Agreement, and the arguments made by the parties, are essentially the same as the WorldCom Agreement, and we will not reiterate them here. Our decision is the same. The preponderance of the evidence shows that BellSouth is required to pay MCI reciprocal compensation for the transport and termination of telephone exchange service local traffic that is handed off by BellSouth to MCI for termination with telephone exchange service end users that are Internet Service Providers or Enhanced Service Providers under the terms of the MCI and BellSouth Florida Partial Interconnection Agreement. Traffic that is terminated on a local dialed basis to Internet Service Providers or Enhanced Service Providers should not be treated differently from other local dialed traffic. We find that BellSouth must compensate MCI according to the parties' interconnection agreement, including interest, for the entire period the balance owed is outstanding.

The Intermedia-BellSouth Agreement

The Agreement with Intermedia defines Local Traffic in Section 1(D) as:

any telephone call that originates in one exchange and terminates in either the same exchange, or a corresponding Extended Area Service (EAS) exchange. The terms Exchange, and EAS exchanges are defined and specified in Section A3 of BellSouth's General Subscriber Service Tariff. (TR 142-143)

The portion regarding reciprocal compensation, Section IV(A) states:

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The delivery of local traffic between the parties shall be reciprocal and compensation will be mutual according to the provisions of this Agreement. (TR 143)

Section IV(B) states:

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

The evidence shows that no exceptions were made to the definition of local traffic to exclude ISP traffic in the Intermedia-BellSouth Agreement. The facts surrounding this Agreement, and the arguments made by the parties, are essentially the same as the WorldCom Agreement, and we will not reiterate them here. Our decision is the same. The preponderance of the evidence shows that BellSouth is required to pay Intermedia reciprocal compensation for the transport and termination of telephone exchange service local traffic that is handed off by BellSouth to Intermedia for termination with telephone exchange service end users that are Internet Service Providers or Enhanced Service Providers under the terms of the Intermedia and BellSouth Florida Partial Interconnection Agreement. Traffic that is terminated on a local dialed basis to Internet Service Providers or Enhanced Service Providers should not be treated differently from other local dialed traffic. We find that BellSouth must compensate Intermedia according to the parties' interconnection agreement, including interest, for the entire period the balance owed is outstanding.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that under the terms of the parties' Interconnection Agreements, BellSouth Telecommunications, Inc. is required to pay Worldcom Technologies, Inc., Teleport Communications Group Inc./TCG South Florida, Intermedia Communications, Inc., and MCI Metro Access Transmission Services, Inc., reciprocal compensation for the transport and termination of telephone exchange service that is terminated with end users that are Internet Service Providers or Enhanced Service Providers. BellSouth Telecommunications, Inc. must compensate the complainants according to the interconnection agreements, including interest, for the entire period the balance owed is outstanding. It is further

ORDERED that these dockets shall be closed.

ORDER NO. PSC-98-1216-FOF-TP
DOCKET NOS. 971478-TP, 980184-TP, 980495-TP, 980499-TP
PAGE 23

By ORDER of the Florida Public Service Commission this 15th
Day of September, 1998.

/s/ Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

This is a facsimile copy. A signed
copy of the order may be obtained by
calling 1-850-413-6770.

(S E A L)
MCB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

**BEFORE THE GEORGIA PUBLIC SERVICE COMMISSION
STATE OF GEORGIA**

e.spire COMMUNICATIONS, INC.)	
Petitioner,)	
)	
v.)	DOCKET NO. 9281-U
)	Regarding Reciprocal Compensation
BELLSOUTH TELECOMMUNICATIONS, INC.)	for Traffic Terminated to Internet
Respondent.)	Services Providers

Initial Decision of the Hearing Officer

PROCEDURAL BACKGROUND:

This matter comes before the Georgia Public Service Commission ("Commission") as a Complaint filed on May 22, 1998 by e.spire Communications, Inc. (hereinafter "Petitioner" or "e.spire") against BellSouth Telecommunications, Inc. (hereinafter "Respondent" or "BST"). In such complaint, e.spire claimed that BST has breached the Interconnection Agreement dated July 25, 1996, as amended October 17, 1996, by and between e.spire's wholly-owned subsidiary, American Communications Services, Inc. ("ACSI") and BST, which Interconnection Agreement was approved by this Commission on November 8, 1998 in Docket No. 6881-U (hereinafter "the Agreement", "the Interconnection Agreement", or the "e.spire/BST Agreement"), by BST's failure to pay reciprocal compensation on traffic originated by BST for its customers and

terminated by e.spire to Internet service providers. Moreover, e.spire further alleged that BST has failed to meet obligations placed on BST by the Telecommunications Act of 1996 ("Telecommunications Act"), the Georgia Telecommunications and Competition Development Act of 1995 (the "Georgia Act"), and the Rules and Orders of the Commission.

Pursuant to Interim Procedures for the Hearing and Resolution of Complaints Arising from Interconnection Agreements adopted by the Commission on November 4, 1997, this case was assigned for hearing before the Commission's Chief Hearing Officer and Director of Case Management, Mr. Philip J. Smith, and Hearing Officer Smith held a preliminary conference on June 1, 1998 at which the parties set forth their positions, and BST requested a hearing on the Complaint. On June 4, 1998, Hearing Officer Smith issued a Scheduling Order, concluding the Commission had jurisdiction to hear the Complaint and establishing a procedural schedule. On June 22, 1998, e.spire filed an amendment to its Complaint in this proceeding seeking compensatory damages for BST's alleged breach of the Agreement. Prior to hearing, Petitioner published timely notice of hearing as required by applicable Commission rules, and both parties timely filed and served pre-filed testimony.

