BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of BellSouth Telecommunications, Inc. for Section 252(b) arbitration of interconnection agreement with Intermedia Communications, Inc.	DOCKET NO. 991854-TP ORDER NO. PSC-01-1015-FOF-TP ISSUED: April 24, 2001

The following Commissioners participated in the disposition of this matter:

E. LEON JACOBS, JR., Chairman
LILA A. JABER

ORDER ON MOTION FOR RECONSIDERATION

BY THE COMMISSION:

I. Case Background

On December 7, 1999, BellSouth Telecommunications Inc. (BST or BellSouth) filed a Petition for Arbitration pursuant to 47 U.S.C. 252(b) of the Telecommunications Act of 1996 (Act) seeking arbitration of certain unresolved issues in the interconnection negotiations between BST and Intermedia Communications, Inc. (Intermedia). BST's petition enumerated ten issues. On January 3, 2000, Intermedia filed its response which contained an additional 38 issues to be arbitrated. At the issue identification meeting, the parties notified our staff that some of the 48 issues had been resolved and that many were under "active discussion." Additional issues were resolved prior to hearing. An administrative hearing was held on April 10, 2000 on the remaining issues. Subsequent to the hearing an additional issue was resolved by the parties. By Order No. PSC-00-1519-FOF-TP, issued August 22, 2000, the Commission addressed the remaining issues. By that Order, the parties were required to submit a signed agreement compliant with our decisions contained therein within 30 days of the issuance of the Order. The signed agreement was due on September 21, 2000.

On September 6, 2000, Intermedia timely filed a Motion for Reconsideration and Clarification of Order No. PSC-00-1519-FOF-TP. Intermedia also filed a Request for Oral Argument on its motion.

On September 13, 2000, BellSouth timely responded to Intermedia's motion and Request for Oral Argument.

On September 20, 2000, the parties contacted our staff and orally requested an extension of time to file the signed agreement, pending the filing of a written request. On September 26, 2000, the parties filed a Joint Motion for Extension of Time requesting until October 4, 2000, to submit the signed agreement. BellSouth filed the agreement on behalf of the parties on October 4, 2000. By Order No. PSC-00-1836-PCO-TP, issued October 6, 2000, the parties' motion was granted.

On January 24, 2001, counsel for Intermedia filed a letter indicating that the parties had reached an agreement regarding Issue 32. That issue addressed whether the definition of "switched access" in the parties' agreement should include Internet Protocol (IP) telephony. We determined that for the purpose of the parties' agreement, IP telephony should be included in the definition of switched access. Intermedia indicated in its letter that the parties' agreement included a provision which states that the parties have been unable to agree whether "Voice-Over-Internet Protocol" (VOIP, also addressed as "IP telephony") transmissions constitute switched access traffic, and the parties agree to abide by any FCC rules and orders regarding the nature of such traffic and compensation payable for such traffic. Intermedia indicated that the agreement had gone into effect pursuant to Section 252(e)(4) of the Act; therefore, it indicates that it has withdrawn this issue from its motion for reconsideration, based on the understanding that the parties' agreement renders our decision on this issue a nullity. We note that this issue will be addressed in our generic reciprocal compensation docket, Docket No. 000075-TP.

On February 28, 2000, counsel for Intermedia contacted legal staff indicating that the parties also resolved an issue contained in Intermedia's motion for clarification, regarding whether our decision on Hearing Issue 26 required that Attachment 3, Section 1.2.1 of BellSouth's proposed language in the parties' draft agreement should be stricken. Attachment 3, Section 1.2.1 provides, in part, the following:

> In order for Intermedia to home its NPA/NXX on a BellSouth Tandem, Intermedia's NPA/NXX(s) must be

> assigned to an Exchange Rate Center Area served by that BellSouth Tandem and as specified by BellSouth.

Intermedia indicates in its letter that the parties decided against this language, and agreed to language which reflects our finding in Issue 26 that:

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

Final Order No. PSC-00-1519-FOF-TP at 43.

