

ORIGINAL

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

Filed: June 30, 1998

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REQUEST FOR OFFICIAL RECOGNITION

Teleport Communications Group Inc. and its affiliate, TCG South Florida (collectively "TCG"), through TCG's undersigned counsel, request that the Commission take official recognition pursuant to Section 120.569, Florida Statutes of the Opinion and Order entered by the Pennsylvania Public Utility Commission in Case No. P-00971256, on June 16, 1998, in a matter entitled Petition for Declaratory Order of TCG Delaware Valley, Inc. for Clarification of Section 5.7.2 of its

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Interconnection Agreement with Bell Atlantic-Pennsylvania, Inc. The Pennsylvania decision is submitted in addition to the series of other state commission decisions listed at pages 4-6 of Exhibit 1, List of Documents for Official Recognition.

A copy of the Opinion and Order is attached.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Teleport Communications Group Inc./TCG South Florida's Request for Official Recognition was furnished by U. S. Mail to the following this 30th day of June, 1998:

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**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265**

Public Meeting held May 21, 1998

Commissioners Present:

John M. Quain, Chairman
Robert K. Bloom, Vice Chairman
John Hanger
David W. Rolka
Nora Mead Brownell

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.

P-00971256

OPINION AND ORDER

BEFORE THE COMMISSION:

Before the Commission for consideration is the Petition for Declaratory Order (Petition) filed by TCG Delaware Valley, Inc. (TCG) on October 1, 1997. The Petition, filed pursuant to 52 Pa. Code § 5.42, requests that we: (1) clarify that the term "Local Traffic" as used in TCG's Interconnection Agreement with Bell Atlantic - Pennsylvania, Inc. (Bell), includes Local Traffic from Bell's end-user customers to Internet Service Providers (ISPs), who are TCG's end-user local customers; (2) order Bell to pay TCG the applicable termination rate for such local calls under the reciprocal compensation provisions of the Interconnection Agreement; and (3) make a specific

finding that Bell's unilateral action in withholding these reciprocal compensation payments was anticompetitive and an unlawful abuse of Bell's monopoly power.

History of the Proceedings

Substantial procedural background of this matter has been set forth in prior Orders of this Commission. See December 11, 1997 Order; March 2, 1998 Order, and April 24, 1998 Order directing Bell to remit payments for reciprocal compensation for traffic to ISP end-users of TCG pending disposition of the merits of the Petition. Consequently, we shall not unduly repeat the procedural history of this matter in this Opinion and Order.

On December 5, 1996, this Commission approved an Interconnection Agreement (Agreement) between Bell and TCG. The Agreement was filed and approved pursuant to the Telecommunications Act of 1996 (Act), 47 U.S.C. § 251, et seq., and this Commission's Order *In re: Implementation of the Telecommunications Act of 1996*; Docket No. M-00960799 (Order entered June 3, 1996; Order on reconsideration entered September 9, 1996).

The Agreement, inter alia, established the terms and conditions for reciprocal compensation for the transport and termination of "Local Traffic." Specifically, Section 5.7.5 of the Agreement provides:

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.

Since December 5, 1996, until on or about April 28, 1997, TCG billed Bell for Local Traffic under the reciprocal compensation arrangements contained in the Agreement and Bell paid those bills. (TCG Petition, p. 3). TCG further states in its Petition that Bell included ISP traffic in reciprocal compensation bills submitted to TCG, and TCG paid such bills.

By letter dated April 28, 1997, Bell informed TCG that it considered Bell end-user originating traffic destined for ISPs, whose local dial tone service is provided by TCG, not to be Local Traffic. Therefore, Bell concluded that this traffic was not subject to reciprocal compensation. Bell determined that such traffic was ineligible for reciprocal compensation treatment because, in its view, such traffic does not terminate within a local calling area as provided under the Agreement. Consequently, Bell provided notice of a dispute under Section 29.8 of the Agreement and informed TCG that it would withhold payment of those disputed portions of bills for reciprocal compensation and associated charges for the "erroneously" billed ISP traffic.

After discussions with Bell representatives to determine whether a negotiated settlement of the issue was possible, the parties agreed that a negotiated settlement was not forthcoming. Bell was firm in its position that the traffic delivered to ISPs is not subject to reciprocal compensation. The instant Petition for Declaratory Order was then filed. TCG further made a Supplemental Filing on November 26, 1997, requesting this Commission to take administrative notice of, inter alia, alleged contradictory statements of Bell and Bell Regional Operating Companies in other forums, and the determinations of other state commissions relative to the issue.

By Order entered December 11, 1997, we held the Petition in abeyance, pending the receipt of comments on two questions. The two questions were published in the Pennsylvania Bulletin and stated as follows:

1. Whether and why calls placed to a local number of an Internet service provider should be treated differently from a local voice grade service to other numbers, generally?
2. What are the specific characteristics of Internet calling and the unique cost associated with originating and terminating such traffic?