On July 1, 1998, by order signed by Philip J. Smith, this case was reassigned to John P. Tucker as Hearing Officer. On July 2, 1998, BST filed a Partial Motion to Dismiss, seeking dismissal of e.spire's amendment to the Complaint (which sought compensatory damages) on the grounds that award of damages is beyond the statutory authority of the Commission and that, even if the Commission were authorized by statute, Petitioner's counsel waived any such claims by stating at the preliminary conference on June 1, 1998, that e.spire had not sought

compensatory damages because it did not believe the Commission had the authority to award such damages and that e.spire cannot by its amendment retract such waiver or argue inconsistently for compensatory damages. On July 14, 1998, this matter came on for hearing before Hearing Officer John P. Tucker at the Commission's Hearing Room at 47 Trinity Avenue, S.W., 5th Floor, Atlanta, Georgia 30334.

At hearing, Mr. William E. Rice of Long, Aldridge & Norman in Atlanta, Georgia and Mr. Brad E. Mutschelknaus of Kelley, Drye & Warren, LLP in Washington, DC, appeared on behalf of e.spire, while Mr. Bennett Ross and Ms. Lisa Spooner appeared as in-house counsel for BST. Ms. Jeanette Mellinger, appeared as a staff attorney on behalf of intervenor the Consumers' Utility Counsel Division of the Georgia Office of Consumer Affairs (hereinafter "CUC"). Petitioner presented in support of its complaint the testimony of its Director of Billing Operations/Revenue Assurance, Mr. Kevin A. Cummings and of its Vice President of Regulatory Affairs, Mr. James C. Falvey. Respondent presented in defense the testimony of BST's Director - Interconnection Services Pricing, Mr. Jerry D. Hendrix. At the outset of such hearing, the Hearing Officer denied BST's partial motion to dismiss on the grounds stated by Hearing Officer Philip J. Smith in the Initial Decision in MFS Intelenet of Georgia, Inc., v. BellSouth Telecommunications, Inc., GPSC Docket No. 8196-U, holding that the Commission has authority to award compensatory damages in contractual disputes under interconnection agreements over reciprocal compensation for ISP traffic.

Both parties filed briefs and reply briefs. BST filed a reply brief in excess of the page length prescribed by the Commission's rules and, subsequent to the deadline for reply briefs

established in the Scheduling order, filed a substitute reply brief of proper page length (along with an accompanying motion requesting Commission acceptance of such substitute reply brief). In the absence of objection by e.spire, such motion and BST's substitute reply brief is hereby accepted by the Commission. As requested by Hearing Officer Tucker at hearing, all parties after hearing submitted copies of federal or state statutory provisions, Federal Communication Commission ("FCC") decisions, rules and regulations, state utility regulatory agency decisions, rules and regulations and federal or state court decisions deemed applicable to this case and cited on brief by either party, and the Commission hereby takes official or administrative notice of such filings. In addition, memorandum submitted by the FCC as amicus curiae to the U.S. District Court for the Western District of Texas (wherein the FCC asserts that the FCC has taken no position to date on whether ISP traffic is local) in Southwestern Bell Telephone Co. v. Public Utility Commission of Texas, Case No. M0-98-CA-43, (W.D. Tx, July 16, 1998), Petitioner objects to administrative notice being taken of such copy of a "pleading" in a federal court case; however, the Hearing Officer has taken administrative notice of such FCC memorandum. Subsequent to the filing of late-filed exhibits and briefs by the parties, Frank B. Strickland of Wilson, Strickland & Benson, P.C. was substituted as counsel for e.spire in place of William E. Rice of Long, Aldridge & Norman. Such substitute counsel filed supplemental "briefs" consisting of copies of decisions by federal courts and other state utility regulatory bodies, and the Commission likewise takes official or administrative notice of such filings.

CONTENTIONS OF THE PARTIES:

A. Contentions of Petitioner e.spire

In its Complaint, as amended, e.spire contends that BST has breached the e.spire/BST Agreement by BST's failure to pay e.spire reciprocal compensation as required by such Interconnection Agreement and that such breach entitles e.spire to compensatory damages in the amount of the reciprocal compensation BST has wrongfully withheld from e.spire. Specifically, according to e.spire the provisions of the e.spire/BST Agreement require BST and e.spire to pay reciprocal compensation to each other for all telephone exchange traffic that originates on one company's network and terminates on the other's network. Both e.spire and BST have provided tariffed local exchange service over their respective networks to end user customers, including some business customers operating as information service providers (hereinafter "ISPs"). Petitioner contends BST has failed to make reciprocal payments to e.spire for calls made by e.spire subscribers to ISPs, because BST contends (erroneously according to e.spire) that such calls do not meet the definition of "local traffic" as defined in the e.spire/BST Agreement or in the applicable rules and regulations of the FCC and this Commission.