Herein, we address Intermedia's Request for Oral Argument and the remaining unresolved issues contained in its Motion for Reconsideration and Clarification.

II. Request for Oral Argument

Intermedia stated that oral argument on its Motion for Reconsideration and Clarification is warranted, because it is necessary for our comprehension and evaluation of very complex matters associated with Intermedia's motion, including:

(1) the unsettled state of the law in Florida and elsewhere concerning the proper application of 47 C.F.R. §51.711(a)(3);

(2) the exclusive federal jurisdiction over, and regulatory classification of, Internet Protocol Telephony/VOIP as an enhanced service;

(3) the relationship between BellSouth's tariffed Foreign Exchange Service offering to the unilaterally restrictive language that BellSouth seeks to impose on Intermedia;

(4) the practical and legal implications of this Commission's determination that both Parties should, on an interim basis, assign numbers only within the areas to which they are traditionally associated; and

(5) the spill-over competitive importance of those issues not only to Intermedia but also to all competitive and incumbent carriers operating in the State of Florida.

Intermedia also stated that oral argument is warranted so that we may have an opportunity to question the parties directly, which would be useful in making necessary legal and policy determinations with regard to Intermedia's motion, especially in addressing Intermedia's challenge regarding VOIP.

BellSouth stated in its response that Intermedia has failed to identify, in its Motion for Reconsideration and Clarification, any point of fact or law overlooked by us; therefore, there is no justification for granting Intermedia's Request for Oral Argument.

Decision

Rule 25-22.058(1), Florida Administrative Code, provides that we may grant oral argument, provided, among other things, that the request states "with particularity why oral argument would aid the Commission in comprehending and evaluating the issues before it." We note that the second reason identified above by Intermedia is no longer at issue, because of Intermedia's withdrawal of the IP telephony/VOIP issue, nor is the "restrictive language" noted in its third reason, as discussed in Section I of this Order. However, we did find that we would benefit from discussion on the remaining points in Intermedia's motion. Therefore, oral argument was heard on Intermedia's Motion for Reconsideration and Clarification.

III. Motion for Reconsideration

Intermedia asks us to reconsider our decision to deny Intermedia reciprocal compensation at the tandem interconnection rate. Intermedia also requests clarification to determine whether certain BellSouth proposed language should be stricken from the parties' draft interconnection agreement, and whether BellSouth must cease to provide Foreign Exchange Service.

A. Tandem Switching Rate

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which we failed to consider in rendering our Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3d DCA 1959); (citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse at 317.

Intermedia argues that we must reconsider our refusal to accord Intermedia reciprocal compensation at the tandem interconnection rate. Intermedia specifies four reasons to support its claim: 1) we failed to apply FCC Rule 51.711(a)(3) in making our decision and, instead, erroneously relied upon Paragraph 1090 of the FCC's First Report and Order (FCC 96-325) in FCC Docket 96-98; 2) we erroneously required that Intermedia demonstrate similar switch functionality; 3) we committed fundamental error by determining that Intermedia was not entitled to the tandem interconnection rate, because it has only one switch in the local calling area; and 4) we failed to give credit to Intermedia's uncontroverted showing that its voice switches serve areas geographically comparable to those of BellSouth.

1. Application of FCC Rule 51.711(a)(3)

Intermedia asserts that the correct standard to be applied in determining whether it is entitled to reciprocal compensation at the tandem interconnection rate is clearly articulated in FCC Rule 51.711(a)(3), which states in part:

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

> the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.

Intermedia asserts that, "When a rule or statute is unambiguous and conveys a clear and ordinary meaning, there is no need to resort to other rules of construction, and its plain meaning must be given effect." See Starr Tyme, Inc. V. Cohen, 659 So.2d 1064, 1067 (Fla. 1995). Intermedia states that Rule 51.711(a)(3) clearly established geographic comparability as the sole criterion that must be considered regarding the tandem interconnection rate. Rather than apply this standard, Intermedia asserts that we created our own "two-prong" test which required a showing of geographic comparability and similar functionality, based on Paragraph 1090 of FCC 96-325. To avoid fundamental, reversible error, Intermedia states that we must reconsider our decision.

