State of Florida

REVISED

Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: AUGUST 7, 2000

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

FROM: DIVISION OF LEGAL SERVICES (CALDWELL)
DIVISION OF COMPETITIVE SERVICES (MARSH)

RE: DOCKET NO. 991946-TP - REQUEST FOR ARBITRATION CONCERNING COMPLAINT OF ITC^DELTACOM COMMUNICATIONS, INC. AGAINST BELLSOUTH TELECOMMUNICATIONS, INC. FOR BREACH OF INTERCONNECTION TERMS, AND REQUEST FOR IMMEDIATE RELIEF.

AGENDA: 08/15/00 - REGULAR AGENDA - MOTION FOR SUMMARY ORDER - DECISION PRIOR TO HEARING - PARTIES MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: TWO SENTENCES DELETED ON PAGE 12.

FILE NAME AND LOCATION: S:\PSC\LEG\WP\991946A.RCM

CASE BACKGROUND

On December 17, 1999, ITC^DeltaCom Communications, Inc. (DeltaCom) filed a request for arbitration concerning a complaint against BellSouth Telecommunications, Inc. (BellSouth). At that time, DeltaCom also filed a Motion to Consolidate its complaint proceeding with the Global NAPs (GNAPs) proceeding in Docket No. 991267-TP. On December 28, 1999, BellSouth filed its Response to DeltaCom's Motion to Consolidate the GNAPs and DeltaCom complaints. On January 11, 2000, BellSouth filed its Answer and Response to DeltaCom's complaint. By Order No. PSC-00-0211-PCO-TP, issued February 2, 2000, DeltaCom's Motion to Consolidate GNAPs' and DeltaCom's complaints was denied. On May 18, 2000, Order No. PSC-00-0979-PCO-TP establishing procedure was issued.

On May 15, 2000, DeltaCom filed a Motion to Continue Proceedings and a Motion for Summary Final Order. On May 22, 2000, BellSouth filed its Response in Opposition to DeltaCom's Motion for

Summary Final Order and Response to DeltaCom's Motion to Continue Proceedings. By Order No. PSC-00-1177-PCO-TP, issued June 29, 2000, DeltaCom's Motion to Continue Proceedings was granted. On May 25, 2000, DeltaCom filed a Supplemental Memorandum in Support of its Motion for Summary Final Order and on June 5, 2000, BellSouth filed its Response in Opposition to DeltaCom's Supplemental Memorandum in Support of its Motion for Summary Final Order.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant ITC^DeltaCom's Motion for Summary Final Order?

RECOMMENDATION: Yes. Staff recommends that the Commission grant ITC^DeltaCom's Motion for Final Summary Order. (CALDWELL)

STAFF ANALYSIS: The issues before this Commission are as follows:

I. Under the BellSouth and ITC^DeltaCom interconnection Agreement, as amended, are the parties required to compensate each other for delivery of traffic to ISPs? If so, what action, if any should be taken?

II. Is the prevailing party entitled to attorney's fees under the agreement?

Order No. PSC-00-0979-PCO-TP, Attachment "A," page 9. The Agreement and subsequent Fourth Amendment of August 27, 1997, under Section VI(B), address the exchange and termination of local traffic and conditions for mutual compensation between DeltaCom and BellSouth. Paragraph 3 of the Fourth Amendment to the Agreement was substituted for Section VI(B) of the Agreement and provides:

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. Each Party will pay the other for terminating its local traffic on the other's network the local interconnection rate of $.009 per minute of use in all states. Each Party will report to the other a Percent Local Usage (PLU) and the application of the PLU will determine the amount of local minutes to be billed to the other Party. Until such time as actual usage data is available, the parties agree to utilize a mutually acceptable surrogate for the PLU factor. For purposes of developing the PLU, each party shall consider every local call and every long distance call. Effective on the first of January, April, July and October of each year, the parties shall update their PLU.

