

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for arbitration  
concerning complaint of TCG  
South Florida and Teleport  
Communications Group against  
BellSouth Telecommunications,  
Inc. for breach of terms of  
interconnection agreement.

DOCKET NO. 001810-TP  
ORDER NO. PSC-01-1427-FOF-TP  
ISSUED: July 3, 2001

The following Commissioners participated in the disposition of  
this matter:

J. TERRY DEASON  
LILA A. JABER  
BRAULIO L. BAEZ

ORDER DENYING MOTION FOR PARTIAL SUMMARY FINAL ORDER  
AND MOTION TO BIFURCATE AND SUPPLEMENTAL MOTION FOR CONTINUANCE

BY THE COMMISSION:

BACKGROUND

On December 20, 2000, TCG South Florida and Teleport  
Communications Group (TCG) filed a complaint against BellSouth  
Telecommunications, Inc. (BellSouth) alleging that BellSouth has  
failed to pay reciprocal compensation for Internet bound traffic  
and switched access charges for intraLATA toll traffic originated  
and terminated by TCG under the terms of the Second BellSouth/TCG  
Agreement. On January 9, 2001, BellSouth filed its response to  
TCG's complaint. By Order No. PSC-01-0833-PCO-TP, issued March 30,  
2001 (Order Establishing Procedure), this matter was scheduled for  
an administrative hearing on June 22, 2001.

On May 18, 2001, TCG filed its Motion for Continuance and  
Rescheduling of Controlling Dates for Prehearing Statements,  
Prehearing Conference and Final Hearing. On May 25, 2001,  
BellSouth filed its response in opposition to TCG's Motion for  
Continuance. At the prehearing conference held May 30, 2001, TCG's  
Motion for Continuance was denied for failure to establish good

DOCUMENT NUMBER-DATE

08158 JUL-30

FPC-RECORDS/REPORTING

cause on the grounds set forth in its Motion. At the Prehearing Conference, TCG made an *ore tenus* Motion to Continue the Hearing Date. BellSouth renewed its opposition to any continuance of the hearing date. TCG was directed to file a written Motion For Continuance. On June 1, 2001, TCG filed its Motion to Bifurcate and Supplemental Motion for Continuance.

On May 25, 2001, TCG filed a Motion for Partial Summary Final Order. On June 1, 2001, BellSouth filed its response to TCG's Motion for Partial Summary Final Order.

The following issues have been identified as pending in this proceeding:

ISSUE 1: What is the Commission's jurisdiction in this matter?

ISSUE 2: Under the Second BellSouth/TCG Agreement, are the parties required to compensate each other for delivery of traffic to ISPs?

ISSUE 3: What is the effect, if any, of Order No. PSC-98-1216-FOF-TP, issued September 15, 1998, in Docket No. 980184-TP (TCG Order), interpreting the First BellSouth/TCG Agreement requiring BellSouth to pay TCG for transport and termination of calls to ISPs, on the interpretation and application of the Second BellSouth/TCG Agreement?

ISSUE 4(a): Has BellSouth breached the Second BellSouth/TCG Agreement by failing to pay TCG reciprocal compensation for transport and termination of Local Traffic as defined in the Second BellSouth/TCG Agreement for calls originated by BellSouth's end-user customers and transported and terminated by TCG to ISPs?

ISSUE 4(b): If so, what rates under the Second BellSouth/TCG Agreement should apply for the purposes of reciprocal compensation?

ISSUE 5(a): Has BellSouth breached the Second BellSouth/TCG Agreement by failing to pay TCG switched

ORDER NO. PSC-01-1427-FOF-TP  
DOCKET NO. 001810-TP  
PAGE 3

access charges for telephone exchange service provided by TCG to BellSouth?

ISSUE 5(b): If so, what rates under the Second BellSouth/TCG Agreement should apply for purposes of originating and terminating switched access charges for intraLATA toll traffic?

Order No. PSC-01-0833-PCO-TP, Attachment "A," page 11. TCG's Motion for Partial Summary Final Order relates specifically to Issues 2, 3, and 4(a).

MOTION FOR PARTIAL SUMMARY FINAL ORDER

As stated in the Background, on May 25, 2001, TCG filed its Motion for Partial Summary Final Order (Motion) in this matter. The issue before us on the Motion is whether under the Second BellSouth/TCG Agreement, the parties are required to compensate each other for delivery of traffic to ISPs.