BellSouth states in its response that we noted at page nine of our Final Order that we did consider the appropriate application of Rule 51.711(a)(3). BellSouth also asserts in a footnote that Intermedia suggests that Rule 51.711(a)(3) and paragraph 1090 of FCC 96-325 are in conflict, but Intermedia provides no authority to support that proposition. Finally, BellSouth asserts that we did not reach the legal issue that Intermedia claims we decided in error -- that a "two-prong" test must be applied. BellSouth asserts that we merely found that, as a matter of fact, Intermedia failed to prove either that its switches performed tandem functions, or that its switches served areas comparable to those served by BellSouth's tandem switches.

Decision

We disagree with Intermedia's assertion that we established a "two-prong" standard which required that Intermedia prove similar functionality and geographic comparability. It is true that we considered both functionality and geographic comparability in making our determination regarding reciprocal compensation at the tandem interconnection rate. We noted at page 12 of its Final Order that we were presented with these two criteria. After all, both criteria were raised at hearing. Nowhere, however, did we set forth that a specific standard regarding either criterion must be applied to determine the issue. As BellSouth correctly asserts, we merely found that, as a matter of fact, Intermedia failed to prove

either that its switches performed tandem functions, or that its switches served areas comparable to those served by BellSouth's tandem switches. In fact, when considering the tandem interconnection rate issue in a subsequent docket, we stated the following:

> We have addressed this same issue in the Intermedia/BellSouth Arbitration Order No. PSC-00-1519-FOF-TP, issued in Docket No. 991854-TP. Again we evaluated the geographic and functional comparability but never made a specific finding whether or not both were required for recovery of the tandem switch rate.

Order No. PSC-00-2471-FOF-TP, issued December 21, 2000, in Docket No. 991755-TP, In re: Request for arbitration concerning complaint of MCImetro Access Transmission Services LLC and MCI WorldCom Communications, Inc. against BellSouth Telecommunications, Inc. for breach of approved interconnection agreement.

Based upon the foregoing, we find that we did not make a mistake of law, because we did apply FCC Rule 51.711(a)(3) in making our decision. Furthermore, we did not create a separate "two-prong" standard based upon paragraph 1090 of FCC 96-325. Intermedia is merely attempting to reargue its position on this issue which, under the earlier cited case law, is inappropriate for reconsideration. In an abundance of caution, we shall, however, delete the word "second" from the first sentence of the first full paragraph on page 15 of our Order, which states, "We find the evidence of record insufficient to determine if the second, geographic criterion is met." Therefore, Intermedia's motion for reconsideration is denied on this point, and the Order is clarified by the removal of the word "second," as described herein.

2. Demonstration of Similar Functionality

Intermedia states that Rule 51.711(a)(3) contains no mention of a required showing of similar switch functionality. Intermedia asserts that because we "had to 'go behind' the plain wording of the FCC's rule to obtain the 'switch functionality' requirement, it was error to require a showing of similar switch functionality."

Moreover, Intermedia argues that if we were correct to apply the wording of paragraph 1090 of FCC 96-325, we mistakenly interpreted paragraph 1090 as requiring a "two-prong" test.

BellSouth responds by stating that this Commission merely found that, as a matter of fact, Intermedia failed to prove either that its switches performed tandem functions, or that its switches served areas comparable to those served by BellSouth's tandem switches. BellSouth states that we determined that Intermedia failed to prove it was entitled to reciprocal compensation at the tandem rate based on geographic functionality, but declined to reach the legal issue of whether Intermedia's interpretation of the rule was correct.

Decision

Intermedia's arguments are essentially the same as those discussed in the previous section. As discussed above, we did apply FCC Rule 51.711(a)(3) in making our decision; however, we did not create a separate "two-prong" standard based upon paragraph 1090 of FCC 96-325. In essence, Intermedia is rearguing its prior reargument of the case. Therefore, Intermedia's motion for reconsideration is denied on this ground as well.