By Order entered April 24, 1998, TCG was granted interim relief. The April 24, 1998 Order required Bell to remit payments consistent with the practice occurring prior to April 28, 1997, pending a resolution of the merits of the Petition.

Bell filed a Petition for Reconsideration and Stay of the April 24, 1998 Order on April 28, 1998. In addition to arguing that the April 24, 1998 Order does not adhere to Section 29.8.3 of the Agreement, which Bell states gives it the opportunity to pay 50% of a "[d]isputed] amount into escrow," Bell requests reopening of the record for the purpose of conducting discovery and the reception of evidence as to the actual routing of calls to the ISPs served by TCG. (Bell April 28, 1998 Petition for Reconsideration and Stay, p. 6). On May 8, 1998, TCG filed a response to the Bell petition. TCG does not, apparently, oppose evidentiary hearings, but appears to oppose there being any further delay in this matter. (TCG Response, p. 7).

To date, we have not acted on the April 28, 1998 Bell Petition. The April 28, 1998 Bell Petition shall be disposed of in this Opinion and Order consistent with our determination on the merits of the TCG request for declaratory relief.¹

Discussion

We note that on November 14, 1997, PECO Hyperion Telecommunications, Hyperion Telecommunications of Harrisburg, Inc., and Hyperion Telecommunications of Pennsylvania, Inc. filed a Petition to Intervene in this proceeding. Said Petition shall be granted.

Also, we incorporate by reference and take administrative notice of the comments received in this proceeding addressing the legal and policy considerations raised by the TCG Petition. We also take administrative notice of the November 26, 1997, Supplemental Filing of TCG. Additionally, we shall grant the request of Intermedia Communications Inc., seeking leave to intervene and file comments in this matter.

A. Comments to the December 11, 1997 Order

Comments were filed by the following Parties: Bell, GTE, North, Inc., (GTE); TCG; Sprint and United Telephone; WorldCom, Inc.; AT&T; Association of Local Telecommunications Services (ALTS); Pennsylvania Internet Service Providers (PaISPs); MCI Metro Access Transmission Services, Inc. (MCI metro); America OnLine (AOL); PECO Hyperion Telecommunications; Pennsylvania Cable and Telecommunications Association (PCTA); Commonwealth Telecom Services, Inc. and RCN Telecom

¹ By letter dated May 4, 1998, we have been advised by Bell that the sum of \$4.834 million has been remitted to TCG, representing payment of the amounts previously withheld for ISP traffic in Pennsylvania.

Services, Inc. (RCN and Commonwealth). Intermedia Communications Inc. filed a Petition for Leave to Intervene and Comments which, as noted, is granted.

All commenting parties, with the exception of Bell and GTE North, Incorporated (GTE), support the position advanced by TCG. That is, that the termination of traffic to an ISP end-user should be considered "Local Traffic," eligible for reciprocal compensation. We shall only focus on, and provide a summary of the comments of GTE, ALTS, PaISP, WorldCom, and AOL, as representative of the comments received on the issue.

GTE North Incorporated

In its comments, GTE urges the Commission to adopt the position that Internet access services are subject to Federal Communications Commission (FCC) jurisdiction due to their interstate nature. GTE analogizes an Internet user to an ILEC end user making a toll call. GTE contends that once a customer ISP-networks, he or she is provided with an array of interstate services. ISP traffic, in GTE's view, should be jurisdictionalized based upon the ultimate server destination of the Internet connection, not where it enters the ISP network.

GTE adds that another similarity between ISP and interexchange carrier (IXC) traffic is that both providers bill and keep end user revenues for their services. GTE comments that ISP customers originate calls and the CLEC should pay usage charges to the originating ILEC.

GTE further points out that the FCC's intent to view Internet Traffic jurisdictionally as interstate can be inferred from the FCC Order which exempted

Enhanced Services Providers and ISP traffic from access charges. *FCC Access Charge Reform Order* at 341, CC Docket No. 96-262 (May 17, 1997). GTE proffers that because federal access charges apply only to interstate access traffic, the FCC's stated exemption necessarily implies that the FCC considers Internet Traffic to be jurisdictionally interstate.

In response to the second question, GTE maintains that Internet access usage creating the need for unscheduled network upgrades results in unrecovered costs for ILECs. This contention is supported by the results of its own data study that demonstrated that ISP traffic constitutes a substantial portion of Public Switched Telephone Network (PSTN) traffic. GTE states that ISP traffic holding times is ten times as long as non-ISP usage.

GTE adds that the network congestion resulting from increasing Internet usage cannot be addressed through techniques such as load balancing, switch deloading, and use of trunk-side terminations. The significant costs of the technology required to implement network capacity augmentation techniques are being ignored, states GTE. GTE maintains that increased network costs occasioned by end office switching and inter-office transport can be attributed to ISP activity.