Section VI(A) of the Agreement provides as follows:

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. Local traffic for these purposes shall include any telephone call that originates and terminates in the same LATA and is billed by the originating exchange outside of BellSouth's service area with respect to which BellSouth has a local interconnection arrangement with an independent LEC, with which DeltaCom is not directly connected. 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. EAS routes are those exchanges within an

> exchange's Basic Local Calling Area, as defined in Section A3 of BellSouth's General Subscriber Services Tariff.

Attachment B to the Agreement defines "local traffic" as follows:

> 49. "Local Traffic" means any telephone call that originates in one exchange or LATA and terminates in either the same exchange or LATA, or a corresponding Extended Area Service (EAS) exchange. The terms Exchange, and EAS exchanges are defined and specified in Section A3. of BellSouth's General Subscriber Service Tariff.

ITC^DeltaCom's Motion

In its Motion for Summary Final Order (Motion), DeltaCom argues that there is no genuine issue as to any material fact and, as a matter of law, the same issues in a prior decision have been answered contrary to BellSouth's position; therefore, summary final order in favor of DeltaCom is appropriate to be granted. (Motion at 1) In addition, as a matter of law, DeltaCom believes BellSouth is collaterally estopped by the decision of the Alabama Public Service Commission (PSC) from re-litigating the issue of whether BellSouth is required to pay reciprocal compensation for calls placed by customers of BellSouth to Information Services Providers (ISPs) served by DeltaCom. (Motion at 1)

DeltaCom argues that at least 25 state commissions have concluded that ISP traffic is subject to local compensation. (Motion at 2) In addition the Federal Communications Commission (FCC) issued, on February 26, 1999, its decision concerning whether a local exchange carrier is entitled to reciprocal compensation for traffic it delivers to an ISP.[1] DeltaCom states that the FCC decided:

> 1. ISP traffic is jurisdictionally mixed and appears to be largely interstate.
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> 2. The FCC's adoption of a rule regarding inter-carrier compensation for ISP traffic . . . to govern prospective compensation would

[1] CC Dockets Nos. 96-98 & 99-68, FCC No. 98-38, Declaratory Ruling and Notice of Proposed Rulemaking, rel. February 26, 1999.

> serve the public interest. Because of an inadequate record, the FCC seeks comment on alternative proposals for such a rule.
>
> 3. Since the FCC has not heretofore adopted a rule governing intercarrier compensation for ISP traffic, there is no reason [for the FCC] to interfere with state commission's findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic, pending adoption of [such a rule]. The FCC's ISP Declaratory Ruling is not to "be construed to question any determination a state commission has made, or may make in the future, that parties have agreed to treat ISP-bound traffic as local traffic under existing interconnection agreements." Moreover, "state commissions . . . may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic." Indeed, although the FCC "has not adopted a specific rule governing the matter, . . . [its] policy of treating ISP bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic." (Motion at 4-5)

DeltaCom argues that it is clear the FCC will not interfere with any state commission decision requiring payment of reciprocal compensation for ISP traffic. (Motion at 5) At least, it adds, until the FCC promulgates a rule on the matter. (Id.)

DeltaCom states that five state commissions have addressed this same issue in proceedings in which BellSouth was a party.[2] (Motion at 5) DeltaCom states that those state commissions interpreted interconnection agreements between BellSouth and various CLECs as providing for payment of reciprocal compensation on ISP traffic. DeltaCom adds that the Alabama PSC and this Commission interpreted the very same interconnection agreement at issue in this proceeding. (Motion at 6)

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[2] Alabama, Florida, Georgia, North Carolina, and Tennessee.

DeltaCom argues that in the Florida proceedings, this Commission considered the case as "primarily a contract dispute between the parties" and therefore, addressed only "the issue of whether ISP traffic should be treated as local or interstate for the purposes of reciprocal compensation as necessary to show what the parties might reasonably have intended at the time they entered into their contracts." (Id.) DeltaCom states this Commission concluded that BellSouth must compensate the alternative (or competitive) local exchange carriers (ALECs or CLECs) according to the parties' interconnection agreement, including interest for the entire period that the balance owed is outstanding. (Id.)