After initially taking the position that this Commission lacks jurisdiction to award compensatory damages at the preliminary conference held before Hearing Officer Smith on June 1, 1998, e.spire obtained a copy of the Initial Decision rendered by Hearing Officer Smith on May 29, 1998 in MFS Intelenet of Georgia, Inc. v. BellSouth Telecommunications, Inc., GPSC Docket No. 8196-U (hereinafter "MFS/BellSouth Initial Decision"), wherein the Hearing Officer held that "the Commission has authority to order compensation for past due amounts under the [interconnection] contract, for without such authority, it cannot adequately perform its duties

under the Telecommunications Act of 1996 or the Georgia Act." Upon learning of such Initial Decision, e.spire amended its Complaint in this case to request specific relief in the form of a Commission order directing BST to pay e.spire the amounts owed under the Agreement as reciprocal compensation; plus interest thereon. However, e.spire's initial Complaint had earlier requested "any other relief the Commission deems meet and proper," and e.spire contends that the recent MFS/BellSouth Initial Decision by the Commission's Hearing Officer provides a supervening legal basis for e.spire's amending its Complaint herein specifically to seek similar relief, even if such amendment were inconsistent with e.spire's prior position at the preliminary conference.

B. Contentions of Respondent BST

BST contends that ISP telephone traffic is as global and long distance in nature as the Internet itself, that jurisdiction over ISP traffic is, therefore, vested in the FCC, and that this Commission is thereby pre-empted from exercising jurisdiction over ISP traffic. BST further contends that, even if this Commission has jurisdiction over ISP traffic, such traffic (1) is one-way and, hence, not reciprocal and (2) is consequently, not subject to the reciprocal compensation under the e.spire/BST Agreement. BST has asked for reconsideration by the full Commission of the MFS/BellSouth Initial Decision, which is not yet the final decision of the Commission, because BST has requested Commission reconsideration and review thereof. Finally, BST contended in its motion for partial dismissal and at hearing that, even if ISP traffic were local and subject to the reciprocal compensation provisions of the e.spire/BST Agreement, this Commission has no statutory authority to award compensatory damages under such interconnection contract

and that e.spire's amendment to its Complaint should, therefore, be dismissed.

C. Contentions of Intervenor CUC

CUC attended the hearing and participated as an observer, and CUC's representative chose not to cross-examine witnesses or to submit written briefs in this proceeding.

FINDINGS OF FACT

BST is the Regional Bell Operating Company headquartered in Georgia and provides, as here pertinent, switched local exchange and other telecommunications services in nine (9) southern states, including Georgia. BST is an incumbent local exchange carrier ("ILEC") in Georgia. Petitioner e.spire Communications, Inc. provides local telecommunications services in Georgia through its wholly-owned subsidiaries American Communications Services of Atlanta, Inc., d/b/a e.spire Communications, Inc., and ASCI, d/b/a e.spire Communications, Inc., both of which are licensed by this Commission as competitive local exchange carriers ("CLECs"). BST and e.spire entered into an Interconnection Agreement on July 25, 1996 which was filed with this Commission on August 27, 1996. Such Interconnection Agreement was amended by a written Amendment dated October 17, 1996 and filed with this Commission on October 24, 1996. On November 8, 1996, the Commission approved such Interconnection Agreement, as amended, in Docket No. 6881-U.

Under Subsection VI.B of the e.spire/BST Agreement, BST obligated itself to track and report local minutes usage or traffic from BST's end-users terminated on e.spire's network. By such Agreement, BST was to track usage for both parties and to provide copies of usage reports to e.spire on a monthly basis. Moreover, the Agreement specified that there would be no cash

payment or compensation between the parties for transporting and terminating each other's traffic unless and until the difference in minutes exceeded two million (2,000,000) minutes per state on a monthly basis. In August, 1997, e.spire's own usage reports show that such two million (2,000,000) minutes per month use difference was exceeded in Georgia, and such difference has continued for every month since August, 1997. However, BST did not provide usage reports to e.spire as BST was obligated to do under the Agreement, despite repeated requests for such by e.spire and despite e.spire's receipt of similar reports from other Regional Bell Operating Companies such as BellAtlantic, US West, and SBC Communications. Thus, only after installing Traffic Master™ software to capture data from its Lucent SESS switches was e.spire able to generate its own local usage reports and begin billing BellSouth in November, 1997 for reciprocal compensation from August, 1997. Pursuant to Subsection V.D.I.A of the e.spire/BST Agreement, e.spire and BST have established multiple trunk groups (including trunk groups 301, 401, 402, 403 and 503) which carry exclusively local traffic and are designated by the parties as local trunk groups, and Traffic Master™ can distinguish between local and all other types of traffic because e.spire's local traffic is carried over a separate local trunk group. On cross-examination of Mr. Kevin A. Cummings, BST's attorneys indicated that, for the purpose of this proceeding, BST was not disputing the accuracy of e.spire's TrafficMASTER™ reports at hearing, but BST refused to stipulate as to the accuracy of such reports, pending audit by BST to exclude ISP traffic which BST contends is not local traffic.

Also, on cross-examination, Mr. Cummings stated that, while three (3) other Regional Bell Operating Companies had supplied traffic usage reports to e.spire and other CLECs, only

BellAtlantic had paid e.spire's reciprocal compensation invoices without question, and Mr. Cummings did not know whether US West and SBC Communications had admitted that ISP traffic was local traffic. BST introduced as a late-filed exhibit a certified copy of a letter from BellAtlantic to the FCC requesting urgent action by the FCC to classify Internet bound calls as not local traffic and not subject to reciprocal compensation.

