

ORIGINAL

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BELLSOUTH TELECOMMUNICATIONS, INC.
REBUTTAL TESTIMONY OF JERRY HENDRIX
BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 981008-TP
DECEMBER 10, 1998

Q. PLEASE STATE YOUR NAME AND COMPANY NAME AND ADDRESS.

A. My name is Jerry Hendrix. I am employed by BellSouth Telecommunications, Inc. ("BellSouth") as Director - Interconnection Services Pricing. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375.

Q. ARE YOU THE SAME JERRY HENDRIX WHO FILED DIRECT TESTIMONY IN THIS PROCEEDING?

A. Yes.

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. The purpose of my testimony is to rebut testimony filed in this docket by e.spire Communications, Inc.'s ("e.spire") witnesses, Mr. Kevin Cummings and Mr. James C. Falvey, as to whether reciprocal compensation for internet service provider (ISP) traffic is required under the interconnection agreement

1 that has been negotiated between BellSouth and e.spire (hereinafter "the
2 Agreement").

3

4 **Rebuttal of Mr. Kevin Cummings' Testimony**

5 **Q. ON PAGE 3 OF MR. CUMMINGS' TESTIMONY, MR. CUMMINGS**
6 **STATES THAT BELLSOUTH COMMITTED TO USING ACSI'S**
7 **[NOW D/B/A E.SPIRE] USAGE REPORTS FOR DETERMINING THE**
8 **LOCAL TRAFFIC DIFFERENTIALS. DO YOU AGREE WITH HIS**
9 **ASSESSMENT OF BELLSOUTH'S POSITION?**

10

11 **A.** Mr. Cummings' assessment is partially correct. Representatives from
12 BellSouth and e.spire met on November 3, 1997, to discuss the issue of
13 reciprocal compensation. During this meeting, BellSouth advised e.spire that it
14 was not yet technically capable of providing local traffic usage reports to
15 e.spire, but that BellSouth was continuing to work toward such capability.
16 e.spire indicated at that time that it already had in place a system called
17 "Traffic Master" that could track and record traffic, both originating and
18 terminating minutes, on its trunks. By letter dated January 8, 1998, BellSouth
19 stated its agreement to use e.spire's existing usage reports for determining the
20 local traffic differentials. In that letter, BellSouth expressed its desire to audit
21 the process used by e.spire's "Traffic Master" to jurisdictionalize traffic. The
22 purpose for such an audit was because "to the extent ACSI [now d/b/a e.spire]
23 is categorizing ISP traffic as local traffic, BellSouth's position is that it should
24 not be counted toward the 2 million minute threshold." Almost one year later,
25

1 e.spire has not agreed to allow BellSouth to conduct such an audit of the
2 Traffic Master's data collection and, thus, BellSouth has no reasonable means
3 of verifying whether e.spire's local traffic has exceeded the 2 million minutes
4 of use specified in Section VI.B of the Agreement to even trigger negotiations
5 for reciprocal compensation rates or their application to local traffic.

6
7 In conclusion, BellSouth did agree to use ACSI's usage reports, but in its
8 January 8, 1998, letter to e.spire, BellSouth clearly stated:

9 . . . during our meeting in November, you indicated that ACSI used
10 combined trunks for its traffic. In order to ensure that the 2 million
11 minute threshold has been reached, BellSouth would like to audit the
12 process used by ACSI to jurisdictionalize its traffic between local and
13 interexchange on these combined trunks.

14
15 BellSouth then stated its position, once again, that traffic to ISPs is not local
16 traffic, not subject to reciprocal compensation, and would not apply to the 2-
17 million- minute threshold.

18
19 **Q. PLEASE ADDRESS MR. CUMMINGS' STATEMENT ON PAGE 3**
20 **REGARDING BELLSOUTH'S REPORT OF LOCAL MINUTES TO**
21 **E.SPIRE.**

22 **A.** BellSouth has been pursuing the technical capability to provide e.spire with
23 copies of local traffic usage reports, and BellSouth is now capable of gathering
24 local minutes of use, originating and terminating. These minutes of use can be
25

1 inserted into an agreed-upon report format. However, as stated earlier,
2 BellSouth is agreeable to using e.spire's usage reports for determining the local
3 traffic differentials, but the data collected must be subject to reasonable audit
4 rights.