As a case in point, GTE comments that in order to accommodate the upsurge of Internet access traffic, it has been forced to incur substantial, uncompensated expenditures for network upgrades. GTE claims that its operating companies have committed between \$50 million and \$85 million, solely attributable to increased Internet access traffic, to avoid a potentially crippling overload of its network. GTE takes the position that recovery of these costs is mandated by the Telecommunications Act and is essential from a public policy perspective in order to establish proper market-based price signals that would induce deployment of data-friendly networks.

Association of Local Telecommunications Services

In its comments, the ALTS states that calls to an ISP are currently required to be treated as local for all regulatory purposes, including reciprocal compensation agreements. ALTS maintains that the FCC has held that local calls to ISPs should be treated as local calls by ILECs. ALTS cites two FCC decisions which it claims support this contention. See MTS and WATS Market Structure, 97 FCC 2d 682, 715 (1983); Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, 3 FCC Red 2631, 2633 (1988).

ALTS outlines the three possible scenarios for ISP calls: (1) where a single ILEC handles both ends of the call, (2) where a CLEC handles one end and the ILEC handles the other, and (3) where an ILEC handles one end and an adjacent LEC handles the other. ALTS questions why Bell is only disputing the continued treatment of an ISP call under the second scenario, in light of the fact that Bell continues to treat ISP calls under the first scenario as local calls.

ALTS claims that Bell's current position on this issue is also contrary to the position taken by Bell in the FCC's Local Competition proceeding. ALTS points out that in that proceeding, Bell identified Internet Traffic as the kind of traffic that would be subject to reciprocal compensation agreements. See Reply Comments of Bell Atlantic filed May 30, 1996, in CC Docket No. 96, at 21.

ALTS adds that Bell and other ILECs implement the ISP Rule by charging all such calls using local tariffs; by treating such calls as local in their separations reports and state rate cases; by treating such calls as local in ARMIS reports; and by treating such

calls as local when they are exchanged among adjacent local exchange carriers. ALTS suggests that given Bell's use of the ISP Rule in the above manner, Bell cannot earnestly challenge the existence or operation of the ISP Rule.

ALTS further comments that nine states, Washington, Oregon, Minnesota, Colorado, Arizona, New York, Maryland, Connecticut and Virginia, have agreed that calls to ISPs should be treated as local under reciprocal compensation agreements between the ILECs and the CLEC. ALTS points out that, at its annual convention, NARUC passed a resolution advocating that ISP traffic continue to be treated as a matter subject to State jurisdiction in interconnection agreements or tariffs between ILECs and CLECs.

With respect to the second question, ALTS states that its sole concern is the proper clarification of the existing rules that apply to ISP traffic. While ALTS takes no position as to whether Internet Traffic somehow differs from Local Traffic, or whether such alleged differences would merit any changes in these existing rules, ALTS urges the Commission to find that such calls are local and must be included in reciprocal compensation agreements between ILECs and CLECs.

Pennsylvania Internet Service Providers

Before responding to the two questions posed by the Commission in the December 11, 1997 Order, the Pennsylvania Internet Service Providers (PaISP) voiced some preliminary concerns. PaISP states that the initiation of competition for ISP business in some parts of the Commonwealth stems from CLECs like TCG. PaISP claims that ISPs are utilizing the service of CLECs for communication needs because the CLECs are able to provide those services not readily available from ILECs such as Bell.

PaISP holds that the adoption of Bell's position would eliminate all competition for ISP business and turn ISPs into second class customers of CLECs for whom the CLEC would not receive compensation for terminating calls. It proffers that the Commission's enforcement of the TCG/Bell Interconnection Agreement eliminates the potential for discrimination against ISPs and enhances competition in the local loop.

In response to the first question, PaISP maintains that there is no reason not to treat calls from one customer to another within a local calling area as a local call. PaISP disputes Bell's contention that calls from the ISP's customer to the ISP, terminate on premises other than the ISP's location. PaISP points out that in most situations, an ISP's facilities are sited based on local calling areas that have been established in a community with the goal of maximizing the number of people who call the ISP by making a local call. PaISP observes that the basic nature of ISP business is to provide a service that can be reached through a local telephone call to an ISP premises which terminates in the computer equipment maintained by the ISP. The ISP customer is not engaging in interstate communication, states PaISP, but rather is making a local connection to the ISP's computer facilities. Once an ISP customer makes a telephone call to an ISP, that customer is connected to the ISP's computer equipment. The ISP's computer will either fulfill the request of the customer by sending back information that is stored on the ISP's computer or, when the information is not stored on the ISP's computer, send the request to another computer, using an IXC's facilities. PaISP contends that the only interexchange communication takes place between the ISPs. PaISP emphasizes that the communication from the ISP's computer to its customer is local.