DeltaCom argues that the issue in this docket is a matter of contract interpretation and there are no genuine issues of material fact. (Motion at 7) DeltaCom argues that the interpretation of contracts is a matter of law and the admission of evidence is improper unless the language of the instrument is ambiguous. DeltaCom concludes that, unless the Commission finds that the Agreement between DeltaCom and BellSouth is unclear, it must determine the issue of reciprocal compensation for ISP traffic as a matter of law based on the plain language of the Agreement without any reference to testimony or other evidence. (Id.)

Specifically, DeltaCom argues that the issue in Docket No. 991267-TP[3] was the same as the issue before this Commission in the instant docket because GNAPs adopted the agreement between DeltaCom and BellSouth pursuant to Section 252(i) of the Telecommunications Act of 1996 (the Act). (Id.) Moreover, DeltaCom argues, the Commission found that the "plain language of the Agreement shows that the parties intended the payment of reciprocal compensation for all local traffic, including traffic bound for ISPs" and decided, as a matter of law, "that the plain meaning of the contract between BellSouth and GNAPs was clear and did not require extrinsic evidence to determine the parties' intent." (Motion at 8) DeltaCom concludes that where there is not a genuine issue of material fact, and the same issues of law were answered in prior decisions, either expressly or impliedly, contrary to the position of the defendant, summary judgment is proper. Id.

DeltaCom also argues that this matter has already been fully litigated and, therefore, BellSouth is collaterally estopped from

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[3] In re: Complaint and/or Petition for Arbitration by Global NAPs, Inc. for Enforcement of Section VI(B) of its Interconnection Agreement with BellSouth Communications, Inc. and Request for Relief - Docket No. 991267-TP.

re-litigating whether it must pay reciprocal compensation. (Motion at 8) In support of its position, DeltaCom argues that the Alabama PSC's March 1999 order[4] interpreted the Agreement between BellSouth and DeltaCom and also interpreted interconnection agreements between BellSouth and other ALECs. DeltaCom asserts the interconnection agreement before the Alabama PSC is the identical agreement, with amendments, that is at issue in this docket and that BellSouth has argued its same responses. (Motion at 9)

DeltaCom argues that under the doctrine of collateral estoppel, where the parties and issues are identical and where a particular matter has been fully litigated and determined in a prior litigation which has resulted in a final decision in a court of competent jurisdiction, the parties are barred from re-litigating the same issues. (Motion at 11) This doctrine, DeltaCom asserts, applies to the decisions of administrative agencies acting in a judicial capacity. DeltaCom notes that in Docket No. 991267-TP GNAPs also argued that the collateral estoppel principle applied based upon the PSC decision and Commission staff recommended on March 16, 2000, that collateral estoppel would not apply in the GNAPs case because the parties were different. DeltaCom concludes, in this instance consistent with staff's observation, that collateral estoppel does apply because the parties and issues are the same. (Id.)

DeltaCom also addresses the issue of attorney's fees. DeltaCom states that this issue was also litigated in the GNAPs docket where this Commission found that the language in the agreement is clear and the prevailing party is entitled to attorney's fees. DeltaCom concludes that the Commission should rule as a matter of law that attorney's fees are due. (Motion at 13)

BellSouth's Response

In its Response, BellSouth responds to the three main points of DeltaCom's argument which are: (1) other state commissions and certain federal courts have upheld the payment of reciprocal compensation for ISP-bound traffic; (2) the Commission's GNAPs decision is binding on the parties to this proceeding; and (3) based upon a collateral estoppel theory, the Commission is bound by

[4] Alabama Public Service Commission Order, issued March 4, 1999, Docket NO. 26619, In re: Emergency Petitions of ICG Telecom Group, Inc. and ITC^DeltaCom Telecommunications, Inc. For a Declaratory Ruling.

