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June 30, 1998

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Ms. Blanca S. Bayo, Director
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Tallahassee, Florida 32399-0850

HAND DELIVERY

Re: Docket Nos. 971478-TP, 980184-TP; 980495-TP and 980499-TP

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 following documents:

1. Original and fifteen copies of TCG's Posthearing Brief; 060884-98
2. Original and fifteen copies of TCG's Request for Official Recognition; and 060885-98
3. A disk in Word Perfect 6.0 containing a copy of the Posthearing Brief.

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

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of WorldCom Technologies, Inc., against BellSouth Telecommunications, Inc., for breach of terms of Florida Partial Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 and request for relief.	**Docket No. 971478-TP**
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**
In re: Complaint of Intermedia Communications, Inc. against BellSouth Telecommunications, Inc., for breach of terms of Florida Partial Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 and request for relief.	**Docket No. 980495-TP**
In re: Complaint of MCImetro Access Transmission Services, Inc., against BellSouth Telecommunications, Inc., for breach of terms of interconnection agreement under Section 252 of the Telecommunications Act of 1996 and request for relief.	**Docket No. 980499-TP**

POST-HEARING BRIEF OF

TELEPORT COMMUNICATIONS GROUP INC.

AND TCG SOUTH FLORIDA

Filed: June 30, 1998

Teleport Communications Group Inc. and its Florida affiliate, TCG South Florida (collectively "TCG") submit this post-hearing brief to the Florida Public Service Commission ("the Commission") in consolidated Docket Nos. 971478-TP, 980184-TP, 980495-TP, and 980499-TP.

Issue 2: **Under their Interconnection Agreement, are Teleport Communications Group Inc./TCG South Florida and BellSouth required to compensate each other for transport and termination of traffic to Internet Service Providers? If so, what action, if any, should be taken?**

Yes. Under the BellSouth-TCG Interconnection Agreement, TCG and BellSouth are required to compensate each other for transport and termination of traffic to Internet Service Providers. The Commission should order BellSouth to immediately remit to TCG all funds unlawfully withheld by BellSouth, with interest.

SUMMARY OF ARGUMENT

This dispute arose from a letter dated August 12, 1997 from BellSouth Telecommunications, Inc. ("BellSouth") to "All Competitive Local Exchange Carriers," including TCG, in which BellSouth repudiated its obligation to pay reciprocal compensation under Interconnection Agreements for traffic terminated by competitive local exchange carriers to Enhanced Service Providers ("ESPs") including Internet Service Providers ("ISPs") (Tr. 89; Exhibit 2 at PK-2).

The Interconnection Agreement between BellSouth and TCG ("the Agreement") was entered into on July 15, 1996 (Exhibit 2 at PK-1) and was approved by Order No. PSC -96-1313-FOF-TP issued October 29, 1996.[1] Prior to the August, 1997 letter, BellSouth had treated ISP traffic as local traffic and had paid reciprocal compensation to TCG for ISP traffic under the Agreement and under

[1] *In Re: Request for Approval of interconnection agreement between BellSouth Telecommunications, Inc. and Teleport Communications Group, pursuant to Sections 251, 252, and 271 of the Telecommunications Act of 1996*, Final Order Approving Negotiated Interconnection Agreement, Docket No. 960862-TP; 96 F.P.S.C. 10:370 (1996).

their earlier interconnection agreement entered into in December 1995 and approved by the Commission pursuant to Chapter 364, Florida Statutes.[2] (Tr. 91, 113, 116-117, 129-130). Beginning with the August, 1997 letter and continuing through June 1, 1998, BellSouth has refused to pay TCG in excess of four million dollars billed to BellSouth for ISP traffic terminated by TCG under the Agreement (Exhibit 3 at Late-Filed Ex. 5; Tr. 88-89, 116-117).

The excuse offered by BellSouth for its repudiation and breach of its duty to pay reciprocal compensation for ISP traffic is based on BellSouth's new position on the issue of where calls to ISPs "terminate." BellSouth's new position, first announced in the August, 1997 letter, is that ISP traffic is jurisdictionally interstate and "enjoys a unique status, especially [as to] call termination." (Exhibit 2 at PK-2). BellSouth's new position contradicts the position which it advocated before this Commission in 1989 and which was adopted by the Commission in Order No. 20815, that calls to ISPs should be viewed as jurisdictionally intrastate local exchange calls terminating at an ISP's location in Florida.[3] BellSouth's new position that ISP traffic should be excluded from local traffic is further undermined by its failure to take any steps when the Agreement was entered into in July of 1996 to develop a tracking system to separately account for ISP traffic, as BellSouth first attempted to do in May or June of 1997 (Tr. 114-115, 298-301; 308-309).

