ORIGINAL

Legal Department

MARY K. KEYER
General Attorney

BellSouth Telecommunications, Inc.
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(404) 335-0729

April 21, 1999

Mrs. Blanca S. Bayo
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

RE: Docket No. 981008-TP

Dear Mrs. Bayo:

Enclosed are an original and 15 copies of BellSouth Telecommunications, Inc.'s Motion for Reconsideration By The Full Commission. Please file this document in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served on the parties shown on the attached Certificate of Service.

Sincerely,

Mary K. Keyer (BW)

Mary K. Keyer

AFA
APP
CAF
CMU
CTR
EAG
LEG 2
MAS 2
OPC
RRR
SEC 1
WAW
OTH

Enclosures

cc: All Parties of Record
M. M. Criser, III
N. B. White
W. J. Ellenberg (w/o enclosures)

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

COMPLAINT OF e.spire COMMUNICATIONS, INC. AGAINST BELLSOUTH TELECOMMUNICATIONS, INC. REGARDING RECIPROCAL COMPENSATION FOR TRAFFIC TERMINATED TO INTERNET SERVICE PROVIDERS	)	Docket No. 981008-TP Filed: April 21, 1999

BELLSOUTH TELECOMMUNICATIONS, INC'S
MOTION FOR RECONSIDERATION BY THE FULL COMMISSION

BellSouth Telecommunications, Inc., pursuant to Rule 25-22.060(1), Florida Administrative Code, hereby files its motion for reconsideration by the full Public Service Commission ("Commission") of Order No. PSC-99-0658-FOF-TP ("Order") issued on April 6, 1999. Reconsideration is required because the Commission overlooked or failed to consider applicable law and evidence affecting the outcome of this proceeding. In support of its motion, BellSouth states:

I. Procedural Background

On February 8, 1996, the Telecommunications Act of 1996 (the "Act") became law. Section 251(b)(5) of the Act imposes upon local exchange carriers (LECs) the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications. In its August 8, 1996, Local Competition Order and applicable rules, the FCC held that the reciprocal compensation obligation imposed on LECs by the Act only applies to local traffic.

First Report and Order, CC Docket No. 96-98 (Aug. 8, 1996), ¶¶ 1033-1040. Section 51.703(a) of the FCC rules requires LECs to "establish reciprocal compensation arrangement for transport and termination of local telecommunications traffic with any requesting telecommunications carrier."

BellSouth and American Communication Services of Jacksonville, Inc. d/b/a e.spire Communications, Inc. and ACSI Local Switched Services, Inc. d/b/a e.spire Communications, Inc. ("e.spire") entered into an interconnection agreement on July 25, 1996 ("Agreement"), which included reciprocal compensation provisions for local traffic. On August 6, 1998, e.spire filed a complaint with the Commission regarding the reciprocal compensation provisions of the Agreement for traffic terminated to Internet Service Providers ("ISP traffic").

A hearing was held on January 20, 1999. On April 6, 1999, the Commission Panel issued its Order holding, among other things, that "the parties intended that calls originated by an end user of one and terminated to an ISP of the other would be rated and billed as local calls," (Order, p. 10); "enforcing the MFN [most favored nations] provisions of the agreement," (Order, p. 14); and holding that e.spire met the two-million-minute differential for terminating local traffic on a monthly basis.

BellSouth seeks reconsideration of the Order by the full Commission because the Panel, in reaching its decision on these issues, either overlooked or failed to consider certain law and evidence applicable to this docket. See Diamond Cab Co. of Miami vs. King, 146 So. 2d 889 (Fla. 1962). The

Commission's decision lacks the requisite foundation of competent and substantial evidence. In making its decision, the Commission must rely upon evidence that is "sufficiently relevant and material that a reasonable man would accept it as adequate to support the conclusion reached." DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1st DCA 1957) See also Agrico Chem. Co. v. State of Fla. Dep't of Environmental Reg., 365 So. 2d 759, 763, (Fla. 1st DCA 1979); Ammerman v. Fla. Board of Pharmacy, 174 So. 2d 425, 426 (Fla. 3d DCA 1965). The evidence must "establish a substantial basis of fact from which the fact at issue can reasonably be inferred." DeGroot, 95 So. 2d at 916. The Commission should reject evidence that is devoid of elements giving it probative value. Atlantic Coast Line R.R. Co. v. King, 135 So. 2d 201, 202 (1961). "The public service commission's determinative action cannot be based upon speculation or supposition." 1 Fla. Jur. 2d, § 174, citing Tamiami Trail Tours, Inc. v. Bevis, 299 So. 2d 22, 24 (1974). In this case, the Commission's decision is doubly arbitrary because it ignores applicable federal law and competent evidence that contradicts the Commission's underlying assumptions in many instances. "Findings wholly inadequate or not supported by the evidence will not be permitted to stand." Caranci v. Miami Glass & Engineering Co., 99 So. 2d 252, 254 (Fla. 3d DCA 1957).