Subsection VI.A of the Interconnect Agreement provides as follows for the exchange of local traffic and calls for compensation therefor:

"A. Exchange of Traffic

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

Attachment B to the Interconnection Agreement defines "local traffic" to include "telephone calls that originate in one exchange and terminate in either the same exchange, or a corresponding Extended Service Area ('EAS') exchange." Such definition does not discriminate upon the types of end users. Nor does such definition exclude calls from end users to other end users in the same local calling area, because one end user happens to be an ISP.

Subsection VI.B of the Interconnect Agreement provides that e.spire and BST initially compensate each other through a "bill and keep" arrangement, whereby each party would transport and terminate the other's local traffic without charge, but Section VI.B also provides for transition to reciprocal compensation as follows:

Compensation

The Parties agree that BellSouth will track the usage for both companies for the period of the Agreement. BellSouth will provide copies of such usage reports to [e.spire] on a monthly basis. For purposes of this Agreement, the Parties agree that there will be no cash compensation exchanged by the parties during the term of this Agreement unless the difference in minutes of use for terminating local traffic exceeds 2 million minutes per state on a monthly basis. In such an event, the Parties will thereafter negotiate the specifics of a traffic exchange agreement which will apply on a going-forward basis.

While the Interconnection Agreement itself does not contain a rate per minute for reciprocal compensation, the language of the above compensation paragraph clearly and ambiguously contemplates the payment of reciprocal compensation when the difference in minutes of use exceeds two million minutes per state on a monthly basis, which e.spire asserts occurred in Georgia in August, 1997 and has recurred continuously since. Also the Interconnection Agreement specifically provides that e.spire may elect to replace any of the material terms of the Agreement, including rates with the corresponding provisions of any other local interconnection agreement that BellSouth enters with another carrier. Subsection XXII.A of the Agreement, granting e.spire most favored nation status, provides:

If as a result of any proceeding before any Court, Commission, or the FCC, any voluntary agreement or arbitration proceeding pursuant to the Act, or pursuant to any applicable federal or state law, BellSouth becomes obligated to provide interconnection, number portability, unbundled access to network elements or any other services related to interconnection, whether or not presented covered by this Agreement, to another telecommunications carrier operating within a state within the BellSouth territory at rates or on terms and conditions more favorable to such carrier than the comparable provisions of this Agreement, then [e.spire] shall be entitled to add such network elements and services, or substitute such more favorable rates, terms or conditions for the relevant provisions of this Agreement, which shall apply to the same states as such other carrier and such substituted rates, terms or conditions shall be deemed to have been effective under this Agreement as of the effective date thereof to such other carrier.

By letter dated November 14, 1997, e.spire informed BST that e.spire had not received any usage reports from BST as required by the Interconnection Agreement. In a January 8, 1998 letter, BST admitted such failure to track or report local usage and agreed to accept e.spire's reports; however BST stated unequivocally that BST would not pay e.spire's bills for reciprocal compensation, because a mutually-agreed upon compensation rate had not been determined, because BST did not believe ISP traffic to be local traffic, and because BST had not been assured by e.spire that its "local traffic" count did not contain interexchange (or nonlocal) traffic. However, as a "carrot" to e.spire or an opening offer in negotiations, BST proposed paying a rate of \$0.002 for terminating local traffic. However, utilizing the above-quoted "most favored nation" clause from subsection XII.A of the e.spire/BST Agreement, e.spire selected a rate of \$0.0087 (or 0.87 cents) per minute from another interconnection agreement concluded by BST with another CLEC (namely, MFS Communications Co., Inc.) and approved by this Commission. BST, on the other hand, views the last sentence of the above-quoted Compensation paragraph of Subsection VI.B as critical: "In such an event, [when local traffic exceeds two million minutes per state on a monthly basis], the Parties will thereafter negotiate the specifics of a traffic exchange agreement which will apply on a forward-going basis." According to BST, such provision postponed all rate negotiations until after the two million minutes per state per month difference in local traffic exchanged had been reached; and, because such sentence is more specific, BST contends it precludes e.spire's reference to the "most favored nation" clause of Subsection XII.A of the Interconnect Agreement as a rate source. However, the "most favored motion" clause of Subsection XII.A applies to all provisions of the e.spire/BST Agreement (including any

subsequently negotiated traffic exchange agreement amending such Interconnect Agreement).

Because BST failed to track local usage or report such to e.spire as BST had obligated itself to do under the e.spire/BST Agreement, e.spire was put to the expense and effort of reconstructing and monitoring local usage by e.spire customers. Other Regional Bell Operating Companies have evidenced the technical capability to produce such local usage reports, and BST gave no adequate or reasonable explanation for its failure to track and report local usage as it was required to do under the e.spire/BST Agreement. Even BST's attorney at hearing indicated BST was not challenging the accuracy of e.spire's TrafficMASTER™ reports on local usage (although he would not stipulate to such) and insisted upon BST's having the right to audit e.spire's local traffic reports to eliminate interexchange (long distance) traffic.

In addition, Section XXX of the e.spire/BST Agreement contains a typical "entire agreement" clause which specifies that the written language of such Interconnect Agreement contains the entire agreement of the parties and supersedes all prior negotiations or agreements between the parties and which further requires that any amendments or changes to such Interconnect Agreement must be in writing and signed by a duly authorized officer or representative of the party to be bound thereby. Thus, any "traffic exchange agreement" or any other amendment to the e.spire/BST Agreement must be in writing and signed by the duly authorized officers or representatives of the BST and e.spire. Moreover, e.spire contends BST's lengthy and continued references at hearing to negotiations, and the intent of negotiators, of the e.spire/BST Agreement constitute no relevant evidence of the meaning of unambiguous language of the Interconnect Agreement in light of the parol evidence rule applicable to contract

construction in Georgia and in light of the Section XXX entire agreement clause of the e.spire/BST Agreement. Similarly, e.spire contends testimony regarding different language in other interconnection agreements is likewise irrelevant to this proceeding regarding the e.spire/BST Agreement.