This is a contract dispute in which the Commission must decide whose meaning is to be given to the term "Local Traffic" in the Agreement. As explained in the testimony of its witness Mr. Paul

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[2] Order No. PSC-96-0082-AS-TP issued January 17, 1996 in Consolidated Docket Nos. 950696-TP, 950737-TP, 950984-TP, and 950985-TP, 96 F.P.S.C. 1:301

[3] *In Re: An investigation into the statewide offering of access to the local network for the purpose of providing information services*, Order No. 20815 issued September 5, 1989 in Docket No. 880423-TP, 89 F.P.S.C. 9:7, 30 (1989)(hereinafter "Order No. 20815").

Kouroupas, TCG maintains that the definition of "Local Traffic" at Section I.D. of the Agreement expressly and unambiguously includes traffic terminated to ISPs as local traffic. (Tr. 91, 104, 114).

BellSouth's new interpretation of the term "Local Traffic" is inconsistent with the operation of the Agreement for two reasons. First, BellSouth's meaning would have required the parties to develop some sort of tracking system prior to the effective date of the Agreement to separately account for ISP traffic, so as to exclude ISP traffic from all other traffic provided under local exchange service tariffs and subject to reciprocal compensation as local traffic. BellSouth never even suggested such a system in the negotiations leading to the Agreement and, of course, no separate treatment or tracking system for ISP traffic is included in the Agreement. Second, BellSouth's meaning would result in ISP traffic being the only kind of traffic not subject to compensation under the Agreement either as local traffic or as toll traffic. This would deprive ALECs of recovery of their costs incurred in terminating calls to ISPs. Consequently, BellSouth's attempt to show that the term "Local Traffic" is ambiguous and its repeated testimony reflecting its alleged subjective intent[4] to not be bound for reciprocal compensation payment for ISP traffic, fails because BellSouth's asserted meaning of the term "Local Traffic" must be rejected as being inconsistent with the Agreement itself.

Even if the Commission were to find some minimal plausibility to BellSouth's claim that the term "Local Traffic" is ambiguous and that the Agreement is susceptible to being interpreted as if "Local Traffic" excludes ISP traffic - - despite the absence of an express exclusion of ISP traffic from the definition of "Local Traffic" at Section I.D. of the Agreement - - that ambiguity should be

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[4] See Tr. 224, 225, 227, 235, 243, 250, 257, 258, 263, 264, 266, 277, 299, 300, 322, 323, 324, 329, 330.

resolved against BellSouth as party most responsible for creating it. There are three primary reasons why BellSouth's asserted ambiguity must be summarily rejected or construed against BellSouth:

1. Before August, 1997, BellSouth's position was that calls to an ISP terminate at the ISP's location in Florida, that the location of the ISP's database is not relevant to the jurisdictional determination of the ISP's access connection, and that all calls to ISPs which use local exchange lines for access are considered local even though communication may take place with databases or terminals in other states. BellSouth's position was a matter of record in Order No. 20815, in which the Commission defined intrastate access specifically for information services as follows:

> Intrastate access is switched or dedicated connectivity which originates from within the state to an information service provider's point of presence (ISP's POP) within the same state.[5]

BellSouth's reversal of its pre-August, 1997 position was never expressed to TCG in negotiations, or to this Commission, before the Agreement was entered into in July, 1996.

2. BellSouth's asserted meaning of the term "Local Traffic" would have required the parties to have developed a system to track ISP traffic separately from all other calls provided under local exchange tariffs. The parties agree that ISP traffic was never discussed in the negotiations leading to the July, 1996 Agreement, and ISP traffic is not referenced in the Agreement. Moreover, ISP traffic was treated by the parties as local traffic under their initial interconnection agreement. BellSouth is both the party attempting to create an ambiguity and the party against whom any ambiguity should be construed.

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[5] Order No. 20815 at 9:33. BellSouth admits that this definition had not been modified by the Commission or preempted by the FCC when the Agreement was entered into in July, 1996, nor has it been modified or preempted to date (Exhibit 7 at 81-82).

3. At all times and like all other Incumbent Local Exchange Carriers ("ILECs"), BellSouth bills calls from its customers to ISPs as local calls. BellSouth also bills ISPs who are customers of BellSouth pursuant to BellSouth's local exchange tariffs. This trade usage was known to TCG when the Agreement was entered into, and conforms with the definition of "Local Traffic" in the Agreement:

> Any telephone call that originates and terminates in the same LATA and **is billed by the originating party as a local call**....