5
6 **Q. PLEASE COMMENT ON THE ABILITY OF BELLSOUTH TO TRACK**
7 **LOCAL USAGE AS COMPARED WITH MR. CUMMINGS' CLAIM**
8 **ON PAGE 4, LINES 8 – 11, THAT OTHER LOCAL EXCHANGE**
9 **COMPANIES HAVE SUCH ABILITY.**
10

11
12 While many Regional Bell Operating Companies and other local exchange
13 companies (LECs) offer measured local service, BellSouth, as ordered by this
14 Commission, must also offer flat-rated local service. Thus, the type of
15 equipment used to record local traffic over BellSouth's switches is different
16 from the type of equipment used by LECs who offer measured local calling
17 only. When BellSouth was ordered to offer flat-rated local service, the
18 investment of equipment capable of recording and processing local traffic was
19 not warranted. Once BellSouth agreed to track local usage for e.spire, plans
20 were initiated to develop this equipment and the processes to produce the
21 tracking reports. BellSouth discovered in this endeavor that the equipment
22 and process by which BellSouth must track local minutes of use, originating
23 and terminating, are more complicated than anticipated due to the complexity
24 of BellSouth's network. This process is further complicated by the fact that
25

1 BellSouth is attempting to track terminating minutes from an originating
2 standpoint. In contrast, e.spire is tracking terminating minutes from a
3 terminating standpoint. BellSouth has continued to work toward developing an
4 efficient manner of tracking this traffic and reporting the usage to e.spire. Due
5 to the complexity of the situation, it has unfortunately taken longer than desired
6 or expected.

7
8
9 **Rebuttal of Mr. James C. Falvey's Testimony**

10 **Q. DO YOU AGREE WITH MR. FALVEY'S "CONTRACTUAL BASIS**
11 **FOR E.SPIRE'S CLAIM THAT BELLSOUTH SHOULD PAY IT**
12 **RECIPROCAL COMPENSATION" AS EXPLAINED ON PAGES 3**
13 **THROUGH 5 OF HIS DIRECT TESTIMONY?**

14
15 **A.** Absolutely not. Mr. Falvey correctly quotes the Agreement between
16 BellSouth and e.spire. However, he does not correctly apply or interpret these
17 quotes.

18
19 Section VI(A) of the Agreement states:

20 The Parties agree for the purpose of this Agreement only that local
21 interconnection is defined as the delivery of local traffic to be
22 terminated on each party's local network so that customers of either
23 party have the ability to reach customers of the other party, without the
24 use of any access code or delay in the processing of the call. The
25 Parties further agree that the exchange of traffic on BellSouth's

1 Extended Area Service (EAS) shall be considered local traffic and
2 compensation for the termination of such traffic shall be pursuant to the
3 terms of this section. (emphasis added)

4 Attachment B of the Agreement states:

5 "Local Traffic" means telephone calls that originate in one exchange
6 and terminate in either the same exchange, or a corresponding Extended
7 Area Service ("EAS") exchange. The terms Exchange, and EAS
8 exchanges are defined and specified in Section A.3 of BellSouth's
9 General Subscriber Service Tariff.

10

11 Given that ISP traffic has always been defined by the FCC as interstate and
12 does not terminate on e.spire's network, it is very clear that reciprocal
13 compensation does not and should not apply for ISP traffic. As explained in
14 my direct testimony, call termination does not occur when an ALEC, serving as
15 a conduit, places itself between a BellSouth end user and an ISP. The Federal
16 Communications Commission (FCC) has concluded that enhanced
17 service providers (ESPs), of which ISPs are a subset, use the local network to
18 provide interstate services, as stated in the FCC's 1987 Notice of Proposed
19 Rulemaking (CC Docket No. 87-215).

20

21 In reference to Section VI(B) of the contract, Mr. Falvey again quotes the
22 contract accurately, but then chooses to ignore a pertinent provision. Section
23 VI(B) states:

24 For purposes of this Agreement, the Parties agree that there will be no
25 cash compensation exchanged by the parties during the term of this

1 Agreement unless the difference in minutes of use for terminating local
2 traffic exceeds 2 million minutes per state on a monthly basis.

3 In such an event, the Parties will thereafter negotiate the specifics of a
4 traffic exchange agreement which will apply on a going-forward basis.

5 (emphases added)

6

7 This language clearly provides that the 2- million- minute threshold must be
8 met before the Parties begin to negotiate a rate. It is then, and only then, that
9 e.spire and BellSouth must negotiate the “specifics of a traffic exchange
10 agreement which will apply on a going-forward basis.”

11

12 **Q. PLEASE COMMENT ON MR. FALVEY’S ANSWER TO THE**
13 **QUESTION ON PAGE 5 OF HIS DIRECT TESTIMONY, “WHY DO**
14 **YOU BELIEVE THAT CALLS PLACED TO ISPS FIT THIS**
15 **DEFINITION?”**

16

17 **A.** Let me begin by stating that due to the ambiguity of the question, I am
18 assuming that Mr. Falvey is intending for “this definition” to refer to the
19 definition of “local traffic.” Assuming such, I will proceed.