a decision from the Alabama PSC interpreting the DeltaCom/BellSouth Interconnection Agreement at issue in this proceeding. (Response at 1-2)

BellSouth argues that the Commission has not decided the issue in this case. (Response at 2) BellSouth argues that the facts and circumstances surrounding the execution of the agreement and the amendment to the agreement must be considered. (Id.) In support of its argument, BellSouth includes an affidavit of its employee, Jerry Hendrix, stating the intent of BellSouth and the facts and circumstances present when the agreement and amendment were signed. (Id., Exhibit A) These facts and circumstances, BellSouth argues, demonstrate that genuine issues of material fact exist that preclude granting DeltaCom a judgment as a matter of law. (Response at 3)

Next, BellSouth argues that the state commission decisions on ISP traffic cited by DeltaCom are not relevant to the resolution of this proceeding. (Response at 4) BellSouth states that DeltaCom appears to imply that this Commission should summarily rule in DeltaCom's favor because BellSouth has never prevailed in an ISP dispute in its region. BellSouth responds by asserting that DeltaCom fails to mention that the Louisiana PSC also considered this issue, based on similar language to that in the agreement before this Commission, and ruled that reciprocal compensation was not due for ISP traffic. (Id.) BellSouth noted another decision by the South Carolina PSC that BellSouth did not owe reciprocal compensation for ISP traffic. BellSouth states that the results for the BellSouth region are mixed, and therefore asserts that DeltaCom's motion is based upon incorrect assumptions. (Id.)

BellSouth also argues that DeltaCom's reliance on Order No. PSC-98-1216-FOF-TP[5] is misplaced. BellSouth asserts that in the WorldCom decision, the Commission considered the circumstances surrounding the negotiation and execution of every interconnection agreement under which a dispute has arisen concerning reciprocal compensation for ISP traffic. (Response at 5) BellSouth argues that DeltaCom has not provided any credible reason for this Commission to depart from prior precedent in the handling of these matters. (Id.)

[5] Docket NO. 971478-TP - Complaint of WorldCom Technologies 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.

BellSouth also claims DeltaCom ignores that the FCC has now ruled twice that calls to ISPs do not "terminate at the ISP." BellSouth argues that although the FCC's Declaratory Ruling has been reversed, the outcome of this case is not affected. (Id.) BellSouth states that the D.C. Circuit did not establish any principle of law, but rather determined that the FCC had failed to provide a sufficient explanation for its conclusions. (Response at 6) Moreover, BellSouth relies on the Chief of the FCC's Common Carrier Bureau who publicly stated that he believes the FCC can and will provide the requested clarification and reach the same conclusion that ISP-bound calls do not terminate locally. (Id.) BellSouth argues that the FCC has made clear in other orders, which are unaffected by the D.C. Circuit's ruling, that ISP bound traffic does not terminate locally. Therefore, BellSouth argues that DeltaCom's invitation to decide this case based upon earlier decisions cannot be reconciled with FCC rulings. (Id.)

BellSouth also argues DeltaCom's reliance on cases from other states is equally misplaced as the facts and circumstances in the other cases are irrelevant to the issues in this proceeding. BellSouth argues that the Commission must decide whether BellSouth and DeltaCom mutually agreed to pay reciprocal compensation for ISP bound traffic based on the facts in this record and not those developed in other cases interpreting other interconnection agreements. (Response at 6-7)

BellSouth also argues that the Commission's GNAPs decision is not dispositive of this proceeding as DeltaCom contends. BellSouth argues that while the issue was litigated in the GNAPs proceeding, the issue was strictly limited to the facts and circumstances surrounding the negotiation and execution of the GNAPS/BellSouth interconnection agreement. BellSouth notes that DeltaCom's petition to intervene in that proceeding was denied. BellSouth asserts that the GNAPs proceeding was conducted under the unequivocal understanding that the GNAPS decision would not have precedential value as to this proceeding, and therefore, DeltaCom's argument should be rejected. (Response at 8-9)