BellSouth's new interpretation of the term "Local Traffic" term contradicts its own practice of billing calls to ISPs as local traffic and offering service to ISP customers of BellSouth under its local exchange tariffs. BellSouth's new interpretation is also inconsistent with the trade usage of the term "Local Traffic" and the course of dealing and course of performance between BellSouth and TCG as to that term. Again, BellSouth's failure to express its new position before August, 1997 makes it the party responsible for the asserted ambiguity.

None of the nineteen state commissions that have considered this matter have allowed ILECs to refuse to pay reciprocal compensation to Alternative Local Exchange Carriers ("ALECs") for ISP traffic.[6] BellSouth's self-help tactic of unilaterally announcing its repudiation and withholding payment has succeeded in impairing TCG's cash flow until the matter is resolved, thereby making TCG less able than it otherwise would be to expand its network, market its services and offer more effective competition to BellSouth (Tr. 99). The Commission should order BellSouth to immediately remit payment, with interest, of all funds withheld from TCG in response to TCG's billings pursuant

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[6] See orders cited at Exhibit 1, List of Documents for Official Recognition, pgs. 4-6; and TCG's Request for Official Recognition filed June 30, 1998.

to the Agreement. Further, the Commission should specifically find BellSouth's unilateral withholding of reciprocal compensation for ISP traffic to be an anti-competitive and unlawful abuse of BellSouth's monopoly power, and should act to deter future abuses by BellSouth under Interconnection Agreements.

ARGUMENT

I. ISP TRAFFIC MEETS BOTH REQUIREMENTS OF THE DEFINITION OF "LOCAL TRAFFIC" IN THE INTERCONNECTION AGREEMENT BETWEEN BELLSOUTH AND TCG.

The definition of "Local Traffic" appears at Section I.D. of the Agreement, and has two elements:

- any telephone call that originates and terminates in the same LATA and
- is billed by the originating party as a local call.... (Tr. 114; Ex. 2 at PK-1, p.2).

It is undisputed that ISP traffic meets the second element of the definition of local traffic in the Agreement. BellSouth bills calls from its customers to ISPs who are also BellSouth customers as local calls (Tr. 78, 88, 91, 103, 108).

BellSouth's new position is that an ISP call does not "terminate in the same LATA" under Section I.D. of the Agreement. Before BellSouth's monopoly over local exchange service was ended by Florida's 1995 amendments to Chapter 364, Florida Statutes and by the Telecommunication's Act of 1996 ("the Act") and until its letter of August, 1997, BellSouth's position on this issue was clearly and unequivocally stated in the Commission's Order No. 20815 in the 1988-89 generic investigation into the offering of local exchange access for information services providers:

> Southern Bell's Witness Payne defined intrastate access as a situation in which a call originates within the State of Florida by an information service provider's customer and **terminates at an ISP's location within the State of Florida**. The implication

of this definition is that the location of an ISP's data base is not relevant to a jurisdictional determination of that ISP's access connection.[7]

Thus, under BellSouth's pre-August, 1997 position that ISP traffic "terminates at an ISP's location in the State of Florida," ISP traffic meets both requirements of the Agreement's definition of local traffic and is subject to reciprocal compensation. (Tr. 108).

A standard industry definition of "service termination point" is: "Proceeding from a network toward a user terminal, the last point of service rendered by a commercial carrier under applicable tariffs.... In a switched communications system, the point at which common carrier service ends and user-provided service begins, i.e. the interface point between the communications systems equipment and the user terminal equipment, under applicable tariffs."[8] According to this definition, traffic destined for ISPs is terminated within the LATA, and thus is local traffic subject to reciprocal compensation under the Agreement (Tr. 109-110).

A call placed over the public switched telecommunications network is considered to be "terminated" when it is delivered to the telephone exchange bearing the called telephone number (Tr. 29). That is, call termination occurs when a connection is established between the caller and the telephone exchange service to which the dialed telephone number is assigned, answer supervision is returned, and a call record is generated (Tr. 31); whether the call is received by a voice grade phone, a fax machine, an answering machine, or in the case of an ISP, a modem (Tr. 51). This is the widely accepted, industry standard definition of "termination" (Tr. 134, 156).

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[7] Order No. 20815, 89 F.P.S.C. at 9:29 (emphasis added).

[8] Martin H. Weik, *Communications Standard Dictionary* (3d ed. 1996), at 93; Tr. 109.