20

21 First, the FCC in the Access Charge Reform Order (CC Docket No. 96-262),
22 referred to by Mr. Falvey, did not address the jurisdiction of ISP traffic, but
23 attempted to reform the current access rate structure to bring it in line with
24 cost-causation principles. In fact, the FCC stated in its Access Charge Reform
25 Order that ISPs use incumbent LEC facilities for interstate calls and created an

1 exception for ISPs in not requiring them to pay interstate access charges for
2 their interstate traffic:

3 In the 1983 Access Charge Reconsideration Order, the Commission
4 decided that, although information service providers (ISPs) may use
5 incumbent LEC facilities to originate and terminate interstate calls,
6 ISPs should not be required to pay interstate access charges . . .

7
8 We decide here that ISPs should not be subject to interstate access
9 charges. The access charge system contains non-cost-based rates and
10 inefficient rate structures, and this Order goes only part of the way to
11 remove rate inefficiencies . . .

12
13
14 We therefore conclude that ISPs should remain classified as end users
15 for purposes of the access charge system.

16
17
18 Access Charge Reform Order, CC Docket No. 96-262, pp. 153-155
19 (released May 16, 1997) (emphases added).

20
21 In summary, through the Access Charge Reform Order, the FCC decided to
22 continue the access charge exemption offered to ISPs for what the FCC defines
23 as interstate calls. This exemption does not in any way imply that these calls
24 are local, but rather confirms that the calls are interstate in nature and,
25

1 therefore, require an exemption because of this status. In order to categorize
2 this exemption, the FCC decided to classify ISPs as end users only for the
3 purposes of the access charge system. This is evident in the meaning of the
4 Order and through the express language of Paragraph 348 of the Order.

5
6 The purpose of the FCC's Universal Service Docket (CC Docket No. 96-45),
7 referred to by Mr. Falvey, was to set forth plans to satisfy statutory
8 requirements and to put into place a universal support system that will be
9 sustainable in an increasingly competitive marketplace. The Order defines
10 telecommunications services and information services for the sole purpose of
11 determining who should contribute to the universal service fund. The Order
12 states that only telecommunications carriers that provide interstate
13 telecommunications services should contribute. Hence, by making a
14 distinction between telecommunications services and the ISP's offering, a valid
15 determination of required contributors can be made. Mr. Falvey is confusing
16 the issue by focusing on the fact that "telecommunications" has a different
17 definition than "information services." The issue at hand is the jurisdiction of
18 ISP traffic and whether reciprocal compensation applies for ISP traffic. The
19 FCC clearly stated in its April 10, 1998, Report to Congress (CC Docket No.
20 96-45), in Footnote 220:

21
22
23 That issue [reciprocal compensation for Internet traffic], which is now
24 before the Commission, does not turn on the status of the Internet
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

service provider as a telecommunications carrier or information service provider.

The FCC specifically rejected Mr. Falvey's argument in its GTE Order issued October 30, 1998, in CC Docket 98-79:

The Commission previously has distinguished between the "telecommunications services component" and the "information services component" of end-to-end Internet access for purposes of determining which entities are required to contribute to universal service. Although the Commission concluded that ISPs do not appear to offer "telecommunications service," and thus are not "telecommunications carriers" that must contribute to the Universal Service Fund, it has never found that "telecommunication" ends where "enhanced" information service begins.

Second, Mr. Falvey is blatantly wrong in his definition and explanation of what constitutes call termination. The three criteria listed by Mr. Falvey as requirements of call termination are that 1) a connection is established between caller and the telephone exchange service to which the dialed number is assigned, 2) answer supervision is returned, and 3) a call record is generated. These three criteria do not, in fact, indicate exclusively that call termination has occurred.

1 Specifically, answer supervision is not a requirement for call completion, and
2 thus does not indicate that it has occurred. Answer supervision only
3 determines when billing for a call should begin. Mr. Falvey's statement is
4 inaccurate and has no legal or technical basis. Answer supervision is common
5 among various access services, including Feature Group A, Feature Group B,
6 Feature Group D, 800 Service, and 900 Service. Just as it is the case with
7 these exchange access services, answer supervision for an ISP call does not, by
8 any means, indicate the termination of the call.
9

10
11 Furthermore, the determination of jurisdiction of a communication should be
12 based on the end-to-end nature of the call, as is thoroughly discussed in my
13 direct testimony, and by the FCC in its GTE Order dated October 30, 1998. In
14 the FCC's 1987 Notice of Proposed Rulemaking in CC Docket No. 87-215 in
15 which it proposed to lift the ISP access charge exemption, the FCC stated:
16

