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April 8, 1998

Ms. Blanca S. Bayo, Director  
Division of Records and Reporting  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Betty Easley Conference Center  
Room 110  
Tallahassee, Florida 32399-0850

**HAND DELIVERY**

Re: Consolidated Docket Nos. 980184-TP and 971478-TL, etc.

Dear Ms. Bayo:

Enclosed herewith for filing in the above-referenced docket on behalf of Teleport Communications Group, Inc./TCG South Florida ("TCG") are the original and fifteen copies of TCG's Memorandum in Opposition to BellSouth's Statement of Proposed Issues.

- ACK \_\_\_\_\_
- AFA \_\_\_\_\_
- APP \_\_\_\_\_
- CAF \_\_\_\_\_
- CMU Norton
- CTR \_\_\_\_\_
- EAG \_\_\_\_\_
- LEG 1
- LIN \_\_\_\_\_
- OPC \_\_\_\_\_
- RCH JRE/rl
- SEC 1
- WAS \_\_\_\_\_
- OTH cc: All Parties of Record

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

Thank you for your assistance with this filing.

Sincerely,

John R. Ellis

Enclosures

Trib.3

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DIVISION OF RECORDS

DOCUMENT NUMBER-DATE

04060 APR-88

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Teleport Communications Group Inc./TCG South Florida for Enforcement of Section IV.C of its Interconnection Agreement with BellSouth Telecommunications, Inc., and Request for Relief.	)	Docket No. 980184-TP and Consolidated Docket Nos. 971478-TL, 98xxxx-TP (MCI), and 98xxxx-TP (Intermedia)
	)	
	)	
	)	
	)	Filed: April 8, 1998

**TO: Hon. J. Terry Deason  
Prehearing Officer**

**TCG'S MEMORANDUM IN OPPOSITION TO BELLSOUTH'S  
STATEMENT OF PROPOSED ISSUES**

Petitioner, Teleport Communications Group Inc./TCG South Florida ("TCG"), files this memorandum in opposition to the statement of proposed issues by BellSouth Telecommunications, Inc. ("BellSouth") as modified on April 3, 1998.

**BellSouth's Proposed Issues 1 and 1(A):**

Issue 1: Describe the type of traffic in dispute.

Issue 1(A): What is the jurisdictional nature of such traffic?

BellSouth's proposed Issue 1 is necessarily included in Staff's proposed issue as to each of the four petitioners. It is unnecessary to add BellSouth's separate statement of an issue which is not in dispute. These cases involve the transport and termination of traffic to Internet Service Providers ("ISPs"). Further, BellSouth's phrasing of the issue is ambiguous. If by the phrase "the type of traffic in dispute," BellSouth means the manner in which calls to ISPs are transported, there is no dispute over these facts; if BellSouth means instead, whether the traffic is local within the meaning of the reciprocal compensation term of the parties' agreements, then that is the ultimate issue in dispute and BellSouth's phrasing of it adds nothing to Staff's statement of the issue.

DOCUMENT NUMBER-DATE

04060 APR-88

FPSC-RECORDS/REPORTING

BellSouth's proposed Issue 1(A) also is unnecessary. BellSouth may assert its legal arguments concerning the jurisdictional nature of calls terminated to ISPs in response to the Staff issues as to each carrier. It certainly would appear that BellSouth must address the jurisdictional nature of the traffic under the Staff issues to support its position that calls terminated to ISPs are not local traffic subject to the reciprocal compensation obligations under the agreements.

**BellSouth's Proposed Issues 3 and 3(A):**

Issue 3: In their interconnection agreement, did Teleport Communications Group, Inc./TCG South Florida and BellSouth Telecommunications, Inc., mutually intend to treat this type of traffic as local traffic for purposes of reciprocal compensation?

Issue 3(A): If Teleport Communications Group, Inc./TCG South Florida and BellSouth Telecommunications, Inc., did not mutually intend to treat this type of traffic as local traffic for purposes of reciprocal compensation, can BellSouth Telecommunications, Inc., be required to pay reciprocal compensation for that traffic?

BellSouth next proposes two issues for each of the four petitioners in these consolidated dockets, in identical terms except for the names of the parties. As to TCG these two issues are numbered 3 and 3(A) . In proposing these issues, BellSouth attempts to elevate one element of an analysis of the construction and effect of a contract over several other elements which are equally or more relevant. For example, four more elements of the analysis of the construction and effect of the contract, which TCG could as easily ask to be emphasized as BellSouth has attempted to do, are:

- What was the law in effect governing the jurisdictional nature of ISP traffic at the time the parties executed the agreement?

- Was there a trade custom or usage concerning charges for ISP traffic, such that the parties may be deemed to have incorporated that custom or usage into their agreement by implication if nothing was said to the contrary?
- What type(s) of traffic, if any, were expressly excluded from the definition of local traffic by the parties under the agreement?
- What did the parties do or omit to do after the contract was made, with respect to the payment of charges for ISP traffic?

In contrast, Staff's statement of one ultimate issue for each party's contract with BellSouth is phrased in neutral terms, and is not subject to the criticism that it is an advocate's attempt to emphasize one element in an analysis of the construction and effect of a contract.

Moreover, BellSouth's attempt to import after-the-fact evidence of BellSouth's subjective intent concerning the treatment of ISP traffic under its agreement with TCG should be rejected as irrelevant. It is a fundamental principle of law, recently recognized by this Commission, that existing law in force at the time a contract is made forms a part of the contract as if expressly incorporated into it. City of Daytona Beach v. Amsel, 585 So.2d 1044 (Fla. 1<sup>st</sup> DCA 1981); Order No. PSC-98-0454-PCO-TP issued March 31, 1998, at 7-8 (WorldCom ISP proceeding). This principle applies to Commission approved contracts as well. Recently, in Panda-Kathleen, L.P. v. Clark, 701 So.2d 322 (Fla. 1997), the Florida Supreme Court affirmed the Commission's conclusion that any understanding of the parties to a standard offer contract contrary to the Commission rules incorporated in such contract was irrelevant. Here, likewise, it is the applicable legal precedent - - FPSC, FCC and other state regulatory commissions - - in existence at the time the agreement was

executed by the parties and approved by the Commission which governs this dispute. After the fact assertions of intent are simply irrelevant.

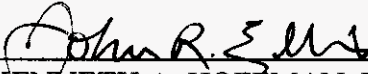
Thus, for the foregoing reasons, BellSouth's proposed Issues (3) and (3)(A) (and, similarly, the corresponding issues for the other carriers) should be excluded from this proceeding.

**BellSouth's Issue 6:**

Issue 6: Is the payment of reciprocal compensation for this type of traffic in the public interest?

BellSouth's proposed Issue 6 invites a generic hearing with the participation of any and all interested parties. The Commission already has determined that these contractual disputes will not be transformed into a generic hearing and will be limited to the parties to the agreements. See Order No. PSC-98-0454-PCO-TP issued March 31, 1998 (WorldCom ISP proceeding).

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of TCG's Memorandum in Opposition to BellSouth's Statement of Proposed Issues was furnished by telecopier (\*) and U. S. Mail this 8<sup>th</sup> day of April, 1998 to the following:

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