Technical words or terms used in a contract are to be interpreted as they are usually understood by persons in the business or profession to which they relate, unless a different meaning is clearly intended by the context of the contract or by an applicable custom or usage of trade. 11 Fla. Jur. 2d, Contracts § 159. Here the Agreement makes no reference to any other understanding of the word "terminates," and consequently under the plain language of the Agreement calls to ISPs are local traffic subject to reciprocal compensation.

II. BELLSOUTH'S ASSERTED MEANING OF THE "LOCAL TRAFFIC" TERM CONTRADICTS ITS PRE-AUGUST, 1997 POSITION AND IGNORES THE TERMS OF ORDER NO. 20815.

BellSouth's pre-August, 1997 position on the issues of where a call to an ISP terminates and the jurisdictional nature of ISP traffic is developed in detail in Section VI. C, "Jurisdictional Nature of Intrastate Access," of the Commission's Order No. 20815 in the 1988-89 generic investigation into the offering of local exchange access for ISPs. Section VI. C of the Order begins by placing the above-quoted testimony of Mr. Payne in historical context as a deviation from the conventional definition of intrastate access, in its implication that the location of an ISP's database in another state is not relevant to the jurisdictional nature of the access. The Order finds that BellSouth's definition is preferable to the conventional definition of intrastate access as applied to information services because BellSouth's definition allows the Commission to clearly draw a jurisdictional line and identify the service classification that will be applied to ISP traffic:

> There are also technical constraints with the traditional definition of jurisdictional access which also makes it unsuitable for information services. According to Southern Bell's Witness Payne, the major concern of the LECs is that it is difficult to identify the jurisdiction of the traffic because the ultimate end points of the call are not known. Payne continues that, in the voice world, the digits dialed provide a highly accurate method for determining jurisdiction due to the ubiquitous use of the North American Numbering Plan. With most enhanced services, however, the LEC has no

> way of knowing the destination of a call once it is handed to an ISP. Witness Payne cites the example that "all calls to a VAN which use local exchange lines for access are considered local, even though communication may take place with databases or terminals in other states." **Witness Payne concludes that such "calls should continue to be viewed as local exchange traffic terminating at the ESP's location. Connectivity to a point out of state through an ESP should not contaminate the local exchange connection." We agree.**[9]

The Order notes that a "mixed jurisdiction" definition of access to ISP traffic would present problems in the identification of a percentage of interstate usage ("PIU") factor, and again quotes Mr. Payne on this point:

> According to Bell's Witness Payne, since the LEC has no real knowledge of what happens to a call beyond the ISP's POP, the determination of a PIU factor is dependent on the ISP's telling the LEC whether a call is inter- or intrastate in nature. In addition, it appears that most ISPs lack the ability to measure and thus generate a PIU.[10]

The Commission consequently adopted the following definition of intrastate access specifically for information services in Order No. 20815, which definition has not been modified by the Commission, overruled by any court, or preempted by the Federal Communications Commission ("FCC"):

> Intrastate access is switched or dedicated connectivity which originates from within the state to an information service provider's point of presence (ISP's POP) within the same state.[11]

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[9] Order No. 20815, 89 F.P.S.C. at 9:30 (emphasis added). A Value Added Network ("VAN") is described at 9:23 as a company which establishes networks of interLATA and intra LATA lines, data communication facilities and switching facilities.

[10] Ibid., at 9:32.

[11] Ibid., at 9:33. In Order No. 23183, issued July 13, 1990, the Commission declined to revise the definition on reconsideration (90 F.P.S.C. 7:232, 235).

BellSouth did not express any disagreement with this definition to the Commission or to TCG at any time before BellSouth's August, 1997 letter of repudiation. (Tr. 46, 47, 113).

Rationalization for BellSouth's recent retraction of its publicly held position that ISP traffic constitutes local traffic was left to Mr. Hendrix. Mr. Hendrix's testimony and explanations, while quite lengthy, were quite vacuous. In sum, BellSouth's new inconsistent position is premised on the belief that an ISP call is an interstate call which does not terminate at the ISP modem dialed by a seven digit local telephone call. (Tr. 229-231).

Note that none of the factual predicates for BellSouth's new position as stated in Mr. Hendrix's direct testimony have changed from the time of BellSouth's original position stated in Order No. 20815:

- an ISP transmits a call to and from the communications network of other telecommunications carriers;
- whereupon it is ultimately delivered to Internet host computers, almost all of which are not located in the local serving area of the ISP;
- there is no interruption of the continuous transmission of signals between the end user and the host computers;
- the dispersion of servers world-wide and the lack of duplication attests to the fact that use of the Internet will invariably involve interstate communications;
- there is an inability to distinguish the jurisdictional nature of each communication that traverses an Internet connection; and
- the originating end user and the ISP's point of presence ("POP") are in the same local calling area, and local interconnection trunks are used to transmit calls to ISPs.