On July 15, 1996, BellSouth and TCG entered into their first agreement (First BellSouth/TCG Agreement), which was approved by Order No. PSC-96-1313-FOF-TP, issued October 29, 1996. The First BellSouth/TCG Agreement was the subject of a complaint regarding whether BellSouth was required to pay TCG reciprocal compensation for delivery of calls to ISPs served by TCG. By Order No. PSC-98-1216-FOF-TP, issued September 15, 1998 (TCG Order), we interpreted the definition of "Local Traffic" under the First BellSouth/TCG Agreement to include transport and termination of calls made to ISPs. Id. at 23-24.

Prior to the issuance of the TCG Order, BellSouth and AT&T entered into an interconnection agreement approved by Order No. PSC-97-0724-FOF-TP, issued June 19, 1997. On July 14, 1999, TCG adopted the BellSouth/AT&T agreement with amendments, which was approved by Order No. PSC-99-1877-FOF-TP, issued September 21, 1999, becoming the Second BellSouth/TCG Agreement. The Second BellSouth/TCG Agreement terminated on June 10, 2000.

TCG's Motion

In its Motion, TCG alleges that there is no genuine issue as to any material fact and that as a matter of law, the controlling

ORDER NO. PSC-01-1427-FOF-TP  
DOCKET NO. 001810-TP  
PAGE 4

provision in the interconnection agreement at issue has been previously interpreted by us in favor of TCG. TCG also alleges that as a matter of law, BellSouth is collaterally estopped by our prior decision from relitigating the issue of whether BellSouth is required to pay reciprocal compensation for calls originated by BellSouth's customers to an ISP served by TCG.

TCG alleges that the BellSouth/AT&T Agreement contained the same definition of "Local Traffic" reflected in the First BellSouth/TCG Agreement. TCG states that the dispute in the First BellSouth/TCG Agreement involved the interpretation and application of the term "Local Traffic" which was defined as follows:

Any telephone call that originates and terminates in the same LATA and is billed by the originating party as a local call, including any call terminating in an exchange outside of BellSouth's area with respect to which BellSouth has a local interconnection agreement with an independent LEC, with which TCG is not directly interconnected.

TCG contends that the definition of "Local Traffic" in the Second TCG Agreement is exactly the same as the definition of "Local Traffic" in the First BellSouth/TCG Agreement. Attachment 11 to the Second BellSouth/TCG Agreement defines "Local Traffic" as follows:

Local Traffic - means any telephone call that originates and terminates in the same LATA and is billed by 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 agreement with an independent LEC, with which [TCG] is not directly interconnected.

TCG states that we found in interpreting the definition of "Local Traffic" in the First BellSouth/TCG Agreement that:

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 out by BellSouth to TCG for termination with telephone exchange service end users

ORDER NO. PSC-01-1427-FOF-TP

DOCKET NO. 001810-TP

PAGE 5

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 an Enhanced Service Provider 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.

Order No. PSC-98-1216-FOF-TP at 22.

TCG argues that even though the definition of "Local Traffic" is the same in both agreements and that BellSouth has been previously ordered to pay reciprocal compensation for ISP-bound traffic under the definition of "Local Traffic", BellSouth has refused to pay reciprocal compensation to TCG under the Second BellSouth/TCG Agreement. TCG states that BellSouth's position is that its obligation to pay reciprocal compensation ended with the first agreement. TCG also states that BellSouth has defended its refusal to pay by claiming that it made its position opposing payment of reciprocal compensation for ISP-bound traffic publicly-known prior to TCG's adoption of the BellSouth/AT&T agreement. TCG contends that BellSouth's refusal to make such payments is a material breach of the Second BellSouth/TCG Agreement as previously interpreted by us in the TCG Order.