By the time BST negotiated and signed the e.spire/BST Agreement in July, 1996, BST had been negotiating interconnection agreements with CLECs in Georgia and other Southeastern states for more than eight (8) months, had negotiated a variety of rates for terminating local traffic between CLECs and BST, was well aware that local traffic differentials could flow heavily toward BST or toward the CLEC, and had in other interconnection agreements negotiated ceilings or caps limiting the amount of reciprocal compensation for local exchange traffic. But, no such cap or ceiling was inserted or agreed to in the e.spire/BST Agreement. Moreover, BST clearly has the same or similar technological capacity and legal expertise as its sister Regional Bell Operating Companies to provide local traffic usage reports and to negotiate interconnection agreements, and BST certainly was not, and is not, a disadvantaged or inferior party to e.spire in the negotiation and performance of the e.spire/BST Agreement. Nevertheless, although BST obviously had the superior bargaining power, knowledge and experience regarding interconnection agreements at the negotiating table with e.spire, BST is now asking this Commission to excuse BST's nonperformance of its duty to track and report local usage and to rewrite the e.spire/BST contract on terms more favorable to BST than those already approved by the Commission and to which BST has already contractually bound itself.

Regarding the issue of whether or not ISP traffic is local traffic, ISPs typically maintain a point of presence within a local calling area for the sole purpose of rendering the call from Internet subscriber to the ISP's point of presence a local call. As BST's witness at hearing admitted, the local nature of such calls is readily apparent, because the Internet subscriber accesses the ISP by dialing the ISP's seven or ten digit local telephone number without the "1" long distance prefix. Such calls to the ISP clearly fall within the definition of local traffic set out in Subsection VI.A of the Interconnection Agreement, because such calls originate with an Internet subscriber and terminate with an ISP point of presence, both of which are located wholly within the same BST local calling area. BST itself treats such calls to ISPs as local calls (1) in allocating costs between intrastate and interstate traffic for state and federal regulatory reporting purposes, (2) in BST's local tariffs, and (3) in BST's billing of its customers [i.e., BST does not bill calls as toll charges when such calls originate with an Internet customer and terminate with an ISP point of presence (which is a BST customer) within the same BST local calling area]. In sum, by the admissions of BST's witness, such calls to ISPs are processed, billed and tarified by BST as local calls. Moreover, e.spire's uncontradicted evidence showed that its TrafficMASTER™ reports were restricted exclusively to local trunks. Nevertheless, BST has refused to pay reciprocal compensation on such traffic conceptually not to be local (because the ISP subsequently provides the Internet subscriber with worldwide access via the Internet) and because BST deems the e.spire/BST contract as not requiring reciprocal compensation until a traffic exchange agreement is negotiated.

CONCLUSIONS OF LAW

A. Commission Authority Over Interconnection Agreements

The Commission has authority and jurisdiction over this matter, as over all interconnection agreements approved by the Commission, pursuant to Sections 251 and 252 of the Telecommunications Act [47USC §§252 and 252] and under the Georgia Act [Q.C.G.A. §§ 46-5-160, et seq.]. Section 251 of the Telecommunications Act expressly directs all local exchange carriers ("LECs") to interconnect their networks with those of competing service providers in order to transport and terminate local exchange traffic over their respective networks. Sec. 47 U.S.C. §251(a). Moreover, Section 251(c) imposes a number of additional interconnection obligations upon ILECs such as BST (including, as here pertinent, the duty to provide interconnection facilities and equipment to CLECs so that interconnection with the CLEC such as e.spire is at least equal in quality to that the ILEC provides for itself, its affiliates or anyone else and that such services be provided on rates, terms and conditions that are just, reasonable, and nondiscriminatory). Sec. 47 U.S.C. §251(c)(2). Georgia law imposes a similar duty on all LECs to permit reasonable interconnection with other LECs. Q.C.G.A. § 46-5-164(a). Concomitant with such duties imposed on LECs by Section 251(a) and (c) of the Telecommunications Act, Section 251(b) requires each LEC to establish reciprocal compensation arrangements for the transport and termination of telecommunications. 47 U.S.C. 251(b). The parties submitted to this Commission, and received this Commission's approval of, the e.spire/BST Agreement; and without the power to interpret and to enforce the terms of such interconnection agreements, the Commission would lack the power to implement and administer the provisions of the Georgia Act. Moreover, the Eighth Circuit Court of appeals has delineated clearly and unmistakably the extensive authority of

state telephone regulatory agencies in interpretation and enforcement of interconnection agreements under the Telecommunications Act. Iowa Utilities Board v. FCC, 120 F.3d753, at 804 (8th Cir., 1997):

“...[S]tate commissions’ plenary authority to accept or reject these [interconnection] agreements necessarily carries with it the authority to enforce the provisions of agreements that the state commissions have approved. State commission authority to enforce these terms, compared to FCC authority, is especially appropriate given the local nature of the calls at issue in this case.”