The section below examines the grounds for reconsideration.

II. The Commission Overlooked the Plain Language of the Agreement and Basic Contract Law in Considering the Nature of ISP Traffic.

Under Florida law, where the language of the contract is clear and unambiguous, the terms of the contract are conclusive. Lyng v. Bugbee Distributing Co., 182 So. 801 (Fla. 1938). Neither the Commission nor a court can entertain evidence contrary to its plain meaning. Sheen v. Lyon, 485 So.2d 422, 424 (Fla. 1986). As the court in Lyng stated:

> "The intention of the parties to a contract is to be deduced from the language employed by them. The terms of the contract, when unambiguous, are conclusive, in the absence of averment and proof of mistake, the question being, not what intention existed in the minds of the parties, but what intention is expressed by the language used." [citation omitted]

182 So. 2d at 802. Regardless of the apparent intent of the parties at the time they entered the agreement, such intent cannot prevail over the actual terms of the agreement. Acceleration Nat'l Serv. Corp. v. Brickell Fin. Servs. Motor Club, Inc., 541 So.2d 738, 739 (Fla. App. 1989).

The actual terms of the Agreement defines local traffic as

> telephone calls that originate in one exchange and terminate in either the same exchange, or a corresponding Extended Area Service ("EAS") exchange. The terms Exchange, and EAS exchanges are defined and specified in Section A3. of BellSouth's General Subscriber Service Tariff.

Agreement, Attachment 2, ¶ 48 (emphasis added). Further, the actual terms of the Agreement clearly and unambiguously state that

> there will be no cash compensation exchanged by the parties during the term of this Agreement unless the difference in minutes of use for terminating local traffic exceeds 2 million minutes per state on a monthly basis.

Agreement, Section VI.B (emphasis added). As a matter of law and fact ISP traffic does not terminate at the ISP's premise and is, therefore, not local traffic under the clear terms of the Agreement. As indicated in the discussion below, the FCC's Declaratory Ruling issued February 26, 1999, reaffirmed this position. If such traffic does not terminate at the ISP's premise today, it did not terminate, and could not have terminated, at the ISP's premise yesterday.

The Commission erred in considering the intent of the parties. The Commission held that the evidence did not indicate that the intent of the parties was to exclude ISP traffic from the definition of local traffic. Order, p. 7. Neither did the evidence indicate that the intent of the parties was to include ISP traffic in the definition of local traffic. Nevertheless, the law is clear that "[r]egardless of the apparent intent of the parties at the time they entered the agreement, such intent cannot prevail over the actual terms of the agreement." 541 So.2d at 739. The actual terms of the Agreement exclude ISP traffic from the definition of local traffic since ISP traffic does not terminate at the ISP premise.

The Commission Panel overlooked the plain language of the Agreement as well as the existing applicable law in deciding that the intent of the parties was not to exclude ISP traffic from the definition of local traffic. The FCC has always determined the jurisdiction of a call by the nature of the traffic that flows through the facilities and has looked at the end-to-end nature of the call or, in other

words, where the call begins and where it ends. Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation, 7 FCC Rec. 1619 (1992), aff'd, Georgia Public Service Commission v. FCC, 5 F.3d 1499 (11th Cir. 1993) ("Memory Call Order"). The FCC in effect rejected the two-call theory propounded by e.spire in this case in rejecting the Georgia Commission's argument in the Memory Call case that the second part of the call from an out-of-state caller seeking to reach his or her voice mailbox should be classified as part of an intrastate enhanced service. The FCC, in its Non-Accounting Safeguards Order, described a call from an end user to an ISP as only transiting through the ISP's local point of presence. Implementation of the 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 (rel. Dec. 24, 1996), note 291. The FCC did not in that order view such a call as terminating with the ISP because there is no interruption of the continuous transmission of signals that would justify treating the ISP as anything other than another link in the chain of transmission between the end user and the host computer.

In its most recent orders addressing Internet traffic, the FCC again rejected the two-call theory relied upon by e.spire in support of its claim that such traffic is local traffic, and further upheld that Internet traffic is interstate traffic and does not terminate at the ISP's local server, but continues to its ultimate destination. GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148, Memorandum Opinion and Order, CC Docket 98-79 (rel.