TCG asserts that under the Second BellSouth/TCG Agreement, the parties have agreed to pay reciprocal compensation to each other for all traffic that originates on one company's network and terminates on the other's network in accordance with the rates set forth in Part IV, Table I of the agreement. TCG states that the Mutual Compensation provision governing the payment of reciprocal compensation reads, in pertinent part:

The Parties shall bill each other reciprocal compensation in accordance with the standards set forth in this Agreement for Local Traffic terminated to the other Party's customer. Such Local Traffic shall be recorded and transmitted to [TCG] and BellSouth in accordance with this Attachment. When a[] [TCG] Customer originates traffic and [TCG] sends it to BellSouth for termination, [TCG] will determine whether the traffic is local or

intraLATA toll. When a BellSouth Customer originates traffic and BellSouth sends it to [TCG] for termination, BellSouth will determine whether the traffic is local or intraLATA toll. Each Party will provide the other with information that will allow it to distinguish local from intraLATA toll. At a minimum, each Party shall utilize NXXs in such a way that the other Party shall be able to distinguish local from intraLATA toll traffic.

Attachment 6, Section 5.1, Second BellSouth/TCG Agreement.

TCG contends that BellSouth's defense in refusing to pay reciprocal compensation because it had made its opposition to pay such compensation publically known prior to the adoption of the Second BellSouth/TCG Agreement is unsupportable. TCG asserts that BellSouth raised the same defense in the Global NAPS case, and it was rejected by us.<sup>1</sup> TCG asserts that similar to the instant case, in Global NAPS BellSouth maintained that it had made its opposition to the payment of reciprocal compensation publically known prior to Global NAPS' adoption of the ITC DeltaCom/BellSouth Agreement. TCG further contends that we rejected BellSouth's position, noting that BellSouth never modified the language of the ITC DeltaCom/BellSouth Agreement. Moreover, TCG states that in Global NAPS we emphasized the importance of maintaining consistency in its interpretation of interconnection agreements.

TCG states that support for its Motion is found under parallel facts in our enforcement decision in the ITC DeltaCom/BellSouth Agreement.<sup>2</sup> TCG asserts that in the ITC DeltaCom case we framed the issue as one of contract interpretation. TCG states that we found that the language at issue in the ITC DeltaCom/BellSouth Agreement

---

<sup>1</sup>Order No. PSC-0802-FOF-TP, issued April 24, 2000, in Docket No. 991267-TP, In re: Complaint and/or Petition for Arbitration by Global NAPS, Inc. for Enforcement of Section VI(B) of its Interconnection Agreement with BellSouth Telecommunications, Inc. and Request for Relief, (Global NAPS).

<sup>2</sup>Order No. PSC-00-1540-FOF-TP, issued August 24, 2000, in Docket No. 991946-TP, In re: Request for Arbitration Concerning Complaint of ITC DeltaCom Communications, Inc. against BellSouth Telecommunication, Inc. for Breach of Interconnection Terms, and Request for Immediate Relief, (ITC DeltaCom).

did not segregate ISP bound traffic from local traffic nor did the agreement address ISP bound traffic elsewhere. TCG further states that based upon our finding that the language of the agreement was clear and unambiguous, we properly found in favor of ITC DeltaCom as a matter of law and granted summary final order. TCG contends that as a matter of law, the TCG Order reflects the governing and controlling law at the time the parties entered into the Second BellSouth/TCG agreement. TCG asserts that the TCG Order renders the language of the Second BellSouth/TCG Agreement clear and unambiguous and precludes the consideration of extrinsic evidence outside the four corners of the agreement.

TCG states that where there is no genuine issue of material fact and the same issue of law has been previously decided, either expressly or implicitly, contrary to the defendant's position, summary judgement is proper.<sup>3</sup> Thus, TCG argues that, in the instant case, summary final order is appropriate because there are no genuine material issues of law or fact. TCG asserts that as a matter of law and under the doctrine of *stare decisis*, its Motion should be granted.

TCG also argues that under the doctrine of collateral estoppel, BellSouth is barred from relitigating the same issue. TCG asserts that in the instant case the same parties, BellSouth and TCG, are litigating the same issue, the interpretation and application of the same definition of "Local Traffic" which resulted in the TCG Order.

According to TCG, BellSouth's affirmative defenses of the statute of limitations and laches are without merit. TCG contends that the statute of limitations for contracts is contained in Section 95.11(2)(b), Florida Statutes. TCG states Florida law requires that a legal or equitable action on a contract, or obligation or liability founded on a written instrument, be commenced within five years. TCG argues that because the Second BellSouth/TCG Agreement was not adopted until July 14, 1999, TCG would not be precluded from filing a complaint for breach of the agreement until July 14, 2004, even if the civil statute of

---

<sup>3</sup>Forte Towers, Inc. v. City of Miami Beach, 360 So.2d 81(Fla. 3d DCA 1978).

limitations applies in a Commission proceeding (an issue which we need not reach).