Inherent in this Commission’s authority to enforce interconnection agreements (such as the e.spire/BST Agreement in this case) is the authority to order parties to such agreements to fulfill their statutory and contractual obligations to remit compensation required thereunder. Without such authority to order compensation for past due amounts under the interconnection contracts with interest thereon, the Commission cannot perform its duties under the Telecommunications Act or the Georgia Act. Hence, this Commission has full and complete authority under the Telecommunications Act and the Georgia Act to interpret and to enforce the e.spire/BST Agreement, including the right to determine the amount of reciprocal compensation due to either party and to order either party to pay such. BST and e.spire recognized such Commission authority by submitting the Interconnection Agreement to the Commission for approval.

B. Traffic Terminating to ISPs Is Local Traffic Subject to Reciprocal Compensation

Nothing in the e.spire/BST Agreement excludes or otherwise differentiates traffic terminating to ISPs (“ISP traffic”) from the definition of “local traffic” contained in such Agreement. Rather, it is precisely for the purpose of terminating Internet subscriber calls as local, rather than as toll calls, that ISPs maintain a point of presence within the local calling area (where

the ISP usually has a bank of computer modems accessing the Internet). The origination and termination of such ISP calls (as well as the dialing, billing and tariffing of such calls) recognizes such calls as local, and BST tariffs, processes and bills such ISP traffic as local calls for its customers. BST argues that calls from an Internet subscriber to an ISP point of presence within the same BST local calling area are not local, because such Internet subscribers thereby reach Internet sites all over the world. However, BST's arguments are misplaced. Termination is the key determination of whether ISP calls are to be considered "local traffic." Such telephone calls terminate at the ISP point of presence within BST's same BST local calling area, and the Internet is not part of such telephone call. As Hearing Officer Philip J. Smith stated in the MFS/BellSouth Initial Decision, "As the term is commonly used in the telephone industry, a call placed over the public switched telecommunications network is considered terminated when it is delivered to the telephone exchange service number that has been called, regardless of the identity or status of the party called. The information service provided by the ISP [in connecting to the Internet] is separate and distinct from the local exchange telecommunications service provided by the exchange carriers."

BST itself treats such ISP traffic as local in its tariffs and billing for its ISP customers in Georgia. Moreover, BST can cite no order or ruling of the FCC, of any state regulatory commission or of any federal court which supports BST's argument that ISP traffic is not local, and BST ignores the contrary decisions that such ISP traffic is local by twenty-one (21) state commissions, by the FCC on more than one occasion and by every federal court that has addressed the issue since the enactment of the Telecommunications Act. BST's sole support for

its argument is an amicus curiae memorandum submitted by the FCC to the U.S. District Court for the Western District of Texas stating that the FCC has not ruled that calls to ISPs are subject to reciprocal compensation, and the District Court considered such FCC Memorandum and nevertheless upheld its earlier decision affirming the order of the Public Utilities Commission of Texas that ISP traffic is subject to reciprocal compensation. Southwestern Bell Telephone Co. v. Public Utilities Commission of Texas, Case No. M0-08-CA-43, Order (W.D. Tx, July 16, 1998) and Order (W.D. Tx, June 22, 1998). Two other federal courts have upheld state commission decisions declaring ISP traffic to be local traffic eligible for reciprocal compensation under interconnection agreements. Illinois Bell Telephone Company, d/b/a AmeriTech Illinois v. World Com Technologies, Inc., et al., case No. 98 C 1925, Memorandum Opinion and Order [N.D. Ill. (E.Div), July 21, 1998]; U.S. West Communications, Inc. v. MFS Intelenet, Inc., Case No. C97-222WD (W.D. Wash., Jan. 7, 1998). Also, recently in Southwestern Bell Telephone Company v. FCC, Case No. 97-2618 (8th Cir. 1998), the Eighth Circuit Court of Appeals in footnote 9 to its decision on other matters opined as follows:

“(9) ISPs subscribe to LEC facilities in order to receive local calls from customers who want to access the ISP’s data, which may or may not be stored in computers outside the state in which the calls were placed. An IXC, in contrast, uses the LEC facilities as an element in an end-to-end long-distance call that the IXC sells as its product to its own customers.”

In the face of such unanimity of judicial and regulatory opinion nationwide, BST has cited no sufficient factual or legal basis for this Commission to find ISP traffic anything other than local traffic.

Thus, this Commission can find no more succinct language than that recently employed by the full Public Utilities Commission of Ohio in ruling on the same issue in ICG Telecom Group, Inc., v. AmeriTech Ohio, Ohio PUC Case No. 97-1557-TP-CSS (Opinion and Order, August 27, 1998):

"The Commission can find no legal basis under this Agreement for treating ISP traffic different than other local traffic originated by an end user for purposes of reciprocal compensation." *Id.*, p.9

Neither the e.spire/BST Agreement nor any federal or state statutory provision distinguish such ISP traffic as different from any other local traffic, and BST has afforded no legal precedent or other basis for making such a distinction. Thus, this Commission concludes that the local call to a local exchange service number of an ISP is a separate and distinct transmission from any subsequent Internet Service provided by the ISP for the caller. Because the call terminated to the ISP is a local call, it must be compensated pursuant to the reciprocal compensation provisions of the Interconnection Agreement or, in the absence of such contractual provision, under the statutory requirement of Subsection 251(b)(5) of the Telecommunications Act [47 U.S.C. § 251(b)(5)].