PaISP then refers to a recently issued Statement of Policy and Proposed Rulemaking of the Pennsylvania Department of Revenue (Revenue) which recognized

ISPs as providers of "enhanced telecommunication services." 61 Pa. Code §60.20 (Telecommunications service), 27 Pa. B. 5432 (Oct. 18, 1997); Department of Revenue, Sales and Use Tax; Telecommunications Service, 27 Pa. B. 6469 (Dec. 13, 1997), proposing changes to 61 Pa. Code Chs. 31,32,48, and 55. PaISP adds that for taxation purposes, ISPs are not recognized by Revenue as resellers of communications services. As a result, ISPs cannot claim the resale exemption from sales tax.

PaISP urges the Commission to adopt the conclusion reached by other states and Revenue, that ISPs are in the business of processing and storing data. PaISP concludes that calls by ISP customers terminate at the ISP's computer facilities and should, therefore, be deemed local calls.

PaISP maintains that there is nothing about a call to an ISP that is inherently different from any other telephone call. PaISP states that the same local loops that are used for voice grade service are also used to provide data transfer between a customer's computer and an ISP's computer. PaISP asserts that the average length of a regular telephone call and a call to an ISP is irrelevant to the issue of the instant proceeding. PaISP avers that with regard to reciprocal compensation, the germane issue is the number of minutes per line and not the number of calls that result in those minutes in use. PaISP argues that ISPs are using their facilities in an efficient manner which is not appreciably different from the manner in which other large customers, such as business purchasers of Centrex service, use and procure their communications facilities. PaISP concludes that there is no justification for treating ISPs any differently from other customers.

PaISP further agrees with the Statement of Commissioner Rolka, that Internet calls are treated as local calls by Bell in their reciprocal compensation arrangements with independent LECs. PaISP also joins Commissioner Rolka's observation that

all of the traffic that Bell is contesting is, in fact, characterized as Local Traffic for purposes of separations, rate filings and other matters. These observations, in PaISP's view, are critical when considering the fairness of Bell's position in the instant proceeding. PaISP summarizes that it would be unfair to permit Bell to avoid its obligations to CLECs to pay compensation for local calls to ISPs.

WorldCom Technologies, Inc.

In its comments, WorldCom Technologies, Inc. (WorldCom),² offers as a general proposition, that the Commission should affirm that local exchange traffic between local exchange users is eligible for reciprocal compensation and direct Bell to pay reciprocal compensation to CLECs for the transport and termination of Internet Traffic. WorldCom argues that the call placed to the local number of an ISP should not be treated differently from local voice grade service to other numbers. It contends that the identity of the end user's local carrier should not be dispositive of the question of whether the call should be considered local. WorldCom adds that it cannot be disputed that the functions performed by a CLEC or an ILEC to terminate a local call to an ISP are no different than those tasks performed to terminate any other call between an ILEC end user to the end user of a CLEC.

WorldCom challenges Bell's argument that calls to ISPs terminate on the Internet and not on the ISP's equipment. WorldCom claims that Bell's definition of "terminate" is contrary to the accepted industry usage. WorldCom states that when a call

² WorldCom Technologies, Inc. is a subsidiary of WorldCom, Inc. and is the successor in interest to MFS Intelenet of Pennsylvania, Inc. The Commission approved the merger of MFS Intelenet of Pennsylvania, Inc. to WorldCom Technologies, Inc. in Docket No. A310580 (Order entered October 2, 1997).

is placed over the PSTN it is considered to be "terminated" when it is delivered to the Telephone Exchange Service number that has been called.

WorldCom points out that definitions of Local Traffic, as stated in its own interconnection agreement with Bell, is consistent with industry usage of the term. It also points out that under the definition of reciprocal compensation, as stated in the Agreement, only traffic from a commercial mobile radio service carrier is excluded. WorldCom explains that the fact that the parties to the agreement could have excluded Internet Traffic from reciprocal compensation and chose not to do so, supports the position that ISP traffic was intended to be included in reciprocal compensation.

WorldCom maintains that Bell's interpretation of the term "termination" is further inconsistent with the position Bell has taken before this Commission and the FCC. WorldCom adds that Bell's position is also contrary to FCC policy on the issue of the nature of calls to ISPs under the Act. *See e.g., In the Matter of Federal-State Joint Board on Universal Service, Report and Order*, CC Docket No. 96-45 (May 8, 1997); *Amendments to Part 69 of the Commission's Rules relating to Enhanced Service Providers*, 3 FCC Rcd 2631; *Implementation of Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended, First Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 96-149 (Dec. 24, 1996); WorldCom explains that in the *Universal Service Order* and *Access Charge Reform Order*, the FCC has determined that the local call to the local exchange service number of an ISP is a separate and distinguishable transmission from any information service provided by the ISP. WorldCom argues that the position taken by the FCC with respect to the severable elements of Internet Traffic, negates Bell's argument that the Internet Traffic should be viewed as an indivisible communication.