TCG states that the doctrine of laches would not bar its proceeding on its complaint because, as codified in Section 95.11(6), Florida Statutes, laches will bar an action unless it is commenced within the time provided for legal actions concerning the same subject matter. TCG asserts that while it is questionable whether we even has authority to grant equitable relief, we need not reach a decision on this matter. TCG argues that under the statutory laches provision, laches would not bar its complaint because under the statutes of limitations, it has until July 14, 2004, to file. Further, TCG contends that an essential element of the doctrine of laches is the defendant's lack of knowledge that the plaintiff will assert the right upon which the suit is based. TCG asserts that under the facts of the instant case, any assertion by BellSouth that it lacked knowledge that TCG would bring an action for enforcement is patently absurd.

TCG concludes that the instant case is a simple matter of contract interpretation. TCG states that the admission of extrinsic evidence to interpret a contract is improper unless the language of the contract is ambiguous, and the language in the Second BellSouth/TCG Agreement is not ambiguous. TCG asserts that we found that the definition of "Local Traffic" in the TCG Order includes ISP bound traffic, particularly where there is no other provision addressing ISP bound traffic; therefore, reciprocal compensation is owed. TCG asserts that our previous interpretation of "Local Traffic" in the TCG Order governs the Second BellSouth/TCG Agreement because the contract language is the same. Further, TCG asserts that the doctrine of collateral estoppel precludes BellSouth from relitigating the definition of "Local Traffic." Therefore, TCG asserts that BellSouth has breached the Second BellSouth/TCG Agreement by failing to pay TCG reciprocal compensation.

#### BellSouth's Response

On June 1, 2001, BellSouth filed its Response in Opposition to TCG's Motion For Partial Summary Final Order (Response). In its Response, BellSouth states that we should deny the Motion for Partial Summary Final Order because there are genuine issues of



material fact for us to consider and collateral estoppel does not apply.

BellSouth contends that the facts, circumstances and legal principles which govern the adopted Second BellSouth/TCG Agreement are vastly different from the First BellSouth/TCG Agreement. BellSouth asserts that the FCC recently has issued an Order<sup>4</sup> which addresses the treatment of ISP bound traffic and contradicts TCG's theory of recovery in this proceeding. Moreover, BellSouth contends that in accordance with the Global NAPS decision when interpreting an adopted agreement, we will look at the intent of the original parties to the agreement, one of which is not a party to this proceeding. Finally, collateral estoppel is inapplicable to the instant case.

BellSouth asserts that the First BellSouth/TCG Agreement has no effect on the interpretation of the Second BellSouth/TCG Agreement. BellSouth does not dispute that the parties had a dispute as to whether reciprocal compensation should be paid for the First BellSouth/TCG Agreement. Nor does BellSouth dispute that at the expiration of the First BellSouth/TCG Agreement, TCG adopted the BellSouth/AT&T Agreement, which became the Second BellSouth/TCG Agreement. However, BellSouth contends that the status of the law had changed at the time TCG opted into the BellSouth/AT&T Agreement. Specifically, BellSouth states that when TCG adopted the agreement, the FCC's Declaratory Ruling, released February 26, 1999<sup>5</sup>, was in effect. BellSouth cites the Declaratory Ruling at paragraph 12 "ISP-bound traffic does not 'terminate at the ISP's local server, as CLECs and ISPs contend, but continues to the ultimate destination or destinations, specifically at an Internet web site that is often located in another state." BellSouth also

---

<sup>4</sup>Order on Remand and Report and Order, CC Docket No. 96-98, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Inter-Carrier Compensation for ISP-Bound Traffic Order No. FCC 01-131 (April 27, 2001) (FCC Remand Order).

<sup>5</sup>Declaratory Ruling, CC Docket No. 96-98, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Inter-Carrier Compensation for ISP-Bound Traffic, Order No. FCC 99-38, (February 26, 1999), (Declaratory Ruling)

cites the FCC Remand Order at paragraph 1, "We previously found in the Declaratory Ruling that [ISP-bound traffic] is interstate traffic subject to the jurisdiction of the Commission under section 201 of the Act and is not, therefore subject to the reciprocal compensation provisions of section 251(b)(5)."