C. Construction of the Interconnection Agreement under Georgia Contract Law

1. Applicable Principles of Contract Interpretation and Construction

a. Parol Evidence Rule/Entire Agreement Clause

Georgia parol evidence rule renders inadmissible "evidence [parol or written] to add to, take from, or vary a written contract." O.C.G.A. § 13-2-2 (1). Absent proof of an ambiguity in the contract (and BST has neither alleged nor proven any ambiguity in the

Interconnection Agreement), the court will look to the written contract alone to find the intention of the parties. E.g., Rice v. Huff, 221 Ga. App. 592, 472 S.E. 2d 140 (1996). In addition, the parol evidence rule in Georgia is not merely a rule of evidence, but rather a rule of substantive law. Dixon v. S. & S Loan Services of Waycross, Inc., 754 F. Supp. 1567 (S.D.Ga. 1990). Thus, where (as in this proceeding) the Interconnection Agreement, as amended, has been reduced to writing, such Agreement will, in the absence of fraud, accident or mistake, be conclusively presumed to contain the entire contract, and parol evidence of prior or contemporaneous representations or statements are inadmissible to add to, take from, or vary the written instrument. Andrews v. Skinner, 158 Ga App. 229, 279 S.E.2d 523 (1981). Also, despite being termed the parol evidence rule, this legal principle also precludes the use of written evidence to add to, take from, or vary the terms of a written agreement. O.C.G.A. § 13-2-2(1); American Cyanamid Co. v. Ring, 248 Ga. 673, 286 S.E. 2d 1 (1982); Dixon v. S& S Loan Services of Waycross, Inc., 754 F. supp. 1567 (S.D. Ga., 1990). Moreover, the entire agreement clause contained in Section XXX of the e.spire/BST Agreement reinforces and strengthens such parol evidence rule by specifying that the Interconnection Agreement supersedes all prior negotiations and agreements between the parties and by prohibiting amendment or change to such Interconnection Agreement except in a writing signed by the party to be bound. Georgia appellate courts have held that, where the parties agree a written contract contains the entire agreement, any understanding not embodied in the agreement is irrelevant. Kelson Co. v. Feingold, 168 Ga. App. 391, 309 SE 2d 394 (1983). Thus, the testimony elicited, and the documents produced, by BST in this proceeding regarding the intent of the parties or the meaning of provisions of the Interconnection Agreement are

inadmissible because of a statutory presumption and are irrelevant because of the entire agreement clause contained in the contractual agreement of the parties, especially in view of BST's failure to demonstrate any ambiguities in the language of the Interconnection Agreement.

b. Construction Which Will Uphold Contract in Whole and in Every Part is Preferred

In arguing that no reciprocal compensation can be paid under the Interconnection Agreement unless and until the specifics of a traffic exchange agreement have been negotiated as per Subsection VI.B of the Interconnection Agreement, BST not only ignores the pro-competition purposes of the Telecommunications Act and the statutory requirement that reciprocal compensation be paid for local traffic transported or terminated, but also ignores the "most favored nation" provisions of Subsection XXII.A of such Agreement and the Georgia statutory contractual interpretation principle requiring that the whole contract be looked at in arriving at the construction of any part and that the preferred construction will uphold a contract in whole and in every part. Compare, 47 U.S.C. §§ 251 and 252; O.C.G.A. §§ 13-2-2(4) and 46-5-161; Continental Casualty Co. v. Continental Rent-A-Car of Georgia, Inc., 349 F. supp. 666 (N.D. Ga., 1971), aff'd, 468 F.2d 950 (5th Cir. 1972). The clear language of, and the most straightforward interpretation of such language in Subsection VI.B of the Interconnection Agreement indicates that the parties' duty to pay reciprocal compensation to each other arises as soon as "the difference in minutes of use for terminating local traffic exceeds 2 million minutes per state on a monthly basis." Because the duty to pay such reciprocal compensation is statutory [47 U.S.C. § 251 (b) (5)], as well as required by the just compensation clause of the United States

Constitution, it is unreasonable to argue as BST does that no compensation is due until a traffic exchange agreement is negotiated between the parties, especially in light of the ability such an interpretation could give either party to slow negotiations and to delay commencement of its duty to compensate the other. Moreover, the "most favored nation" clause contained in Section XXII.A. clearly gives e.spire the right to replace any rate negotiated with BST pursuant to subsection VI.B. with a more favorable reciprocal compensation rate contained in any other interconnection agreement executed by BST with a Georgia-certificated CLEC. Thus, in an effort to give effect to all provisions of Subsections VI.B. and XXII.A in accordance with the meaning clearly expressed and intended from the contractual language of such provisions in relation to each other and to all other provisions of the Interconnection Agreement, the Commission finds that BST's duty to pay reciprocal compensation to e.spire commenced the month the difference in minutes of use for local traffic (including ISP traffic) under the Interconnection Agreement exceeded two million (2,000,000) minutes in Georgia and has continued for each and every month since that such 2,000,000 minute difference has been exceeded. Moreover, unless and until BST and e.spire agree to a different local traffic rate under Subsection VI.B., e.spire is contractually entitled under Subsection XXII.A ("the most favored nation" clause) to collect the \$0.0087 per minute rate adopted from the MFS Intelenet interconnection agreement for all such reciprocal compensation since August 1, 1997.