(Tr. 229-231).

What has changed since 1989, of course, is the phenomenal growth of the Internet and the loss of BellSouth's monopoly over the provision of local exchange service to ISPs in its franchised

territory. However, what takes place after the call is terminated to the ISP, including the subject of Internet telephony, is not the issue in this proceeding. The issue in dispute is the payment of reciprocal compensation for that component of internet access obtained by delivery of local calls to ISPs, not the component of information services provided by ISPs[12] (Tr. 53, 56, 73-73, 90, 95, 107-108).

III. BELLSOUTH'S ASSERTED MEANING OF THE TERM "LOCAL TRAFFIC" IS INCONSISTENT WITH THE OPERATION OF THE AGREEMENT.

If the parties were to accept BellSouth's new position that an ISP call "terminates" at each of the computer databases or information sources to which the ISP delivers the packet switched message (Tr. 231) so that ISP traffic is not included in the definition of "Local Traffic" in the Agreement, then it would be necessary to develop a tracking system to separate calls to ISPs from all other calls subject to reciprocal compensation as local traffic (Tr. 114-115, 123-124, 128, 183-185). The direct testimony of Mr. Hendrix begged the question whether before August, 1997 BellSouth must have paid reciprocal compensation to TCG and must have billed TCG for local traffic to ISP customers because no such tracking system was in place (Tr. 104, 223). Mr. Hendrix ultimately conceded on cross-examination that BellSouth had "...made an attempt to exclude that type of traffic from any bills that's being rendered to the ALEC" (Tr. 290-291) as of May or June of 1997 (Tr. 303, 308-309), and that "We may have paid some. I will not sit here and say that we did not pay any." (Tr. 309). BellSouth's tracking system apparently relies on ALECs to provide BellSouth with the seven-digit

[12] The inconsistency between BellSouth's position in this proceeding and its position before the FCC on the issue of whether the first component of Internet access could be provided by BellSouth without a Section 272 separate subsidiary, was emphasized by Mr. Kouroupas and was noted on cross-examination by the Commission. (Tr. 96-97, 283-288).

local exchange telephone numbers of their ISP customers (Tr. 294-295), and in the absence of being provided with these numbers BellSouth has fabricated an estimate of the amount of traffic placed to ISPs on TCG's network (Tr. 105). Mr. Hendrix was unclear to what extent BellSouth's tracking system was automated as recently as the night before the hearing, although he conceded that it would be far more efficient to have an automated system in place to track all traffic terminated to hundreds, if not thousands, of ISPs in Florida (Tr. 307-308).

However, whether BellSouth's tracking mechanism for ISP traffic is automated yet as to any ALECs or whether it continues to rely upon fabricated estimates as to all of them, the fact remains that in order for BellSouth's asserted meaning of the term "Local Traffic" to be effective, a tracking system would have to have been developed to separate ISP traffic from all other local traffic for which reciprocal compensation is due. Of course, the Agreement does not even reference "ISP traffic," much less provide a separate tracking system so as to exclude ISP traffic from all other local traffic (Tr. 300-301).

A further reason why BellSouth's asserted meaning of the "Local Traffic" term is inconsistent with the Agreement is that if ISP traffic were to be separately tracked and excluded from all other local traffic, then it would be the only class of inter-carrier traffic that would not be compensable as either local calls or exchange access service (Tr. 94). Section 252(d)(2) of the Act requires state commissions to ensure that interconnection agreements provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination of traffic exchanged between them. ALECs incur costs in terminating traffic to ISPs which would not be compensated if BellSouth's asserted meaning of the "Local Traffic" were given effect. (Tr. 94, 320).