WorldCom also states while Bell seeks to have ISP traffic to not be considered as a local call, Bell's actions such as charging its own customers local rates for traffic to ISPs and classifying ISP traffic as local for purpose of separations, demonstrates that Bell considers Internet Traffic to be local. WorldCom points out that in the FCC local competition proceeding, Bell argued that traffic to ISPs was local and eligible for reciprocal compensation. See Reply Comments of Bell Atlantic filed in May 30, 1996, in CC Docket No. 96098 at 26. WorldCom asserts that despite Bell's seeming dissatisfaction with the deal voluntarily made in the interconnection agreement, Bell should not be released from its contractual obligations.

WorldCom shares the concern of other CLECs that the Bell's position is also anticompetitive. WorldCom states that affirmation of Bell's position would enable Bell to utilize CLECs' equipment and facilities without compensation. WorldCom projects that because Bell controls most of the originating traffic within its territory, CLECs will not aggressively seek to provide service to ISPs for which the CLEC would not receive compensation for termination. This probable result and consequence is, in WorldCom's view, contrary to the intent of Section 271 and the Telecommunications Act. WorldCom contends that the anticompetitive ramifications of Bell's conduct is further evident by Bell's present offering of Internet access service to consumers. WorldCom cautions that Bell is striving to put itself in a position to drive competing ISPs out of the local market, leaving it with a de facto monopoly over access to the Internet among other services.

WorldCom also asserts that Bell's legal arguments are without merit. WorldCom claims that Bell's contention that ISPs utilize the local network in the same manner as interexchange carriers was squarely rejected by the FCC in its *Access Charge Reform Order*. WorldCom further argues that Bell's reliance on the *Access Charge*

Reform Order for the proposition that Internet Traffic is interstate is misplaced.

WorldCom posits that the central issue of the instant proceeding is local exchange telecommunications services provided by the CLEC and not the functions performed by the ISP to obtain information service after it receives the incoming exchange telephone call.

WorldCom further argues that the Georgia Voicemail Case cited by Bell for the proposition that the FCC has rejected the arguments that components of an enhanced service transmission can be separated is distinguishable from the facts of this proceeding. WorldCom proffers that the distinguishing factor in the Georgia Voicemail Case is that the call was never answered until it reached its final destination at the voicemail apparatus. WorldCom continues that in the case at bar, the local exchange call is answered and the answer supervision is returned when the ISP's modem answers the incoming call. WorldCom reasons that the ruling in the Georgia Voicemail Case, that calls do not terminate at switches, is inapplicable to this case.

WorldCom also opines that the federal decision implementing the *Modified Final Judgment (MFJ)* in the AT&T divestiture proceeding is also inapplicable. WorldCom acknowledges that the district court in the *MFJ* Case held that Bell would violate the *MFJ*'s restriction against interLATA entry by operating an information service in which users would dial a local gateway within their own LATA. WorldCom also points out that in the *MFJ* proceeding, Bell attempted to provide interLATA communication between the central processor and the local gateway. WorldCom states that the District Court's concern that local subscribers tied to the RBOC monopoly would have to cross-subsidize the service with respect to its interLATA features is reflected in Title 47 U.S.C. Section 272(a)(2)(c), which requires the RBOCs to operate interLATA information services through a separate affiliate. WorldCom claims that the present

dispute and the *MFJ* precedent involves very different legal issues. The issue here, WorldCom, espouses, is whether the transport and termination of calls to ISPs constitute “transport and termination of telecommunications” within the meaning of the reciprocal compensation requirement of 251(b)(5), not whether RBOC provision of interLATA information services is anticompetitive. WorldCom claims that if such traffic were deemed interstate, as argued by Bell, rather than local, Bell would violate Section 271 prohibiting the provision of interLATA service by an RBOC every time a Bell customer connected with Bell’s own Internet service provider.

WorldCom further suggests that Bell’s position is contrary to the compensation scheme of the Act. WorldCom proffers that the statutory scheme of Section 251(b)(5) and (g) requires the termination of traffic carried by two or more carriers not otherwise subject to access charges, should be subject to reciprocal compensation. WorldCom adds that the FCC reached the same conclusion in its *Local Competition Order*. Bell’s refusal to pay reciprocal compensation for Local Traffic to ISPs is contrary to the FCC’s decision and a violation of the Act.

WorldCom emphasizes that other jurisdictions have rejected the position advanced by Bell. It cited the rejection of similar arguments offered by other RBOCs in Arizona, Colorado, Minnesota, Oregon, Washington, New York, Maryland, Connecticut, and Virginia. WorldCom contends that these jurisdictions have concluded that the local exchange traffic to ISPs is local in nature and eligible for reciprocal compensation. WorldCom maintains that these decisions are persuasive and Bell should be prohibited from unilaterally withholding reciprocal compensation from CLECs, such as WorldCom, for the termination of local calls to ISPs.