17 We are concerned that the charges currently paid by enhanced service
18 providers do not contribute sufficiently to the costs of the exchange
19 access facilities they use in offering their services to the public. As we
20 have frequently emphasized in our various access charge orders, our
21 ultimate objective is to establish a set of rules that provide for recovery
22 of the costs of exchange access used in interstate service in a fair,
23 reasonable, and efficient manner from all users of access service,
24 regardless of their designation as carriers, enhanced service providers, or
25 private customers. Enhanced service providers, like facilities-based

1 interexchange carriers and resellers, use the local network to provide
2 interstate services. To the extent that they are exempt from access
3 charges, the other users of exchange access pay a disproportionate share
4 of the costs of the local exchange that access charges are designed to
5 cover. (emphases added)

6

7 In contradiction to Mr. Falvey, the FCC specifically addressed call termination
8 in CC Docket No. 98-79 in Paragraph 19 of the Order released October 30,
9 1998:

10 Consistent with these precedents, we conclude that the communications
11 at issue here do not terminate at the ISP's local server, as some
12 competitive LECs and ISPs contend, but continue to the ultimate
13 destination or destinations, very often at a distant Internet website
14 accessed by the end user.

15

16 Mr. Falvey's third, fourth and final concerns can be addressed in a single
17 answer. While I am not a separations expert, the separations process is
18 controlled by Part 36 of the FCC rules, which BellSouth is required to follow.
19 Separations rules make a number of broad-based allocations that are not
20 precise (e.g., 25% gross allocator, 10% interstate special access allocated to
21 interstate, etc.). BellSouth cannot report ISP traffic correctly -- as interstate
22 calls -- until the FCC approves new separations rules. The FCC's separations
23 rules must be followed. Further, Automated Reporting Management
24 Information System ("ARMIS") rules must reflect separations rules.
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Periodically, separations rules must be updated if they are to remain accurate, even at a broad-based level. To my knowledge, separations rules have not been updated to allow for the proper allocation of several new or growing services such as services provided by ISPs and services using unbundled network elements. Moreover, there was previously no need to update separations to properly allocate ISP traffic to the interstate jurisdiction due to the ISP access charge exemption initially being labeled as temporary or transitional. Similar reporting problems existed when the FCC introduced Feature Group A service. Separations and ARMIS reporting will not be accurate until the transitional access charge exemption is revoked or until the FCC approves new separations procedures.

Recent separations activities have focused on freezing separations rules rather than making continual adjustments as was done in the past. To the extent separations rules are updated, it is BellSouth's position that the rules should be revised to reflect the actual interstate jurisdiction of ISP traffic.

In summary, the FCC did not, in any of the dockets cited by Mr. Falvey, contradict the long standing position that ESPs' or ISPs' services are jurisdictionally interstate. The determination of jurisdiction must be based on

1 the end-to-end nature of a call, not on one component or a few components of a
2 call. As the FCC stated in its February 14, 1992, Georgia Memory Call Order:

3 Our jurisdiction does not end at the local switch , but continues to the
4 ultimate termination of the call. The key to jurisdiction is the nature of
5 the communication itself, rather than the physical location of the
6 technology.

7
8 **Q. DO YOU AGREE WITH MR. FALVEY'S CLAIM ON PAGE 8, LINES**
9 **15 - 17, THAT THE FCC'S RECENT ORDER REGARDING THE GTE**
10 **DSL TARIFF HAS NO IMPACT ON THIS PROCEEDING?**

11
12 Absolutely not. Mr. Falvey chooses to incorrectly state that this Order is
13 irrelevant because the Order clearly contradicts several of Mr. Falvey's claims.
14 This Order clarifies many issues on the jurisdictional nature of ISP traffic.
15 Although the Order states that it makes no decision on the payment of
16 reciprocal compensation, this does not change the jurisdictional facts which are
17 presented and the conclusions reached by the FCC regarding ISP traffic.

18
19 **Q. PLEASE ADDRESS MR. FALVEY'S CONCERN ON PAGE 8, LINE 18**
20 **OF HIS DIRECT TESTIMONY ABOUT THE COSTS THAT E.SPIRE**
21 **INCURS IN "TERMINATING THIS TRAFFIC FOR BELLSOUTH."**

22
23 The FCC has ruled that Enhanced Service Providers (ESPs), of which ISPs are
24 a subset, use local exchange facilities to provide interstate communications
25 services. Therefore, each carrier would have to seek compensation from ISPs.