To DeltaCom's contention that the GNAPs decision renders moot any consideration of the intent of the parties in negotiating and executing the agreement, BellSouth argues that it was not permitted to introduce any evidence of BellSouth's and DeltaCom's intent in Docket No. 991267-TP; therefore, the Commission could not have decided this issue, notwithstanding any language in the GNAPs decision to the contrary. (Response at 9-10)

Finally, BellSouth argues that this Commission is not collaterally estopped from considering BellSouth's position in this proceeding. BellSouth contests DeltaCom's suggestion that the Commission lacks the authority to consider this issue on its own and is bound by the decision of an administrative agency from another state. BellSouth asserts that in the context of a Section 252 arbitration proceeding where identical issues are litigated on a multi-state basis, under DeltaCom's theory, the first arbitration decision from a state commission would be binding upon all other state commissions, as the parties and subject matter would be the same in each jurisdiction. (Response at 10)

In addition, BellSouth asserts that the Alabama PSC decision is based on a hearing that was conducted prior to the FCC's Declaratory Ruling; the Alabama PSC order is not a final order, as the decision is currently on appeal to the U.S. Court of Appeals for the Eleventh Circuit; the Alabama PSC decision is based on the nuances of Alabama law, not Florida law; and finally, that the cases footnoted by DeltaCom do not apply to foreign administrative decisions. BellSouth also notes that DeltaCom has a pending ISP complaint proceeding before the South Carolina PSC under this identical interconnection Agreement. Moreover, BellSouth asserts that DeltaCom requested summary judgment and the South Carolina PSC denied DeltaCom's motion. (Response at 10-11)

Finally, BellSouth argues that it is bad policy for this Commission to rely upon foreign administrative bodies to determine a course of action for Florida. BellSouth argues that the Florida Commission is in the best position to determine the appropriate course of action for Florida and is vested with the responsibility to do so. (Response at 11-12)

DeltaCom's Supplemental Memorandum

In its May 25, 2000, Supplemental Memorandum (Memorandum) in support of its Motion for Summary Final Order, DeltaCom states that BellSouth leaves out one critical argument it made. (Memorandum at 1) DeltaCom argues its point was that this case is a matter of contract interpretation for which extrinsic evidence is not admissible unless the contract language is ambiguous. (Id.) DeltaCom argues that unless the provisions of the contract are ambiguous on their face, the decision in this case must be made as a matter of law and the Commission may not admit or consider any evidence. (Memorandum at 2) DeltaCom argues that before the Commission can allow either party to submit any evidence in this case, it must first make an affirmative finding that the controlling provisions of the interconnection agreement are unclear

and ambiguous.[6] DeltaCom argues, otherwise, the Commission must rule for one party or the other based on its interpretation of the interconnection agreement alone. (Id.)

DeltaCom next makes the point in its memorandum that the Commission should rule on the motion for summary final order before the parties proceed with discovery. DeltaCom requests that the Commission either rule on its motion on an expedited basis prior to the commencement of discovery or continue the proceedings until such ruling has been made. (Memorandum at 3)

BellSouth's Response to DeltaCom's Memorandum

On June 5, 2000, BellSouth filed its response in opposition to DeltaCom's supplemental memorandum (Response Memorandum). BellSouth asserts that given its importance to the resolution of this proceeding, the fact that "terminates" is an undefined term raises a question of fact as to the usage of the term as of the effective date of the agreement; therefore, defeating DeltaCom's Motion for Summary Final Order.[7] (Response Memorandum at 2-3)

Finally, BellSouth notes that the contract is void of any express assertion of whether reciprocal compensation is due for ISP traffic, and that each party contends that the language is unambiguous as to that party's position. BellSouth asserts that in this situation the Courts have found

> it is a well-established legal principle that if a written contract is ambiguous so that the intent of the parties cannot be understood from an inspection of the instrument, extrinsic or parole evidence of the subject matter of the contract, of the relation of the

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[6] See Emergency Associates of Tampa, P.A. v. Sassamo, 664, So 2d 1000, 1002 (Fla 2nd DCA 1995); See also Sears v. James Talcott, Inc., 174 So 2d 776, 778 (Fla. 2nd DCA 1965); Olive v. Tampa Educational Cable Consortium, 723 So 2d 883, 884 (Fla. 2nd DCA 1998).