Oct. 30, 1998)("GTE ADSL Tariff Order") and In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling and Notice of Proposed Rulemaking, CC Dkt. No. 96-98 (rel. Feb. 26, 1999). These rulings further confirm the FCC's prior rulings in existence at the time the parties entered into their Agreement that Internet traffic is interstate in nature as determined by an end-to-end analysis of the call being made.

Section XXVII of the Agreement states that the Agreement shall be governed by, construed and enforced in accordance with applicable federal law. Under clear FCC and other federal precedent in existence at the time the parties negotiated their Agreement, and thereafter, calls bound for the Internet through an ISP's switch do not terminate at the ISP's premise, but terminate at the Internet host computer containing the data that the originating end user seeks to access and, therefore, as a matter of law and fact cannot be considered local traffic under the clear and unambiguous terms of the Agreement. Accordingly, the Panel erred in ignoring the plain language of the Agreement, applicable contract law and federal precedent regarding the termination of traffic, specifically ISP traffic.

III. The Commission's Finding that the MFN Clause Should Be Applied Overlooks the Evidence in This Case and Is Contrary to Existing Law.

It is a basic principle of contract interpretation under Florida law that a limited or specific provision will prevail over one that is more broadly inclusive. Raines v. Palm Beach Leisureville Community Assoc., 317 So. 2d 814 (Fla. App.

Dist. 4, 1975)(specific clause in contract takes precedence over general clause.) rev'd on other grounds, 413 So. 2d 30. The Panel erred in ignoring this principle of law in reaching its decision of resolving the parties' dispute by "enforcing the MFN provisions of the agreement." Order, p. 14. In addition to there being no evidence upon which the Commission could base this finding, there is also no law that supports such a conclusion.

Section VI.B of the Agreement states

> there will be no cash compensation exchanged by the parties during the term of this Agreement unless the difference in minutes of use for terminating local traffic exceeds 2 million minutes per state on a monthly basis.

Section XXII of the Agreement, referred to as the MFN provision, states:

> If as a result of any proceeding before any Court, Commission, or the FCC, any voluntary agreement or arbitration proceeding pursuant to the Act, or pursuant to any applicable federal or state law, BellSouth becomes obligated to provide interconnection, number portability, unbundled access to network elements or any other services related to interconnection, whether or not presently covered by this Agreement, to another telecommunications carrier operating within a state within the BellSouth territory at rates or on terms and conditions more favorable to such carrier than the comparable provisions of this Agreement, [e.spire] shall be entitled to add such network elements and services, or substitute such more favorable rates, terms or conditions for the relevant provisions of this Agreement, which shall apply to the same states as such other carrier and such substituted rates, terms or conditions shall be deemed to have been effective under this Agreement as of the effective date thereof to such other carrier.

As the Commission acknowledged in its Order, the "more specific language of Section VI(B) would control in this Agreement." Order, p. 14. Yet, the Commission then ruled, without any basis in fact or law, that "negotiations between the parties quickly failed," therefore, the Commission held that it "believe[d] that the more general provisions of Section XXII of the agreement were properly invoked by e.spire." Order, pp. 14. There is, however, no evidence upon which the Commission could find that negotiations occurred as required under Section VI.B or that Section XXII, the MFN clause, is to be applied if the parties either fail to negotiate or are unsuccessful in doing so. e.spire's bare demand for a rate available under the MFN provision does not constitute negotiations agreed to by the parties in Section VI.B of the Agreement. Such a finding in effect renders the meaning and application of Section VI.B null and void and deprives the parties of the specific contractual provision to which they agreed.

In addition to rendering superfluous the language in Section VI.B, such a construction is unreasonable and cannot be accepted by the Commission. See Bay Management, Inc. v. Beau Monde, Inc., 366 So. 2d 788 (a contract must receive reasonable construction); Reinhardt v. Reinhardt, 131 So. 2d 509 (Fla. App. Dist. 3, 1961)(a reasonable interpretation is preferred to one which is unreasonable); White v. Harmon Glass Service, Inc., 316 So. 2d 599 (Fla. App. Dist. 4, 1975)(reconciliation of two clauses in a contract will be made on a reasonable, rather than an unreasonable, basis). If e.spire could assert the

general provisions of Section XXII regarding a reciprocal compensation rate, then there would have been no reason for the parties to negotiate Section VI.B. A finding that e.spire could exercise Section XXII with regard to a reciprocal compensation rate is not a reasonable construction and should be reconsidered.

e.spire admitted at the hearing that Section VI.B. is a specific provision that applies to the traffic exchange agreement. (Falvey, Tr. at 121). Mr. Falvey further admitted e.spire was required under Section VI.B to negotiate a traffic exchange agreement once the two-million-minute threshold was met, which would have addressed what type of traffic should be included. (Falvey, Tr. at 96-97) Such negotiations were not done. There was no evidence in the hearing and no language in the Agreement from which the Commission can base a finding that the MFN provision applies in this case.