BellSouth asserts that because the definition of "Local Traffic" in the Second BellSouth/TCG Agreement refers to "any telephone call that originates and terminates in the same LATA . . .", as a matter of law under the Declaratory Ruling, ISP-bound traffic could not have been included in the meaning of "Local Traffic" because it is interstate and would not originate and terminate within the same LATA.

BellSouth states that the TCG Order and all other previous decisions cited by TCG were executed prior to the Declaratory Ruling and have no bearing on this specific case. BellSouth contends that the standard and analysis set forth in our decisions in Global NAPS and ITC Deltacom must now change in light of the FCC Remand Order. BellSouth asserts that under the FCC Remand Order, the FCC confirmed that ISP-bound traffic is predominately interstate access traffic under Section 251(g). FCC Remand Order at paragraphs 1, 34, 36, and 44. BellSouth states that in the FCC Remand Order, the FCC initiated steps to limit the regulatory arbitrage that resulted from the payment of ISP bound traffic. *Id.* at paragraph 2. BellSouth further states that as a result of the FCC's decision, the only way parties to an interconnection agreement can now owe each other reciprocal compensation for ISP-bound traffic is if the parties explicitly include such a provision in the agreement. Thus, BellSouth asserts that without such a provision federal law requires a state commission interpreting an agreement to find that reciprocal compensation is not owed for ISP-bound traffic.

Further, BellSouth questions whether under the FCC Remand Order a state commission still has authority to order payment for reciprocal compensation. BellSouth cites the FCC Remand Order at paragraph 82: "Because we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, however, state commissions will no longer have authority to address this issue." Therefore, BellSouth contends that following the Global NAPs, ITC DeltaCom, and TCG Order decisions would require us to violate federal law and the FCC's

express goal to limit regulatory arbitrage resulting from the payment of reciprocal compensation for ISP-bound traffic. BellSouth states that the FCC's statement in its FCC Remand Order does not "preempt any state commission decisions regarding compensation for ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here" does not require a different conclusion. FCC Remand Order at paragraph 82. BellSouth contends that we has not made a decision in the instant case; therefore, the FCC Remand Order applies to the Commission interpretation in this case.

In addition, BellSouth argues that assuming the Second BellSouth/TCG Agreement is ambiguous and that BellSouth's interpretation of the FCC's decisions does not apply, questions of fact exist as to the parties' intent to pay reciprocal compensation. BellSouth states that under the Global NAPS decision, it is the intent of the original parties to the agreement (AT&T and BellSouth) that is relevant, not that of TCG and BellSouth. BellSouth asserts that according to its witness Shiroishi in her direct and rebuttal testimony, AT&T filed comments with the FCC at the time of the execution of the AT&T/BellSouth Agreement. BellSouth contends that AT&T's comments establish that, like BellSouth, AT&T believed that ISP-bound traffic was interstate traffic. (Shiroishi Direct testimony at page 5, Rebuttal testimony at page 6). BellSouth states that it appears that both AT&T and BellSouth intended not to compensate each other for the transport and termination of ISP-bound traffic because it was interstate and not local. BellSouth asserts that its position is buttressed by the fact that AT&T has not brought a claim against BellSouth for payment of reciprocal compensation. (Shiroishi Direct testimony at page 5). Therefore, BellSouth contends that a question of fact exists as to the intent of the original parties.

Further, BellSouth argues that even if the Global NAPS analysis does not apply, question of fact still exists. BellSouth contends that to determine the intent of the parties at the time of the contract, we should consider the circumstances at the time of the agreement as well as the subsequent actions of the parties. BellSouth contends that, as made clear in the direct testimony of witness Shiroishi, BellSouth did not intend to pay reciprocal compensation for ISP-bound traffic under the terms of the Second BellSouth/TCG Agreement. BellSouth asserts that we must hear evidence of and rule on the intent of the parties to the Second

BellSouth/TCG Agreement. BellSouth states that we cannot automatically assume that the intent of the parties in the First BellSouth/TCG Agreement is the same in the Second BellSouth/TCG Agreement. Thus, BellSouth asserts that the Motion for Partial Summary Final Order should be denied.