As is explained in the direct testimony of Mr. Kouroupas, any rudimentary understanding of FCC rules confirms that ISP traffic is not interstate access service as identified in the Agreement (Tr. 92-94; 102-103). If calls to ISPs were interstate access traffic, BellSouth was required by FCC rules in effect since 1984 to (a) count these minutes for purposes of determining its local switching element per minute revenue requirement under Section 69.106 of the rules; (b) deduct these minutes for purposes of computing the required message unit credit for interexchange carriers under the same rule; and (c) account for these minutes in its jurisdictional separations studies. BellSouth never did these things (Tr. 97-98). Further, both the Interconnection Agreement and the Act limit "exchange access service" to telephone toll services. The Act defines "exchange access" as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. § 153(16). (emphasis added). The 1934 Communications Act defines "Telephone toll service" as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service." 47 U.S.C. § 153(48). ISP offerings are not telephone toll services by any stretch of the imagination. They are not telecommunications services under current rules, therefore they can hardly be "telephone toll services." (Tr. 102-103). As Mr. Hendrix admitted, toll charges are not applied to calls to ISPs. (Exhibit 7 at 23-24). To the contrary, such calls are billed by BellSouth as local calls. (Tr. 88, 103, 108). Consequently, BellSouth's asserted meaning of the term "Local Traffic" would leave ISP traffic as the only kind of traffic that would not be compensable under the Agreement as either local calls or exchange access service.

For these reasons, BellSouth's asserted meaning of the "Local Traffic" term is inconsistent with the operation of the Agreement and consequently must be rejected.

IV. THE "LOCAL TRAFFIC" TERM OF THE AGREEMENT IS NOT AMBIGUOUS.

Established principles of contract interpretation provide that a word or phrase in a contract is ambiguous only when it is of uncertain meaning and may fairly be understood in more ways than one. Friedman v. Virginia Metal Products Corp., 56 So.2d 515, 517 (Fla. 1952). Friedman involved a one-sentence written guarantee of payment for "all materials purchased" by one company from another. The Florida Supreme Court's decision set aside the trial court's order denying the seller's motion for new trial, finding that parol evidence should be received on the issue of whether "all materials purchased" meant only all materials purchased in the past, or as the seller contended also included all materials to be purchased in the future. The Court's opinion states the general rule that a contract is ambiguous when it is reasonably or fairly susceptible to different constructions. Friedman, supra at 517. The corollary of this rule is that when a contract is not reasonably or fairly susceptible to different constructions, it is not ambiguous.

An example of a recent case in which a court rejected a claim of ambiguity and instead found an asserted alternative meaning to be unreasonable, is Allstate Life Ins. Co. v. Fox, 700 So.2d 49 (Fla. 5th DCA 1997). In Allstate, an incontestability clause under Section 627.455, Florida Statutes had been set up against a life insurer as a result of an alleged ambiguity between the policy language and the statutory language, based on a misplaced comma and the use of the word "once" to mean "after" in the policy language. The court reversed a judgment against the insurer, finding that the insured's interpretation of the policy language "...should be discarded because it is not a reasonable one." Allstate, supra, at 50. Similarly, in Nugget Oil v. Universal Sec. Inc. Co., 584 So.2d 1068 (Fla. 1st DCA 1991), the court affirmed a summary judgment in favor of a liability insurer, finding no coverage for a claim involving a property which the insured's policy application literally crossed out

with an "X" from a list of properties submitted with the application. The court found that the policy language of coverage for "all locations occupied by the insured" must be read together with the list submitted with the policy application, and rejected the insured's assertion that there was a genuine inconsistency, uncertainty, or ambiguity concerning coverage. Nugget Oil, supra at 1070-1071.

The intention of the parties to a contract is to be ascertained from consideration of the whole agreement, and all of the provisions of a contract must be given their due meaning and construed so as to render them consistent if possible; and the theory of the law is against the destruction of contracts because of ambiguity. 11 Fla. Jur. 2d, Contracts §§ 161, 165. The term "Local Traffic" in the Agreement is not ambiguous because the alternative meaning offered by BellSouth would render the Agreement incomplete in its omission of a separate tracking system for ISP traffic and further incomplete in its failure to provide some form of compensation for costs incurred to transport and terminate calls to ISPs. Consequently, BellSouth's asserted meaning of the term "Local Traffic" must be rejected.

V. EVEN IF THE TERM "LOCAL TRAFFIC" WERE TO BE CONSIDERED TO BE AMBIGUOUS, THE DISPUTE SHOULD BE RESOLVED AGAINST BELLSOUTH AS THE PARTY RESPONSIBLE FOR CREATING THE MISUNDERSTANDING.