3. Number of Switches in Local Calling Area

Intermedia asserts that we found that it could not be performing a tandem function and, therefore, could not be entitled to the tandem interconnection rate, because it only "has one local switch in each local calling area." Final Order at 14. Intermedia claims that we erred, because Rule 51.711(a)(3) does not refer to "switches," but "on its face clearly states that the tandem interconnection rate compensation shall be paid when 'the switch' of a carrier other than an ILEC serves a geographic area comparable to the area served by the ILEC's tandem switch." Intermedia also alleges that Paragraph 1090 uses the term "switch" in the singular form. Intermedia argues that there is no basis for our finding that the FCC intended to restrict payment of reciprocal compensation at the tandem rate to carriers with more than one switch in the local calling area.

Intermedia states that the FCC's intent, as demonstrated by Paragraph 1090, contemplates competitive carriers using new and innovative technologies to perform a similar function to the ILEC switch. Intermedia further states that implementing a single, large, expensive switch to cover a large calling area is the network architecture most typical of competitive carriers. Intermedia states that our erroneous interpretation of Rule 51.711(a)(3) means that it will be impossible for any competitor to obtain the tandem interconnection rate unless it mirrors the "antiquated, legacy network design of the incumbent carrier."

BellSouth responds by stating that our decision was not based on the number of switches Intermedia has in any one area. BellSouth states that this Commission made a finding that Intermedia provided no evidence that its switches function as a local tandem.

Decision

Intermedia attempts to frame its argument as a mistake of law, arguing that we failed to consider the FCC's use of the word "switch" in making our determination. Intermedia is, however, simply attempting to reargue its position that Intermedia's single switches perform a tandem switch function. Reargument is inappropriate for reconsideration under Sherwood. Further, we made no specific finding that the FCC intended to restrict payment of reciprocal compensation at the tandem rate to carriers with more than one switch in the local calling area.

Although we did find that Intermedia's single switches could not perform a tandem function, our focus went to the tandem function itself, not the number of switches. We found that "a tandem switch functions by connecting one trunk to another trunk as an intermediate switch between two end office switches . . . ." Final Order at 13. This is what we determined that Intermedia could not prove. We made that determination with regard to both Intermedia's single switches, as well as Intermedia's two switches in the Orlando area. Final Order at 13. Based on the foregoing, Intermedia's motion for reconsideration on this ground is denied. We note, however, that Intermedia's arguments on this point are immaterial. Even if we were to reconsider our decision on this ground, the outcome would remain the same, because we determined

that Intermedia failed to prove geographic comparability under Rule 51.711(a)(3).

4. Evidence Regarding Geographic Comparability

Intermedia argues that we made a fundamental error by refusing to accord proper credit to its showing that Intermedia's switches in Florida are each geographically comparable to the serving area of a single BellSouth tandem switch. Intermedia states that we considered maps depicting the local calling area of Intermedia's switches overlaid against the local calling areas of BellSouth's switches, which created shaded areas that represented geographic comparability of the parties' switches. We were unpersuaded by the maps. Intermedia alleges that we failed to consider Intermedia witness Jackson's testimony that its switches were serving customers depicted in the shaded calling areas. Intermedia asserts that witness Jackson's testimony was uncontroverted, because BellSouth did not attempt to produce any proof that Intermedia does not serve customers in those areas. Intermedia argues that its testimony must be given credence under law.

BellSouth states that Intermedia provided no documentary evidence to substantiate witness Jackson's statements. BellSouth further asserts that Intermedia produced no evidence regarding the number or location of its customers. BellSouth adds that the parties made contradictory claims regarding the areas served by Intermedia's switches. As such, BellSouth argues that Intermedia incorrectly asserts that witness Jackson's statements were uncontroverted. BellSouth states that we simply chose not to accept Mr. Jackson's disputed assertions as true. BellSouth asserts that Intermedia had the burden of proof on this issue, and we simply concluded that it failed to carry that burden.