WorldCom is also of the opinion that the consideration of the issue of Local Traffic to ISPs should not be deferred to the FCC. WorldCom states that the sole dispositive issue is compensation for the transport and termination of Local Traffic to local exchange customers who are ISPs. WorldCom posits this proceeding is a request to enforce the terms of an interconnection agreement previously approved by the Commission.

America OnLine

America OnLine (AOL) is the only ISP to participate. In lieu of comments, AOL filed a position paper on the issue of reciprocal compensation for ISP traffic in which it outlines its rationale for the continuation of the reciprocal compensation system. First, AOL contends that reciprocal compensation for ISP traffic is mandated by law. AOL argues that reciprocal compensation is required for the termination of all Local Traffic, including ISP traffic. AOL contends that the local nature of an ISP call is demonstrated by the process by which a customer connects to an ISP. It explains that a call is made by a customer over the PSTN and is transmitted to an ISP point of presence. The local nature of these calls, AOL adds, is further supported by the fact that ILECs charge their own customers local calling rates for calls placed to ISPs, and, as well, treat these calls as local for purposes of separations in ARMIS reports and when they are exchanged among non-competing carriers.

AOL also asserts that prohibiting CLECs from collecting reciprocal compensation for terminating ISP local numbers and imposing greater charges on ISPs purchasing local service is unreasonably discriminatory. It also takes the position that treating ISP end users differently from end users purchasing the same local services violates both state and federal law. 66 Pa. C.S. §1304; 47 U.S.C. §202(a). AOL

maintains that the ILECs' attempt to eliminate reciprocal compensation for ISP traffic, because ISP traffic consists primarily of one-way incoming calls, is unlawful. AOL explains that calls to ISP local numbers are transported and terminated in the same manner on the PSTN as other local calls. AOL asserts that many PBX owners, for example, pizza parlors, concert ticket offices, and talk show businesses, generate similar large volumes of one-way incoming calls. AOL summarizes that the ILECs' proposals to exclude ISP traffic from reciprocal compensation is inconsistent with state law and the 1996 Act, and should be rejected outright.

As a large consumer of local telecommunications services, AOL believes that a consistent application of reciprocal compensation provisions is required to promote a competitive telecommunications environment. AOL does not offer a preference for a particular form of reciprocal compensation arrangement (e.g., per minute-of-use, flat-rate charges, or some form of bill-and-keep). AOL is of the opinion, however, that the designated or negotiated method of reciprocal compensation should promote fundamental competition in the local telecommunications marketplace and be consistent with the parameters of state and federal law.

AOL claims that the elimination of reciprocal compensation for any Local Traffic, including ISP traffic, would have a stifling effect upon competition in the local exchange market. If the CLECs are not compensated for calls to ISP local numbers, they will be left with three options: (1) absorb the transport and termination costs; (2) raise their rates; and (3) refuse to provide services to ISPs. AOL maintains that given the limited resources of CLECs as new entrants in the local exchange marketplace, CLECs would be unable to absorb the transportation and termination costs. AOL argues that because CLECs could not forego collecting these costs without raising their rates, CLECs would be forced to charge noncompetitive rates which would price them out of the local

marketplace. Consequently, CLECs would be left with no viable option but to stop serving ISPs. AOL projects that this course of action would serve to strengthen the LEC monopolies in the local telecommunications service markets and give those companies exclusive control over services that are related to a business in which they are directly competing, the ISP market.

AOL also discusses what it perceives to be the ILECs' ongoing efforts to advance their own Internet offerings over the independent ISPs, such as AOL. AOL points to recent announcements of Bell (or, more appropriately, Regional Bell Operating Companies), revealing their aim to increase market share of the Internet access market in the next five to eight years. AOL suggests that the ILECs' action is an attempt to manipulate the regulatory structure in a manner that frustrates the nature of competitive Internet access. This, in AOL's view would burden ISPs with higher prices relative to what they are currently being charged by the CLECs, and allow ILECs to pit their own ISP affiliates against existing ISPs and capture sought-after market share. AOL posits that the ILECs' efforts will not foster competition, but rather will increase rates and diminish the overall quality of ISP services for consumers.

B. Analysis

1. Jurisdiction to Resolve the Petition

Bell has raised the threshold question of whether the nature of the telecommunications service involved is interstate and, therefore, subject to the jurisdictional authority of the FCC. We, hereby, take administrative notice of the various FCC decisions, and decisions of other public service commissions which have, in some manner, considered the classification of ISP calls.