BellSouth contends that collateral estoppel does not apply for several reasons. BellSouth asserts that the issues are not the same because the facts and issues surrounding the First BellSouth/TCG Agreement are different than the current claim. BellSouth states that the First BellSouth/TCG Agreement was negotiated, while the second agreement was an opt-in agreement. BellSouth claims that under Global NAPS this changes the dynamics of this case because only the original parties' intent is relevant. Therefore, BellSouth states that the focus of this proceeding is whether AT&T and BellSouth intended to pay reciprocal compensation, whereas in the TCG Order the focus was whether TCG and BellSouth intended to pay reciprocal compensation for ISP-bound traffic.

In addition, BellSouth states that the TCG Order is currently on appeal to the United States District Court for the Northern District of Florida, Case No. 4:98 CV 352-RH, and thus not a final judgement giving it preclusive effect.<sup>6</sup> In addition, BellSouth argues that the Declaratory Ruling and the FCC Remand Order changed the law upon which the TCG Order was based. BellSouth asserts that a change or development in the controlling legal principles may prevent the application of collateral estoppel even though an issue has been litigated and decided.<sup>7</sup> BellSouth states that the basis for this rule is that "modifications in 'controlling legal principles,' could render a previous determination inconsistent with prevailing doctrine."<sup>8</sup> BellSouth contends that such is the case here because the TCG Order was issued prior to the Declaratory Ruling and the FCC Remand Order, which establish that ISP bound

---

<sup>6</sup>Cohen v. City of Stuart, 702 So.2d 255 (Fla. 4<sup>th</sup> DCA.1997) and ITC DeltaCom Order at 7.

<sup>7</sup>North Georgia Elec. Membership Corp. v. City of Calhoun, Georgia, 989 F.2d. 424, 433 (11<sup>th</sup> Cir. 1993) (citing Commissioner v. Sunnen, 333 U.S. 591, 599 (1948)).

<sup>8</sup>Montana v. United States, 440 U.S. 147 (1979) (quoting Sunnen, 333 U.S. at 599)

traffic is interstate in nature and not subject to reciprocal compensation. Thus, BellSouth contends that the TCG Order is inconsistent with these controlling legal principles because it requires the payment of reciprocal compensation. BellSouth argues that even assuming the TCG Order is final, collateral estoppel does not apply because to hold otherwise would violate federal law.

BellSouth also states that it raised several affirmative defenses, including statutes of limitation for specific performance which runs for one year, because TCG waited until six months after the termination of the Second BellSouth/TCG Agreement to file its complaint. BellSouth contends that it is unnecessary to dismiss its affirmative defenses because they have been subsumed within the issues identified in the Procedural Order.

#### Decision

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 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

ORDER NO. PSC-01-1427-FOF-TP  
DOCKET NO. 001810-TP  
PAGE 14

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 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.

Based on the pleadings and the extensive discussions at the June 12, 2001, Agenda Conference, we believe that there may be genuine issues of material facts in dispute. Moreover, we note that regardless of our decision on the Motion, a hearing will be held on the remaining issues. Therefore, we find it appropriate to deny TGC's Motion for Partial Summary Final Order.

MOTION TO BIFURCATE AND SUPPLEMENTAL MOTION FOR CONTINUANCE

As stated in the Background, at the prehearing on May 30, 2001, TCG made an *ore tenus* Motion to Continue to the Hearing Date. BellSouth renewed its opposition to any continuance of the hearing date. TCG was directed to file a written Motion For Continuance. On June 1, 2001, TCG filed its Motion to Bifurcate and Supplemental Motion for Continuance (Motion for Continuance).

In support of its Motion for Continuance, TCG states that the predominant portion of the prefiled testimony and exhibits that have been filed in this proceeding address the issue of whether BellSouth has breached the Second Agreement by failing to pay reciprocal compensation. TCG asserts that the resources of the parties and the Commission would be efficiently utilized by first addressing the Motion for Partial Summary Final Order before the final hearing. TCG states that if the Motion for Partial Final Summary Order is granted, then the issues for final hearing will be significantly reduced, and if it is denied, no party will be prejudiced.