1 BellSouth has been collecting local exchange business rates from ISPs in
2 compliance with the previous FCC rulings. ALECs, in their provisioning of
3 telecommunications service, would also have to seek compensation by
4 charging appropriate rates to ISPs. Further, ALECs are not bound by the Part
5 69 Access Charge rules and regulations and, therefore, are free to charge
6 whatever the market will allow.

7
8 Even more of a concern is the current position of e.spire. As I described in my
9 direct testimony, e.spire's position would have the effect of creating a class of
10 inter-carrier traffic that would require a carrier, such as BellSouth, serving end
11 users originating calls to ISPs to not only turn over to the ALECs that serve
12 these ISPs every penny of local exchange revenue it receives from its end
13 users, but to also pay a significant amount more per month in reciprocal
14 compensation. This situation makes no economic sense and would place an
15 unfair burden on a carrier, such as BellSouth, and its customers.

16

17 **Q. HASN'T THE FLORIDA COMMISSION ADDRESSED THIS ISSUE IN**
18 **ITS SEPTEMBER 15, 1998, DECISION?**

19

20 **A. This Commission , in Order No. PSC-98-1216-FOF-TP, specifically stated that**
21 **it did not address the generic question about the nature of ISP traffic for**
22 **reciprocal compensation purposes. Further, the Order reads:**

23 **It appears that the FCC has largely been silent on the issue [of**
24 **reciprocal compensation for ISP traffic). This leads us to believe the**
25 **FCC intended for the states to exercise jurisdiction over the local**

1 service aspects of ISP traffic, unless and until the FCC decided
2 otherwise.

3

4 Since the time of this Order, the FCC released its October 30, 1998, GTE DSL
5 Order which explicitly states Internet traffic is interstate in nature. Further, the
6 Florida September 15, 1998, Order stated the Commission's decision was
7 based on the language in the agreements between the parties in the proceeding
8 and the intent of those parties at the time they entered into the agreements.
9 Since the FCC has clarified the nature of ISP traffic and since parties in this
10 proceeding have a different contract and different language concerning
11 reciprocal compensation, the September 15, 1998, Order has no bearing on this
12 case.

13

14 **Q. MR. FALVEY CLAIMS, ON PAGES 13 AND 14, THAT 23 STATES**
15 **HAVE DETERMINED THAT TERMINATION OF CALLS PLACED**
16 **TO ISPS ARE SUBJECT TO PAYMENT OF RECIPROCAL**
17 **COMPENSATION. WHAT IS YOUR RESPONSE TO THAT**
18 **STATEMENT?**

19

20 **A. The ex parte filing by SBC Telecommunications, Inc., that was filed with the**
21 **FCC on August 14, 1998, and attached to my direct testimony as Exhibit JH-3,**
22 **gives a concise summary of the decisions of each state at the time of the ex**
23 **parte filing. As is seen in that summary, eight states have acted pending FCC**
24 **review of this issue or recognizing that their orders may need to be later**
25 **modified based on an FCC ruling. Since that time, Bell Atlantic has filed a**

1 more recent ex parte with the FCC, which is attached as Exhibit JH-4. This ex
2 parte includes recent rulings of states, and as seen in the summary, 10 states
3 have now said they may revisit their reciprocal compensation rulings based on
4 further FCC action. Furthermore, these decisions are not relevant or binding to
5 the Florida Public Service Commission.

6

7 **Q. ON PAGE 14, LINES 11 – 19, MR. FALVEY STATES FIVE AREAS IN**
8 **WHICH E.SPIRE IS SEEKING RELIEF FROM THE COMMISSION.**
9 **PLEASE ADDRESS THESE REQUESTS.**

10

11 **A.** The language in the agreement between BellSouth and e.spire in no way
12 subjects itself to the interpretation that ISP traffic should be subject to
13 reciprocal compensation. Further, the language specifies that calls must
14 terminate in order to receive reciprocal compensation, and calls to ISPs do not
15 terminate at the ISP's point of presence. The language in this agreement also
16 clearly provides that the 2- million- minute threshold must be met before the
17 Parties negotiate a rate. It is then, and only then, that e.spire and BellSouth
18 must negotiate the "specifics of a traffic exchange agreement which will apply
19 on a going-forward basis." As discussed in my direct testimony, the most
20 favored nation provision is not intended to circumvent the appropriate
21 negotiations process as e.spire intends to do. It is also interesting to note that
22 e.spire is asking to adopt the highest reciprocal compensation rate BellSouth
23 offers. In usual and normal circumstances, an alternate local exchange carrier
24 (ALEC), would desire a low interconnection rate. This would lead BellSouth
25 to believe that e.spire is hoping to gain an unjust "windfall" through the issue

1 of reciprocal compensation for traffic to ISPs. Since BellSouth believes that
2 the 2- million- minute threshold has not been met, there are no outstanding,
3 overdue bills for reciprocal compensation. e.spire is not entitled to
4 reimbursement for attorney fees as there is no legal basis for this statement.