On consideration of the positions of TCG and Bell, we conclude that the issue of whether end-user traffic to an ISP is jurisdictionally interstate or intrastate is not material to our authority over interconnection agreements. We note with approval the argument of TCG, set out in its Petition, pp. 4-5, where it states "The Court [Eighth Circuit] found that state commissions retain the primary authority to enforce the substantive terms of the agreements made pursuant to section 251 and 252. The Commission's authority under the federal Act is applicable even where the underlying jurisdiction of the call is interstate. The Act gives state commissions authority to review and arbitrate interconnection agreements governing intrastate, interstate and international traffic." We conclude that the foregoing is an accurate statement of our authority to entertain the TCG Petition. Bell's position is rejected.

Even though we have jurisdiction to terminate the controversy or remove uncertainty involving the question raised by the Petition, an important corollary to this determination is whether or not pending FCC proceedings counsel in favor of deferring action. We observe two problems with Bell's request that we defer consideration of the TCG Petition pending any forthcoming FCC action related to this dispute.

First, the FCC has had occasion to state its position on the question and has not, thus far, definitively addressed the issue. Second, the FCC, while aware of the various state commission determinations on the issue, has not reacted adversely to those decisions. As emphasized by TCG, those state commissions which have considered the issue have resolved the controversy in favor of the position advocated by TCG.³ On the basis of the foregoing, we conclude that, at present, the matter is appropriate for state

³ We note that there are additional proceedings pending before the New York Public Service Commission on this question.

commission resolution. Pending or potential FCC action does not militate in favor of deferring action.

2. Is the Agreement Able to Be Interpreted by the Clear and Plain Meaning of the Words or is Extrinsic Evidence to be Considered

The general rule is that in the absence of fraud, accident or mistake, the law declares the writing to be not only the best, but the only evidence of the agreement between parties. *Gianni v. R. Russel & Co.*, 281 Pa. 320, 126 A. 791 (1924); TCG Petition, p. 7, citing *Young v. Young Equitable Life Assur. Soc. of U.S.*, 350 Pa. Superior Ct. 247, 504 A.2d 339 (1986); *Com. Dept. of Transp. v. Bracken Const. Co.*, 457 A.2d 995 (Pa. Cmwlth. 1983) and *Merriam v. Cedarbrook Realty, Inc.*, 266 Pa. Superior Ct. 252, 404 A.2 398 (1978).

Consequently, it is only if the Agreement is not capable of being interpreted according to the plain and ordinary meaning of the words contained therein, will this Commission have to look to extrinsic evidence to resolve the dispute between the parties. *Comm. Dept. of Transp. v. Brozzetti*, 684 A.2d 658, 664 (Pa. Cmwlth. 1996).

TCG makes the argument that whether this Commission concurs with its position that the Agreement is capable of being reviewed according to the plain and ordinary meaning of the words, or whether we find the Agreement to be ambiguous and needing extrinsic considerations to resolve, its position should prevail.

On consideration of the positions of the parties, we find ourselves in agreement with TCG concerning the proper approach to be given the interpretation of the term "Local Traffic" as used in the Agreement. Based on the application of contract principles to this controversy, we agree with TCG that according to the plain and ordinary

meaning of the words, the traffic from end-users to ISPs is local and subject to reciprocal compensation arrangements.

We are persuaded that the definition of "Local Traffic," taken from Section 1.44 of the Agreement is conducive to TCG's position:

Under Section 1.44 of the Agreement, "Local Traffic" is defined as: traffic that is originated by a Customer on one Party on that Party's network and terminates to a Customer of the other Party on that other Party's network, within a given local calling area, or expanded areas service ("EAS") area, as denied in Bell's effective Customer tariffs, or, if the Commission has defined local calling areas applicable to all LECs, then as so defined by the Commission.

Section 5.7.5 of the Agreement further states that the designation of whether a call is local or toll "shall be based upon the actual originating and terminating points of the completed end to end call," and also refers to the fact that the Local Traffic is "billable by Bell or TCG."

Since the Agreement explicitly refers to this Commission's definitions for purposes of determining the geographic limitations of Local Traffic, these Commission regulations are important to resolving this question. "Local calling area" is defined under Pennsylvania law as the area "...between which calls may be completed without having inter-exchange toll rates applied." Bell apparently bills its end user customer originating local usage charges when the customers dials an ISP, whether served by Bell or TCG; Interexchange toll rates are not applied. Therefore, TCG submits that calls to ISPs fits well within the definition of Local Traffic.

(Petition, pp. 7-8) (Note omitted).

Even if we were view Bell's position, which rests on its "end-to-end" analysis, in the light most favorable to Bell, we would still be persuaded that TCG has the better view.

Bell's position is that common sense dictates that calls over the Internet do not terminate at the ISP's Point of Presence (POP), as that POP is not the "spatial or temporal end" of the call, but merely a connecting way-station enroute to another end-user across the Internet. However, this assertion is not true as a technical matter in all instances of ISP service.