ORDER NO. PSC-01-1427-FOF-TP

DOCKET NO. 001810-TP

PAGE 15

Further, TCG states that should the Motion for Partial Final Summary Order be granted, Issues 1 through 4(a) would be resolved. TCG contends that it would be appropriate to bifurcate Issues 1 through 4(a) into one hearing process, and Issue 4(b), Issue 5(a) and Issue 5(b) into a second hearing process. TCG states that if its partial summary final order is denied, then it would request to go forward on Issues 1 through 4(a) on June 22, 2001, or reschedule the hearing date on those issues to no later than 60 days after June 22, 2001.

TCG also contends that bifurcation and rescheduling of Issues 4(b), 5(a) and 5(b), would increase the prospect of settlement and resolution of this docket *in toto*. TCG asserts that should TCG's Motion for Partial Summary Final Order be granted, the only issues remaining involve the amount owed on reciprocal compensation for "Local Traffic;" and intrastate switched access charges due to TCG from BellSouth. TCG states that the critical issue that remains is whether TCG is entitled to include the tandem interconnection rate in its claim for reciprocal compensation under the Second BellSouth/TCG Agreement. TCG asserts that currently we will be addressing this issue in its generic investigation in Docket No. 000075-TP, by establishing general rules and criteria for when an ALEC can recover the tandem rate. Therefore, TCG contends that the outcome of Docket 000075-TP may play a significant role in determining how the tandem rate issue is resolved in the instant case. Therefore, TCG states that the prospect of settlement should increase once the "rules of the road" for the tandem rate have been established, if the parties are reasonable. TCG states that we are scheduled to make a determination in Phase II of Docket 000075-TP, which includes the tandem rate issue, at the September 4, 2001, Agenda Conference. TCG requests that the hearing on Issues 4(b), 5(a) and 5(b) commence no later than 30 days after September 4, 2001. TCG states that this will give the parties 30 days to negotiate the issue of the tandem rate amount in the event that the Motion for Partial Summary Final Order is granted.

As noted above, at the Prehearing Conference, BellSouth stated that it objected to a continuance of the hearing date. BellSouth stated that even if the Motion for Partial Summary Final Order was granted, there would still be a hearing on the remaining issues. BellSouth indicated that it would not feel comfortable agreeing to a continuance just to allow TCG's Motion for Partial Summary Final Order to be heard. BellSouth also stated that TCG had a lot of

ORDER NO. PSC-01-1427-FOF-TP  
DOCKET NO. 001810-TP  
PAGE 16

time to bring the Motion for Partial Summary Final Order. BellSouth also stated that TCG has outstanding discovery and in TCG's Motion to Compel, TCG indicated that they were going to depose witnesses.

Further, BellSouth stated that it does not believe that the hearing should wait until the generic docket is resolved. BellSouth asserts that "kicking" the rate issues to the generic docket will not promote judicial economy. BellSouth states that while it may be true that AT&T [TCG] will know its position on what rates it could charge, that is on a going-forward basis. BellSouth contends that this is an agreement and it requires certain rates which are the subject of this contract dispute. Thus, BellSouth maintains that the hearing needs to go forward and the rate issue should not be "kicked" to the generic docket or delayed until the generic docket is resolved.

#### Decision

Since we have decided to deny TCG's Motion for Partial Summary Final Order, this matter will proceed to hearing on all issues. We do not find that bifurcation is appropriate, nor would it promote judicial economy. Thus, we do not find good cause to grant a continuance of the hearing date.

Based on the foregoing, we deny TCG's Motion to Bifurcate and Supplemental Motion for Continuance.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that TCG South Florida and Teleport Communications Group's Motion for Partial Summary Final Order is hereby denied. It is further

ORDERED that Florida Public Service Commission that TCG South Florida and Teleport Communications Group's Motion to Bifurcate and Supplemental Motion for Continuance is hereby denied. It is further

ORDERED that this docket shall remain open pending the resolution of TCG South Florida and Teleport Communications Group's complaint.



ORDER NO. PSC-01-1427-FOF-TP  
DOCKET NO. 001810-TP  
PAGE 17

By ORDER of the Florida Public Service Commission this 3rd  
Day of July, 2001.

BLANCA S. BAYÓ, Director  
Division of the Commission Clerk  
And Administrative Services

By: Kay Flynn  
Kay Flynn, Chief  
Bureau of Records

( S E A L )

PAC

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 the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule

ORDER NO. PSC-01-1427-FOF-TP  
DOCKET NO. 001810-TP  
PAGE 18

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 the Commission Clerk and Administrative Services 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.