5

6 In summary, traffic to ISPs is not subject to reciprocal compensation. At
7 which time e.spire and BellSouth meet the 2- million- minute difference in
8 terminating minutes, the specifics of a traffic exchange arrangement will be
9 discussed. At the present time, e.spire is not entitled, under the terms of the
10 Agreement, to any payment for reciprocal compensation.

11

12 **Q. CAN YOU SUMMARIZE YOUR REBUTTAL TESTIMONY?**

13

14 **A.** Yes. Messrs. Cummings and Falvey are incorrect in claiming that the
15 interconnection agreement between BellSouth and e.spire require payment of
16 reciprocal compensation for ISP traffic. When that agreement was negotiated,
17 filed and approved by this Public Service Commission, BellSouth understood,
18 based on current FCC orders, that such traffic was defined as jurisdictionally
19 interstate. The language of the agreement does not include the traffic to ISPs
20 in the definition of local traffic for reciprocal compensation purposes. The
21 agreements, therefore, do not require such treatment and the Florida
22 Commission should so order. The interconnection agreement between
23 BellSouth and e.spire states that there will be no cash compensation exchanged
24 by the parties until a difference in minutes of use for terminating local traffic
25 exceeds 2 million minutes per state per month. Once this threshold has been

1 met, the parties will negotiate a traffic exchange agreement which will apply on
2 a going forward basis. BellSouth does not believe this threshold has not been
3 met, when excluding traffic terminating to ISPs. Thus, BellSouth does not owe
4 reciprocal compensation to e.spire. BellSouth is willing, however, to use
5 Traffic Master's data, subject to audit rights, and to begin negotiations for a
6 reciprocal compensation rate to be agreed upon when the difference in
7 terminating minutes exceed the 2- million- minute threshold.

8

9 **Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?**

10

11 **A. Yes.**

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Bell Atlantic Network Services, Inc.
1320 North Court House Road
8th Floor
Arlington, Virginia 22201
(703) 974-2944
(703) 525-6436 - FAX

Michael E. Glover
Associate General Counsel



November 4, 1998

EX PARTE

Mr. Kevin Martin
Mr. Paul Misener
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Re: Reciprocal Compensation On Internet Traffic (Dkts CCB 97-30 and 96-98)

Dear Mr. Martin and Mr. Misener:

This follows up on two points from our meeting yesterday.

First, the FCC should not preempt the states' ability to reconsider their decisions concerning the applicability of reciprocal compensation to Internet traffic. Rather, the FCC should expressly say that it is not addressing what effect its order has on existing agreements or prior state orders addressing those agreements. State regulatory commissions are in the best position to address those issues. And a number expressly said that they will do so once the FCC releases its order addressing the nature of the traffic (examples are attached).

In contrast, some parties urge the FCC to preempt the ability of state commissions to reconsider their prior orders. It should do so, they say, either directly by requiring them to leave existing arrangements in place, or indirectly by inserting language into the order that effectively dictates to the states the factors to "consider" in re-examining their decisions. *But preemption by any name is still preemption*, and efforts to foreclose any meaningful role for the states should be rejected.

Second, there is no reason to think the states are not up to the task of interpreting existing agreements. Once the nature of the traffic is clarified, the individual agreements can be interpreted according to basic principles of contract law. The states are at least as well suited for this task as the FCC.

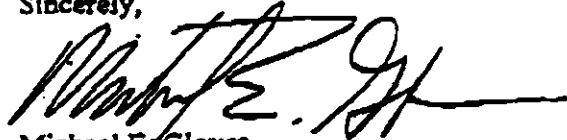
For example, the express terms of Bell Atlantic's agreements say that reciprocal compensation applies only to calls that are local on an end-to-end basis. And the most basic principle of contract law is that contracts must be interpreted based on the express language of the contract itself. See Restatement (Second) of Contracts § 203(b) at 93

("Express terms are given greater weight than course of performance, course of dealing, usage of trade...."); see also *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971) (the scope of an agreement "must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it").

Likewise, despite requests to do so, Bell Atlantic refused to agree that Internet traffic is local or that it is subject to reciprocal compensation. And a closely related principle of contract interpretation is that courts (or agencies) may not read terms into a contract that the parties did not agree to include. See *Coca-Cola Bottling Comp. v. The Coca-Cola Company*, 769 F. Supp. 599, 616-617 (D. Del. 1993) ("Courts do not rewrite contracts to include terms not assented to by the parties."); 17A Am. Jur. 2d Contracts § 340 ("A court may not make a new contract for the parties or rewrite their contract under the guise of construction;" for example, it may not impose on one of the parties terms which it did not voluntarily consent to include).