If it is assumed for the sake of argument that the Agreement is susceptible to BellSouth's asserted meaning of the term "Local Traffic," then the ambiguity still should be resolved against BellSouth. The applicable rules of contract interpretation are demonstrated by the case of Raffles v. Wichelhaus, 159 Eng. Rep. 375 (Ex. 1864), in which a seller and a buyer of certain cotton disagreed over which of two ships named Peerless sailing from Bombay two months apart was intended to deliver the cotton. Sections 71 and 233 of the first Restatement of the Law of Contracts provide that

as to a material term, where one party knows or has reason to know of an ambiguity and the other does not, a contract results in favor of the party who is without fault. Under Sections 21(a) and 227 of the Restatement Second, the rule which has evolved is that a contract results on the meaning of the party who is less at fault for the misunderstanding, if the other party has reason to know of that meaning. Calamari and Perillo, Law of Contracts (2d ed. 1977), Sec. 3-10.

There are three primary reasons why BellSouth is the party most responsible for the misunderstanding. First, as stated above, BellSouth's pre-August 1997 position that calls to an ISP terminate at the ISP's point of presence, and the Commission's definition that intrastate access "originates from within the state to an ISP's POP within the same state," were matters of record in Order No. 20815 when the Agreement was entered into in July of 1996, and TCG had no reason to know of BellSouth's reversal of its pre-August, 1997 position (Exhibit 7 at 104).

Second, as previously discussed, BellSouth's asserted meaning of the "Local Traffic" term would require the parties to develop a system to track ISP traffic separately from all other calls to which access was provided under local exchange tariffs, whereas TCG's asserted meaning requires no specific reference to ISP traffic. The parties agree that ISP traffic was never discussed in the negotiations leading to the July, 1996 Agreement, and ISP traffic is not referenced in the Agreement. (Tr. 114-115). ISP traffic was treated as local traffic under the prior agreement. Certainly, by July of 1996, BellSouth was aware of the growth of ISPs and had its own Internet service (Tr. 126-127). BellSouth thus knew that ISPs were part of the local exchange traffic volume at that time (Tr. 159). Mr. Hendrix testified on cross-examination that BellSouth had the concern that call centers would

become ALEC customers and result in "a lot of terminating traffic that we are paying for" (Tr. 319).[13] As the party whose meaning required exceptional treatment for ISP traffic, it was up to BellSouth to say something if there was no "meeting of the minds" (Tr. 128, 300-301), and thus by its silence BellSouth is the party most responsible for the alleged misunderstanding.

Third, the industry standard definition of "termination" and the trade usage of billing ISP traffic as local calls, were known to both BellSouth and TCG when the Agreement and its December, 1995 predecessor were entered into, and became a course of performance and course of dealing between the parties. Again, as the party that allegedly sought a different meaning, BellSouth's silence is most responsible for this result.

VI. NONE OF THE NINETEEN STATE COMMISSIONS WHICH HAVE CONSIDERED THIS MATTER HAVE ALLOWED AN ILEC TO WITHHOLD RECIPROCAL COMPENSATION FOR ISP TRAFFIC.

The issue of reciprocal compensation for ISP traffic has been addressed by nineteen state commissions since 1997, most recently in the June 16, 1998 order of the Pennsylvania Public Utility Commission on the petition of TCG Delaware Valley, Inc. ("TCG Delaware") for a declaratory order clarifying the term "Local Traffic" in its interconnection agreement with Bell Atlantic - Pennsylvania, Inc. ("Bell Atlantic").[14] The Pennsylvania decision is representative of the unanimity between state commissions in refusing to allow ILECs to withhold reciprocal compensation for ISP traffic

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[13] Mr. Hendrix's assertion that the treatment of ISP traffic as local traffic would cause substantial financial harm to BellSouth is undermined by the 5% cap included in the Agreement, limiting the total monthly billed local interconnection minutes of use. (Tr. 106; Ex. 2 at PK-1, pgs. 4-5 and 32).

[14] Petition for Declaratory Order of TCG Delaware Valley, Inc. for clarification of Section 5.7.2 of its Interconnection Agreement with Bell Atlantic-Pennsylvania, Inc.; See TCG's Request for Official Recognition, filed June 29, 1998.

terminated by competitive local exchange carriers. The "Local Traffic" term at issue in the Pennsylvania case provided:

> The designation of Traffic as Local or Toll for purposes of compensation shall be based upon the actual originating and terminating points of the complete end-to-end call, regardless of the carrier(s) involved in carrying any segment of the call.

TCG Delaware had billed and had been paid by Bell Atlantic for ISP traffic under the reciprocal compensation term of their agreement from December 1996 until April, 1997, when Bell Atlantic informed TCG Delaware that it would withhold partial payment of reciprocal compensation bills because, as BellSouth has claimed here, Bell Atlantic asserted that ISP traffic did not terminate in a local calling area and thus was not local traffic.