[7] See Section 671.205(2), Florida Statutes, defining the usage of trade and stating that "[t]he existence and scope of such usage are to be proved as facts;" see also Affiliated FM Ins. Co. v. Constitution Reins Corp., 416 Mass. 839, 626 N.E. 2d 878, 882 (Mass. 1994); Restatement (Second) of Contracts, §222(2) (1991).

> parties, and of the circumstances surrounding them when they entered into the contract may be received in order to properly interpret the instrument.[8] (Response Memorandum at 3)

Recommendation

Rule 28-106.204(4), Florida Administrative Code, provides:

> Any party may move for summary final order whenever there is no genuine issue as to any material fact. The motion may be accompanied by supporting affidavits. All other parties may, within seven days of service, file a response in opposition, with or without supporting affidavits. A party moving for summary final order later than twelve days before the final hearing waives any objection to the continuance of the final hearing.

~~The Commission has not considered a motion for summary final order. This will be a case of first impression for the Commission.~~

The purpose of summary judgment, or in this instance summary final order, is to avoid the expense and delay of trial when no dispute exists concerning the material facts. The record is reviewed in the most favorable light toward the party against whom the summary judgment is to be entered. When the movant presents a showing that no material fact on any issue is disputed, the burden shifts to his opponent to demonstrate the falsity of the showing. If the opponent does not do so, summary judgment is proper and should be affirmed. The question for determination on a motion for summary judgment is the existence or nonexistence of a material factual issue. There are two requisites for granting summary judgment: first, there must be no genuine issue of material fact, and second, one of the parties must be entitled to judgment as a matter of law on the undisputed facts. (See Trawick's Florida Practice and Procedure, §25-5, Summary Judgment Generally, Henry P. Trawick, Jr. (1999).)

The first question is whether the record shows an absence of disputed material facts under the substantive law applicable to the action. To decide the question, the applicable substantive law

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[8] See Lemon v. Aspen Emerald Lakes Assoc. Ltd. 446 So. 2d 177 (Fla. 5th DCA 1984).

must be determined and then compared with the facts in the record. If the comparison shows a genuinely disputed material factual issue, summary judgment must be denied and the court cannot decide the issue. Even though the facts are not disputed, a summary judgment is improper if differing conclusions or inferences can be drawn from the facts. (Id.)

The question before the Commission is whether the interconnection agreement on its face is clear that reciprocal compensation is due for ISP bound traffic. Staff agrees with DeltaCom that the issue is a question of contract interpretation. In that regard, the first question that must be answered then is whether the record shows an absence of disputed material facts under the substantive law applicable to the action. As argued by DeltaCom, in a contract dispute, an affirmative finding must be made that the controlling provisions of the agreement are unclear and ambiguous.

Staff believes that the language in the Agreement and the subsequent Fourth Amendment of August 27, 1997, under paragraph 3 relating to Section VI(B), is clear and calls for reciprocal compensation for local traffic. The Agreement does not segregate traffic to ISPs from local traffic, nor is it addressed elsewhere in the agreement. Without some indication in the Agreement that traffic to ISPs was to be treated differently or somehow segregated from "local traffic," although dialed by the customer as a local call, staff can find no basis for BellSouth's contention that the definition of "local traffic" is not clear. Moreover, staff believes BellSouth's argument that the term "terminates" is "unidentified" is also without merit for the same reason.