I would be happy to address any questions you may have.

Sincerely,



Michael E. Glover

Attachment.

**Examples of State Commissions That Have Said They May
Revisit Their Reciprocal Compensation Decisions**

Massachusetts:

"We agree with Bell Atlantic that the FCC has jurisdiction over Internet traffic. Pursuant to that authority, the FCC may make a determination in proceedings pending before it that could require us to modify our findings in this Order. See FCC Comments on Request by ALTS for Clarification of the FCC's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic, and Public Notice, CC Docket 97-30 (rel. July 2, 1988, 12 FCC Rcd 9715) (FCC stated that it has not yet determined whether CLECs are entitled to reciprocal compensation for terminating Internet traffic); see also In the Matter of GTE Telephone Operators [sic], GTOC Tariff No. 1, GTOC Transmittal No. 1148, CC Docket No. 98-79 (rel. August 20, 1998)."

Complaint of WorldCom Technologies, Inc., D.T.E. 97-116 at 5, n.11 (Mass. Dept. of Telecom. and Energy, Oct. 21, 1998) (emphasis added).

Maryland:

*"The Commission recognizes that there is a question as to whether these communications are 'jurisdictionally interstate communications.' See In the Matter of MTS and WATS Market Structure, 97 F.C.C. 2d 682, paragraphs 82-83 (1983). However, it does not believe that this question affects the result herein because of the Federal Communications Commission's ('FCC') requirement that although ISPs use incumbent LEC facilities to originate and terminate interstate calls, these services should be purchased 'under the same intrastate tariffs available to end users.' In the Matter of Access Charge Reform, FCC 92-158, paragraphs 341-342 (1997). Moreover, we note this issue is currently being considered by the FCC and may ultimately be resolved by it. In the Matter of Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic, CCB/CPD 97-30. *In the event the FCC issues a decision that requires revision to the directives announced herein, the Commission expects the parties will so advise it.*"*

Letter Order by Daniel Gahagan, Executive Secretary, Maryland Public Service Commission, at 1 (Md. PSC Sept. 11, 1997) (emphasis added).

West Virginia:

"Although the Commission agrees that a final determination on this matter rests with the FCC, it is clear that, historically, calls that originate and are terminated to ISPs in local calling areas are treated as local traffic. . . . The fact that the FCC may be reconsidering – and conceivably may abandon – its policy that ISP calls originating within local calling areas should be considered local traffic, does not alter the fact that this is the policy currently in effect."

"If the FCC should change its position, then the Commission expects interconnection agreements to be applied in accordance with the FCC's new policy. Moreover, the parties will be directed to bring the FCC's final determination to the Commission's attention in order to allow it to consider whether any further action is appropriate."

MCI Telecommunications Corporation, Case No. 97-1210-T-PC at 29-30 (W.Va. PSC Jan. 13, 1998) (emphasis added).

Ohio:

"We also recognize that the FCC is in the process of considering arguments addressing these broader policy implications. The FCC's deliberations could, therefore, have an impact on this Commission's view of the issues presented by the parties in this complaint. We specifically reserve our rights to consider these policy implications in a future proceeding."

Complaint of ICG Telecom Group, Inc., Case No. 97-1557-TP-CSS, at 8 (Pub. Util. Com'n. Ohio, Aug. 27, 1998) (emphasis added).

Michigan:

"Further, Ameritech Michigan's position depends on a conclusion that calls to ISPs cannot be separated into a local call and a subsequent communication with the information service provider.... As to the meaning of the FCC's prior rulings and pronouncements, the Commission is not persuaded that the FCC has ruled as Ameritech Michigan asserts. In fact, the FCC's more recent statements have moved away from the view upon which Ameritech Michigan's position depends. When the FCC rules in the pending docket, the Commission can determine what action, if any, is required."

In re Brooks Fiber Communications of Michigan, Inc., Case No. U-1178, et al., at 14-15 (Mich. PSC Jan. 28, 1998) (emphasis added).

Illinois:

"If the FCC had concluded that calls to ISPs are interstate in nature and thus that the connections between incumbent LECs and Internet ISPs were interstate in nature, like those between incumbent LECs and DXCs for purposes of interstate calls, it would have concluded that it has the authority to address those compensation issues."

* * *

"There is no dispute that the FCC is currently considering various issues regarding internet communications.... The ultimate conclusion, as well as its timing can only be the subject of speculation. *This Commission anticipates that if the FCC institutes a change in policy which impacts the interconnection agreements or any other aspect of state policy, the parties will bring that matter to the Commission's attention in an appropriate fashion.*"

Teleport Communications Group v. Illinois Bell, Docket No. 97-0404 at 12-13 (Ill. Comm. Com'n., March 11, 1998) (emphasis added).