2. Effect of Nonperformance by BST

BST has admitted that it failed to perform its contractual obligation to track and report to e.spire local minutes usage (or local traffic) under Subsection VI.B of the

e.spire/BST Agreement. Moreover, BST's counsel at hearing did not contest the accuracy of e.spire's TrafficMASTER™ reports, although he refused to stipulate such reports as accurate, pending audit to eliminate ISP traffic. The unrefuted testimony of e.spire's witnesses at hearing demonstrated that e.spire used TrafficMASTER™ software to track local minutes usage only on local trunks in Georgia. In light of the demonstrated capability of other Regional Bell Operating Companies to track local traffic and in view of BST's failure to explain satisfactorily or sufficiently its nonperformance in this matter, it is difficult for the Commission to understand why BST has not measured and reported local traffic for and to e.spire as it was obligated to do under the Interconnection Agreement. Moreover, it is precisely because of BST's nonperformance in this area that e.spire was put to the effort and expense of measuring such local traffic (i.e., of performing in BST's stead or of curving BST's nonperformance). Therefore, in the absence of such performance by BST, and in addition to any other compensatory damages awarded hereunder, e.spire is entitled to compensatory damages in the amount of e.spire's incurred costs in reconstructing and monitoring local traffic (including ISP traffic) under the Interconnection Contract since August 1, 1997; provided, that e.spire shall provide to BST copies of e.spire's local traffic reports or reconstructions since August 1, 1997; and, provided further, that BST shall be estopped from complaining to this Commission regarding accuracy of such e.spire reconstructions and reports, unless and until BST shall provide such local traffic reports as it is obligated to do under the Interconnection Contract.

CONCLUSIONS

(1) This Commission has the statutory authority and duty to interpret, to enforce, to direct performance of and to award compensatory damages under interconnection agreements it has approved, including the instant e.spire/BST Agreement. See Section 251 and 252 of the Telecommunications Act [47 U.S.C. §§ 251 and 252]; O.C.G.A. § 46-5-168.

(2) Calls placed by BST and users to ISPs who are customers of a CLEC (where such calls originate and terminate within the same BST local calling area) are local calls and, therefore, subject to the statutory requirement for reciprocal compensation [See 47 U.S.C. § 251(b)(5)], as well as the requirement of the e.spire/BST Agreement for reciprocal compensation.

(3) Under the e.spire/BST Agreement, BST is required

(a) to pay to e.spire as compensatory damages, reciprocal compensation for local traffic since August, 1997 for every month the difference in minutes terminated with e.spire's Georgia customers exceeds 2,000,000 at a rate selected by e.spire under the "most favored nation" clause of such Agreement; and

(b) to pay to e.spire as compensatory damages the reasonable cost to e.spire for reconstructing, tracking and/or reporting e.spire local traffic minute usage since August 1, 1997, which e.spire effort and expense was occasioned and necessitated by BST's failure to perform its contractual duty to provide such tracking and reporting for e.spire.

(4) All compensatory damages awarded hereunder should bear interest at the highest level rate of interest permissible from the date of this Initial Decision shall become the final decision of this Commission.

WHEREFORE IT IS ORDERED, that BellSouth Telecommunications, Inc. must comply with the reciprocal compensation terms of the e.spire/BST Agreement and make payments to e.spire Communications, Inc. for the termination of local calls (including calls terminating with information service providers who are customers of e.spire Communications, Inc. where such call originates and terminates within the same local BST calling area); and

IT IS FURTHER ORDERED, that unless BellSouth Telecommunications, Inc. and e.spire Communications, Inc. shall otherwise voluntarily enter into a traffic exchange agreement under Subsection VI.B of the e.spire/BellSouth Agreement within thirty (30) days from the entering of this Initial Decision, e.spire Communications, Inc. may by written notice to BellSouth Telecommunications, Inc. and to this Commission select under the "most favored nation" clause in Subsection XXII.A of such Agreement the reciprocal compensation rate from any existing interconnection agreement approved by this Commission as the reciprocal compensation rate applicable to the e.spire/BST Agreement; and

IT IS FURTHER ORDERED, that no later than forty-five (45) days from the entering of this Initial Decision, e.spire Communications, Inc. shall present to BellSouth Communications, Inc. and file with this Commission documentation showing the reciprocal compensation claimed by e.spire Communications, Inc. under the e.spire/BST Agreement that is past due from BellSouth Telecommunications, Inc.; and

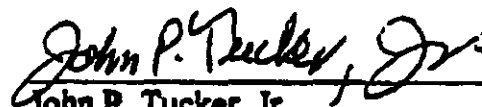
IT IS FURTHER ORDERED, that all reciprocal compensation and other compensatory damage amounts billed to BellSouth Telecommunications, Inc. by e.spire Communications, Inc. shall bear interest at the highest legal rate allowable from the later of the date this Initial Decision

becomes the final order of this Commission or a date thirty (30) days after the date each such bill was first mailed by e.spire Communications, Inc. to BellSouth Telecommunications, Inc.; and

IT IS ORDERED FURTHER, that jurisdiction over this proceeding is expressly retained for the purpose of entering such further order or orders, as this Commission may deem just and reasonable; and

IT IS FURTHER ORDERED that any motion for reconsideration, rehearing or oral argument, or any motion for full Commission review, shall not stay the effectiveness of this Initial Decision unless expressly so ordered by the Commission.

SO ORDERED, this 19th day of October, 1998.



John P. Tucker, Jr.

Hearing Officer

GEORGIA PUBLIC SERVICE COMMISSION

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