The subject of compensation for the exchange of local traffic is specifically described in Section VI.B. Consistent with Florida contract law, this specific provision cannot be diminished, limited, or totally rendered superfluous by relying upon the general language in Section XXII. e.spire's demand for the reciprocal compensation rate under the MFN clause does not constitute negotiations contemplated under Section VI.B of the Agreement, but merely ignores the specific provision of the Agreement in favor of the more general MFN provision in Section XXII. Such a finding is contrary to basic contract law and the plain language of the Agreement.

IV. There Was Insufficient Evidence upon which to Determine e.spire Met the Two-Million-Minute Threshold on a Monthly Basis.

There is insufficient evidence from which the Commission could find that e.spire met the two-million-minute differential threshold on a monthly basis, which was the issue addressed by the Commission in the hearing. First, the Commission erred in including ISP traffic in calculating the differential as set forth in Section II of this motion. Secondly, even if ISP traffic were properly included, there is no evidence upon which the Commission could find e.spire met the two-million-minute differential in Florida for any month except the months of March and April 1998. Order, p. 12. If e.spire were able to provide evidence of the differential having been met in March and April 1998, it could have provided similar information for the other months at issue. e.spire failed to do so and consequently failed to meet its burden of proof on this issue.

The Agreement in Section VI.B pertaining to "Compensation" for "Local Traffic Exchange" specifically provides in relevant part as follows:

> [T]he Parties agree that there will be no cash compensation exchanged by the parties during the term of this Agreement unless the difference in minutes of use for terminating local traffic exceeds 2 million minutes per state on a monthly basis. In such an event, the Parties will thereafter negotiate the specifics of a traffic exchange agreement which will apply on a going-forward basis.

(Emphases added). e.spire's witness, Mr. James Falvey, described the negotiations of a "traffic exchange agreement" to "include everything from who's going to measure the traffic. . . ; whether there would be audit rights; certainly,

what is the rate. . . . When—what type of traffic will this apply to." (Falvey, Tr. at 96-97) As indicated by Mr. Falvey, the traffic exchange agreement to be negotiated by the parties included when and what type of traffic would be included.

Based upon a plain reading of the Agreement, two requirements must be met before the payment of reciprocal compensation may be due. First, there must be the requisite differential in traffic terminations for local traffic on a monthly basis; and second, the parties must negotiate a traffic exchange plan pursuant to which reciprocal compensation, if any, will be calculated thereafter. Neither of these requirements has been met in this case. There is no evidence that e.spire met the two-million-minute differential for any months except for March and April 1998, and then only by including ISP traffic as local traffic. Nor is there evidence of negotiations of a traffic exchange agreement that would address when and what type of traffic would be included for reciprocal compensation purpose. Therefore, the Commission erred in finding that e.spire met the two-million-minute differential threshold in Florida on a monthly basis.

V. Conclusion

WHEREFORE, BellSouth respectfully requests that the full Commission accept BellSouth's motion and reconsider the Order complained of herein.

Respectfully submitted this 21st day of April, 1999.

BELLSOUTH TELECOMMUNICATIONS, INC.

Nancy B. White (by)

NANCY B. WHITE
c/o Nancy Sims
150 South Monroe Street, Suite 400
Tallahassee, FL 32301
(305) 347-5558

William J. Ellenberg II (by)

WILLIAM J. ELLENBERG II
MARY K. KEYER
675 West Peachtree Street, #4300
Atlanta, Georgia 30375
(404) 335-0711

160140

CERTIFICATE OF SERVICE
Docket No. 981008-TP

I HEREBY CERTIFY that a copy of the foregoing has been furnished by

U.S. Mail this 21st day of April, 1999 to:

Beth Keating
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

e.spire Communications, Inc.
131 National Business Parkway
#100
Annapolis Junction, MD 20701
Tel. No. (301) 361-4200
Fax. No. (301) 361-4277

Ervin Law Firm
Everett Boyd
P.O. Drawer 1170
Tallahassee, FL 32302
Tel. No. (850) 224-9135
Fax. No. (850) 222-9164

Messer Law Firm
Norman Horton
P.O. Box 1876
Tallahassee, FL 32302
Tel. (850) 222-0720
Fax. (850) 224-4359
Represents e.spire

Mary K. Keyer

Mary K. Keyer