"After reviewing relevant FCC precedent, this court finds that the FCC has not reached a coherent decision on the issue of the compensation of LECs providing Internet access. This result is due, in part, to the fact that the Internet, as a recently new development to the telecommunications world, presents questions that have not previously been addressed by FCC decisions and policy.... Thus, the precise issue under review in the instant case is currently being decided by the FCC. As of the date of this Memorandum Opinion and Order, the issue has not been resolved. *Any ruling by the FCC on that issue will no doubt affect future dealings between the parties on the instant case.*"

* * *

"Second, this court finds that the ICC's determination that calls to the ISP terminate at the ISP is not contrary to federal law and is supported by substantial evidence. Ameritech's argument that federal law requires that this court adopt a 'jurisdictional' standard for termination that would be measured on an 'end-to-end' basis is not convincing."

* * *

"Instead of classifying the web sites as the jurisdictional end of the communication, the FCC has specifically classified the ISP as an end user. *Given the absence of an FCC ruling on the subject, this court finds it appropriate to defer to the ICC's finding of industry practice regarding call termination.*"

Illinois Bell Tel. Comp. v. Worldcom Technologies, Inc., No. 98 C 1925, Mem. Op. and Order at 17-18, 26-27 (N.D. Ill. July 21, 1998) (citations and footnotes omitted) (emphasis added).

Arizona:

"The Commission will adopt the exemption permitted by the FCC. However, the Agreement should indicate that if and when the FCC modifies the access charge exemption, the Agreement will also be modified."

MFS Communications Comp., Inc., 1996 WL 787940 *5 (Ariz. Corp. Com'n Oct. 29, 1996) (emphasis added).

Delaware:

"The FCC may someday reach a contradictory conclusion. However, there is no reason to assume in advance that it will. Moreover, a deferral of authority here appears to leave a substantial gap in the event that there is no FCC determination. In contrast, exercising authority here to adopt the position urged by BA-Del presents no substantial problem should the FCC decide in the future that it will use federal authority to negate the action taken here. Thus, there are also substantial practical grounds to favor reaching a decision on this issue in this arbitration, rather than deferring one indefinitely, as BA-Del proposes."

Petition of MCI, Dkt No. 97-323, Arbitration Award at 14-15 (Del. PSC, Dec. 16, 1997) (emphasis added).

Missouri:

"[T]he Commission has been advised by the parties and takes official notice that, as to the crucial issue in this case, i.e. reciprocal compensation under this type of scenario, the FCC has requested comments and taken the matter under advisement in Docket No. 97-30. The record presented by the parties is not sufficiently persuasive to move this Commission to make a final decision on the reciprocal compensation issue in light of the FCC's pending proceeding on the same issue."

"[P]rior to a decision from the Federal Communications Commission on the issue of reciprocal compensation for traffic to ISPs within a local calling scope, the parties shall compensate one another for such traffic in the same manner that local calls to non-ISP end users are compensated, subject to a true-up following the Federal Communication Commission's determination on the issue."

In re Birch Telecom of Missouri, Inc., 1998 WL 324141 *3, *5 (Mo. PSC Apr. 24, 1998) (emphasis added).

North Carolina:

"The FCC has not squarely addressed this issue, although it may do so in the future. While both parties presented extensive exegeses on the obscurities of FCC rulings bearing on ISPs, there is nothing dispositive in the FCC rulings thus far."

In re Interconnection Agreement Between BellSouth Telecommunications, Inc. and US LEC of North Carolina, LLC, Dkt No. P-55, SUB 1027 at 7 (N.C. PUC Feb. 26, 1998)
(emphasis added).

Florida:

"The FCC has not yet decided whether ISP traffic is subject to reciprocal compensation. While the FCC has determined that ISPs provide interstate services, it appears that the FCC may consider those services severable from telecommunications services, as we explain below. No FCC order delineates exactly for what purposes the FCC intends ISP traffic to be considered local. By the same token, the FCC has not said that ISP traffic cannot be considered local for all regulatory purposes. It appears that the FCC has largely been silent on the issue. This leads us to believe the FCC intended for the states to exercise jurisdiction over the local service aspects of ISP traffic, unless and until the FCC decided otherwise."

Complaint of WorldCom Technologies, Inc., Dkt No. 971478-TP, Order No. PSC-98-1216-FOF-TP at 8-9 (Florida P.S.C., Sept. 15, 1998) (emphasis added).

November 4, 1998