While in some past decisions on similar issues, the Commission has determined that circumstances that existed at the time the companies entered into the agreement, as well as the subsequent actions of the parties, should be considered in determining what the parties intended when the language in the agreement is not clear, the Commission is not precluded by these prior decisions from determining that language in a different agreement is clear, and therefore, further examination of extrinsic evidence is unnecessary. In this case, staff agrees with DeltaCom that the plain language of the Agreement calls for the payment of reciprocal compensation for all local traffic, including traffic bound for ISPs. Staff agrees with DeltaCom that unless the Agreement between DeltaCom and BellSouth is unclear, the issue of reciprocal compensation for ISP traffic must be determined as a matter of law based on the face of the Agreement without any reference to testimony or other evidence. Therefore, staff believes it is not

necessary to look beyond the written agreement to the actions of the parties at the time the agreement was executed or to the subsequent actions of the parties to determine their intent.

As to DeltaCom's argument that BellSouth is collaterally estopped from relitigating whether it must pay reciprocal compensation, staff believes that because the Agreement is clear on its face, DeltaCom's arguments of collateral estoppel need not be reached. In addition, staff believes that while the Alabama PSC decision is instructive, it is not controlling. Moreover, the decision of the Alabama PSC has been appealed to the U. S. Court of Appeals. (BellSouth response at 10.)

With regard to the Commission's statement in the GNAPs Order that the decision in the GNAPs docket would not have precedential value in the instant proceeding, staff believes that decision does not prohibit these findings to be consistent with the outcome of that case. In addition, while staff notes DeltaCom's arguments that there is no issue of material fact to be decided because of the decisions made by the FCC, other state commissions, and this Commission, staff believes that reliance should not be placed on those decisions because the decisions affected different parties and related to different interconnection agreements. Moreover, staff notes BellSouth's assertions that the opinions are not unanimous.

Based upon the foregoing discussion, staff recommends that the Commission grant DeltaCom's Motion for Summary Final Order. Staff believes that the language in the Agreement and the subsequent Fourth Amendment of August 27, 1997, under paragraph 3 relating to Section VI(B) is clear and calls for reciprocal compensation for local traffic. The Agreement does not segregate traffic to ISPs from local traffic. Thus, staff believes that the plain language of the Agreement calls for the payment of reciprocal compensation for all local traffic, including traffic bound for ISPs.

ISSUE 2: Is the prevailing party entitled to attorney's fees under the agreement?

RECOMMENDATION: Yes. The interconnection agreement provides that the prevailing parties are entitled to receive attorney's fees. Thus, if the Commission approves staff's recommendation in Issue 1, DeltaCom would be entitled to attorney's fees. **(MARSH)**

STAFF ANALYSIS: DeltaCom argues that it is entitled to attorney's fees as there is no genuine issue of material fact that the agreement is clear and the prevailing party is entitled to attorney's fees. DeltaCom argues that BellSouth agreed with the Commission on this point and further argued that the prevailing party was entitled to attorney's fees because "the plain language of the Agreement is unambiguous." (Motion at 12-13.) BellSouth did not address this argument in its response.

The interconnection agreement clearly provides that the prevailing party is entitled to receive attorney's fees. (Section XXV, page 59 of the Agreement provides: [t]he Party which does not prevail shall pay all reasonable costs of the arbitration or other formal complaint proceeding, including reasonable attorney's fees and other legal expenses of the prevailing Party.) Thus, if the Commission approves staff's recommendation in Issue 1, staff believes DeltaCom would be entitled to attorney's fees.

ISSUE 3: Should this docket be closed?

RECOMMENDATION: Yes, if the Commission approved staff's recommendation on Issues 1 and 2, no further action by the Commission is necessary, therefore, the docket should be closed. **(CALDWELL)**

STAFF ANALYSIS: If the Commission approved staff's recommendation on Issues 1 and 2, no further action by the Commission is necessary, therefore, the docket should be closed.