We take administrative notice of those comments of the PaISP, which would indicate that not all ISPs provide service in an identical manner. Thus, to distinguish between those ISPs who do, in fact, provide service which is not, as Bell states, the spatial or temporal end of the call, from other ISPs who clearly provide service solely via a computer accessed within the local POP, one would have to use sophisticated tracking technology. We consider the comments of Sprint which pointed out that because of cost considerations, Local Traffic is not generally recorded, tracked or analyzed, unless required to examine usage billing on originating calls. We view the fact that it is only recently that the technology to distinguish between ISP and other voice grade calls is being generally deployed, as extrinsic evidence which counsels against Bell's position. The dearth of technology available to track the ISP related calls for purposes of excluding those which may be "handed off" outside of the local POP from reciprocal compensation is supportive of the soundness of TCG's position.

Finally, we note with agreement TCG's references to other extrinsic considerations, and its citation to the industry understanding and practice involving reciprocal compensation for ISP calls as compelling. See Petition, pp. 9-22.

Based on the foregoing, we shall grant TCG's Petition. We conclude that, at the time the Agreement was executed, the definition of Local Traffic, eligible for

reciprocal compensation, included traffic from Bell's end-user customers to ISPs who are TCG's end-user local customers. We decline, however, to make any findings of anticompetitiveness or bad faith on the part of Bell.

3. Bell's Request for Evidentiary Proceedings

In its April 28, 1998 Petition for Reconsideration and Stay, Bell requests a reopening of the proceeding. Significantly, Bell argues:

BA-PA respectfully requests that the Commission reopen this proceeding for the discovery and reception of evidence as to the actual routing of calls to the ISPs served by TCG. ... [E]ven if one ignores the true end-to-end nature of these calls and accepts TCG's incorrect argument that a call over the Internet terminates at the ISP location, a substantial number of these calls still may not be "local" calls under the terms of the parties' interconnection agreement. Under TCG's erroneous view, Internet-bound traffic that originates, and is terminated to an ISP within a local calling area would be considered "local traffic" for the purposes of reciprocal compensation. However, many calls to ISPs may not actually be handed to the ISP within the same local calling area where the call originated. Instead, ISPs in many cases have simply obtained local NXXs - thereby putting pressure on numbering resources - while actually locating their premises in distant local calling areas. In such situations, the call would appear to be a "local call" to the calling party, while in fact BA-PA would be required to carry that call outside the local calling area without receiving compensation for doing so.

* * *

... it now appears that even if TCG wins the legal point -- which it should not -- its so-called "local" ISP calls still may not be "local" in fact -- even under TCG's view that the call "terminates" at the ISP premises.

(Bell Petition, pp. 6-7) (Notes omitted).

On consideration of the Petition for Reconsideration and Stay, we shall deny it, consistent with this Opinion and Order. Specifically, we are able to resolve the proper interpretation of the Interconnection Agreement based on the law and policy considerations discussed, above. The concerns raised by the TCG Petition have reached a conclusion in this docket. Therefore, we shall close the instant proceeding. Bell, however, should be permitted to pursue development of its concerns through a generic proceeding.

Conclusion

Based on the foregoing, we shall grant TCG's Petition consistent with this Opinion and Order. Bell's request for evidentiary hearings pertaining to the instant docket shall be denied. Bell, however, shall advise the Commission within ten (10) days of entry of this Opinion and Order, whether it wishes to pursue its identified concerns through initiation of a generic proceeding; **THEREFORE,**

IT IS ORDERED:

1. That the Petition for Declaratory Order filed by TCG Delaware Valley, Inc. on October 1, 1997, is hereby granted to the extent consistent with this Opinion and Order.
2. That the term "Local Traffic" as used in TCG's Interconnection Agreement with Bell Atlantic - Pennsylvania, Inc., includes Local Traffic from Bell's end-user customers to Internet Service Providers, who are TCG's end-user local

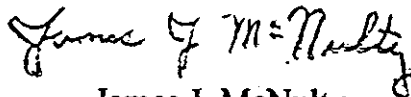
customers and that Bell shall pay TCG the applicable termination rate for such local calls under the reciprocal compensation provisions of the Interconnection Agreement.

3. That Bell Atlantic - Pennsylvania, Inc.'s Petition for Reconsideration and Stay, including its request for evidentiary hearings in Docket No. P-00971256, is hereby denied consistent with this Opinion and Order.

4. That Bell shall advise the Commission within ten (10) days of the entry date of this Opinion and Order whether it wishes to pursue its identified concerns through initiation of a generic proceeding.

5. That the instant docket shall be marked closed.

BY THE COMMISSION,



James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: May 21, 1998

ORDER ENTERED: JUN 16 1998