The Pennsylvania commission accepted comments from a number of interested parties, but rejected Bell Atlantic's request for an evidentiary hearing. The commission agreed with TCG Delaware that under the plain and ordinary meaning of the words defining "Local Traffic," and with reference to industry understanding and practice concerning reciprocal compensation for ISP calls, ISP traffic is local traffic for which reciprocal compensation must be paid under the agreement. Further, the Pennsylvania commission concluded that the issue of whether ISP traffic is jurisdictionally interstate was not material to its authority over interconnection agreements under Sections 251 and 252 of the Act and Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997).

Similarly, the January 28, 1998 decision of the Michigan Public Service Commission in five consolidated proceedings involving interconnection agreements with Ameritech Michigan found that "...Ameritech Michigan did not cease paying reciprocal compensation for the disputed calls to correct a past 'mistake' or to return to the clear meaning of the agreements, but rather to implement a policy

change that it found advantageous."[15] The Michigan commission rejected Ameritech Michigan's assertion that payment of reciprocal compensation for ISP traffic would have "an extremely disparate economic on all local exchange carriers," responding as follows: "The short answer is that the issue should be addressed when negotiating or renegotiating an interconnection agreement, not by one party unilaterally imposing a solution on the other party."

This Commission has held that it will not reopen a negotiated private interconnection agreement upon a change in applicable FCC rules during the pendency of the agreement without a strong showing that the agreement is discriminatory or contrary to the public interest.[16] In the March 31, 1998 Order Denying Intervention, Requiring Placement of Disputed Payments in Escrow and Setting Dispute for Hearing in this docket, the Commission stated its belief that "...we must resolve the dispute between the parties by determining the state of the law concerning the jurisdictional nature of ISP traffic at the time the parties executed their agreement and by applying principles of contract construction."[17] There is no reason for the Commission to depart from existing law or to speculate as to what the FCC ultimately may conclude in another proceeding in order to resolve this dispute.

VII. THE COMMISSION SHOULD ORDER BELLSOUTH TO IMMEDIATELY REMIT PAYMENT WITH INTEREST AND SHOULD FIND BELLSOUTH'S UNILATERAL WITHHOLDING OF PAYMENT TO HAVE BEEN AN ANTI-COMPETITIVE AND UNLAWFUL ABUSE OF BELLSOUTH'S MONOPOLY POWER.

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[15] See Exhibit 1, List of Documents for Official Recognition, at p.5.

[16] *In Re: Request for approval of interconnection agreement between Metropolitan Fiber Systems of Florida, Inc. and United Telephone Company of Florida*, Order No. PSC-97-0240-FOF-TP in Docket No. 961333, issued February 28, 1997, 97 F.P.S.C. 2:723, 724.

[17] Order No. PSC-98-0454-PCO-TP issued March 31, 1998 in Docket No. 971478-TP, 98 F.P.S.C. at 3:411.

The Commission should order BellSouth to immediately remit payment of the principal amount of $4,039,779.70 withheld from TCG as a result of BellSouth's August 12, 1997 repudiation and breach of the Agreement (Ex. 3 at Late-Filed Ex. 5). The Commission's order should further require the payment of interest at the legal rate, on each outstanding balance billed by TCG to BellSouth under the Agreement.[18] Even if there had been an honest and bona fide dispute as to whether payment was due to TCG, which there was not, this would have no bearing on TCG's right to payment with interest. Hatch v. Minot, 369 So.2d 974 (Fla. 2d DCA 1979); Parker v. Brinson Construction Company, 78 So.2d 873 (Fla. 1955).

The Commission should further make an express finding that BellSouth's unilateral withholding of payment was an anti-competitive and unlawful abuse of BellSouth's monopoly power. Section 364.01(g), Florida Statutes, authorizes the Commission to exercise its exclusive jurisdiction to ensure that all providers of telecommunications services are treated fairly by preventing anti-competitive behavior. As stated in the direct testimony of Mr. Kouroupas, BellSouth's self-help tactics could be repeated in other areas so as to damage the viability of local competition by TCG and other ALECs. As competition grows, ALECs may succeed in obtaining market segments from ILECs. If each time this occurs, the ILEC, with its greater resources overall, is able to fabricate a dispute with ALECs and thus invoke costly regulatory processes, local competition could be stymied for many years (Tr. 99-100). Consequently, the Commission should make the requested express finding that BellSouth's unilateral withholding of payment constituted anti-competitive behavior in violation of Section 364.01, Florida Statutes.

[18] Under Sections 687.01 and 55.03, Florida Statutes, the rate is 12 percent.

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CERTIFICATE OF SERVICE

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