Decision

Once more, Intermedia is attempting to reargue its case, and reconsideration shall, therefore, be denied. Further, we disagree with Intermedia's assertion that we failed to consider comments made by witness Jackson. At page 13 of our Final Order, we noted witness Jackson's statement that, "as demonstrated by Intermedia, its switches serve a geographic area comparable to that served by BellSouth's tandem switches, Intermedia should be compensated at

the composite tandem rate." This statement sums up witness Jackson's testimony on this issue and is no less affirmative than any sentence cited in Intermedia's motion for reconsideration. There is no requirement that we include every comment made by witness Jackson as proof that we considered Intermedia's case. Further, Intermedia is incorrect that witness Jackson's testimony was uncontroverted. As noted at page 14 of our Final Order, BellSouth witness Varner stated:

> Intermedia claims that its switches are capable of serving areas comparable to BellSouth's tandems. However, that finding is insufficient. Any modern switch is capable of doing this. The issue is does it actually serve customers in an area that is comparable. And I submit that Intermedia's switches do not.

We weighed the evidence and determined that BellSouth made a more compelling case. Intermedia had the burden of proof on this issue and failed to satisfy it. There is no point of fact or law that has been overlooked by us. Therefore, we also deny reconsideration on this ground.

B. Clarification Regarding, *Inter Alia*, Foreign Exchange Service

Intermedia states that we agreed with Intermedia that each party should be permitted to establish its own local calling area, but then stated:

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

Final Order at 43.

Intermedia calls attention to BellSouth's provision of Foreign Exchange (FX) service, which is defined in BellSouth's tariff as follows:

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

Intermedia requests that we clarify that our determination under Hearing Issue 26 also requires that BellSouth cease all provision of FX service.

BellSouth responds by stating that it is unaware of any law or Commission rule providing for a motion for clarification. BellSouth asserts that if Intermedia's request is intended to be treated as a motion for reconsideration, Intermedia raises no point of fact or law overlooked or not considered. BellSouth further argues that Intermedia's request for clarification is actually an attempt to collaterally challenge BellSouth's FX Tariff. BellSouth states that FX service was never a part of the arbitration; therefore, it is improper to raise a new issue at this time. Further, BellSouth states that FX service was not at issue under Hearing Issue 26. With FX service, a telephone number is assigned within the local calling area, and dedicated facilities connect the serving central office and the end user's premises. BellSouth states that the service under Issue 26 does not involve dedicated facilities to the end user, and the telephone number is actually assigned outside the local calling area.

Decision

While we have considered motions for clarification, there is no specific standard identified for addressing such requests. Parties have filed motions for clarification when our intent is not readily apparent from our order. See Order No. PSC-00-1242-PCO-WS, issued on July 10, 2000, in Docket No. 000610-WS; and Order No. PSC-97-0822-FOF-GU, issued July 8, 1997, in Docket No. 960547-GU. Therefore, we do not find that Intermedia is precluded from filing a motion for clarification in this proceeding.

We do, however, agree that BellSouth's provision of FX service was never an issue in this arbitration. Pursuant to Section 252(b)(4) of the Act, we are only required to arbitrate the issues that were raised in BellSouth's petition for arbitration and

Intermedia's response. Therefore, we shall not clarify our Final Order to require BellSouth to cease provision of FX service. Based upon the foregoing, we hereby deny Intermedia's Motion for Reconsideration and Clarification.

Based on the foregoing, it is therefore

ORDERED by the Florida Public Service Commission that Intermedia Communications, Inc.'s Motion for Reconsideration and Clarification is hereby denied as set forth in the body of this Order. It is further

ORDERED that Order No. PSC-00-1519-FOF-TP is clarified to the extent set forth in the body of this Order. It is further

ORDERED that this Docket shall be closed.

By ORDER of the Florida Public Service Commission this 24th Day of April, 2001.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

BK/TV

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 judicial review in Federal district court pursuant to the Federal Telecommunications Act of 1996, 47 U.S.C. § 252(e)(6).