

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for arbitration)
concerning complaint of)
Intermedia Communications Inc.)
against GTE Florida Incorporated)
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.: 980986-TP
FILED: April 30, 1999

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INTERMEDIA COMMUNICATIONS INC.'S
POST HEARING BRIEF

INTERMEDIA COMMUNICATIONS INC. (Intermedia), pursuant to Rules 28-106.215 and 28-106.104, Florida Administrative Code, and Orders Nos. PSC-98-1398-PCO-TP, 99-0163-PCO-TP, 99-0291-PCO-TP, and 99-0458-PCO-TP, hereby files this its post-hearing brief in the above-referenced matter.

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STATEMENT OF THE FACTS

The Agreement

Pursuant to Section 252 of the Telecommunications Act of 1996 (Act), Intermedia and GTEFL negotiated an Interconnection Agreement and filed it with the Florida Public Service Commission (Commission), on February 20, 1997. In accordance with Section 252(e) of the Act, the Commission approved the interconnection agreement by Order No. PSC-97-0719-FOF-TP, issued on June 19, 1997. This agreement was subsequently amended by GTEFL and Intermedia and was approved by the Commission by Order No. PSC-97-0788-FOF-TP, issued July 2, 1997 (collectively "Agreement").

Pursuant to terms of the Agreement, Intermedia and GTEFL provide local exchange telecommunications services over their respective networks. This enables end-users subscribing to Intermedia's local exchange service to place calls to end-users subscribing to GTEFL's local exchange service and vice versa.

Under the Agreement, the parties owe each other reciprocal compensation for any "Local Traffic" terminated on the other's network. Traffic to ISPs meets that definition of "Local Traffic."

Specifically, Section 1.20 of the Agreement defines "Local Traffic" as:

originated by an end user of one Party and terminates to the end user of the other Party within GTE's then current local serving area, including mandatory local calling scope arrangements. A mandatory local calling scope arrangement is an arrangement that requires end users to subscribe to a local calling scope beyond their basic exchange serving area. Local Traffic does not include optional local calling scopes (i.e., optional rate packages that permit the end user to choose a local calling scope beyond their basic exchange serving area for an additional fee), referred to here- after as "optional EAS."

The traffic at issue originates and terminates within GTEFL's current local serving area

within the meaning of the Agreement.

Section 3.1 of the Agreement regarding transport and termination of traffic states in part:

The Parties shall reciprocally terminate Local Traffic originating on each other's networks utilizing either direct or indirect network interconnections as provided in this Article.

Moreover, Section 3.3.1 of the original Agreement regarding mutual compensation states:

The Parties shall compensate each other for the exchange of Local Traffic in accordance with Appendix C attached to this Agreement and made a part hereof. Charges for the transport and termination of intraLATA toll, optional EAS arrangements and interexchange traffic shall be in accordance with the Parties' respective intrastate or interstate access tariffs, as appropriate.

To reiterate, pursuant to the Agreement, the parties owe each other reciprocal compensation for any "Local Traffic" terminated on the other's network within the meaning of the Agreement.

The Breach And Intermedia's Response

GTEFL sent a letter, dated December 16, 1997, from Ms. Kimberly Tagg to Mr. Kirk Champion, of Intermedia, stating in part as follows:

GTE believes that there is an error in your billing for reciprocal termination of local traffic as provided for in our interconnection agreement. It appears that you are billing GTE for more than Local Traffic as defined in that agreement.

A copy of this letter is attached as Exhibit JOS-2 to the direct testimony of Julia Strow (hereafter "Strow Direct Testimony"). Moreover, GTEFL stated that it disputed the bill and was withholding payment.

Intermedia responded to GTEFL by letter dated January 7, 1998, stating that it disagreed with GTEFL's position that it is billing more than local traffic. In fact, Intermedia reiterated its request that GTEFL specifically identify the traffic GTEFL believes not to be local in the billings from Intermedia and to identify the specific dollar amount that GTEFL considers to be non-local

traffic. [Strow Direct Testimony, Exhibit JOS-3]

Intermedia and GTEFL participated in a meeting to discuss these issues on January 26, 1998. GTEFL then sent another letter to Intermedia, dated February 5, 1998, providing its position on the exchange of information service provider traffic and its proposal of the manner in which billing disputes should be handled pending final resolution by the FCC or appropriate state commission. [Strow Direct Testimony, Exhibit JOS-4]

By letters dated February 17, 1998 and March 2, 1998, GTEFL again informed Intermedia that it believed there was an error in billing regarding local traffic and was withholding payment. [Strow Direct Testimony, Exhibit JOS-5]

On March 2, 1998 representatives from GTEFL and Intermedia conducted a teleconference regarding the billing dispute. After this meeting, Intermedia sent an e-mail to GTEFL regarding Intermedia's position that traffic transported and terminated to ISPs is local traffic and is subject to reciprocal compensation, its proposed solution, and comments to GTEFL's proposed long-term and interim solutions. [Strow Direct Testimony, Exhibit JOS-6]

Intermedia informed GTEFL, by letter dated June 15, 1998, [Strow Direct Testimony, Exhibit JOS-7] that since they have not been able to reach resolution with respect to the issue of Internet traffic, Intermedia has no alternative but to seek resolution of the issue via the regulatory process.

**ISSUE PRESENTED
AND
RESTATEMENT OF POSITION**

ISSUE:

Under their Interconnection Agreement, are Intermedia Communications Inc., and GTEFL Telecommunications, Inc., required to compensate each other for transport and termination of traffic to Internet Service Providers? If so, what action, if any, should be taken?

INTERMEDIA'S POSITION:

**** Yes. The term "local traffic" as used in the Agreement and as construed consistently by numerous regulatory bodies contemplates calls from end users to Internet Service Providers both originating and terminating within GTEFL's local serving area. The Commission should issue an Order finding GTEFL to be in willful and material breach of the parties' Agreement and requiring GTEFL to pay Intermedia for terminating such local traffic under the reciprocal compensation provisions of the Agreement.****

ARGUMENT

UNDER THEIR INTERCONNECTION AGREEMENT, INTERMEDIA AND GTEFL ARE REQUIRED TO COMPENSATE EACH OTHER FOR TRANSPORT AND TERMINATION OF TRAFFIC TO ISPS

A. INTRODUCTION

This is an action by Intermedia to enforce the reciprocal compensation provisions in its Interconnection Agreement with BellSouth as applied to the transport and termination of traffic to ISPs. As framed in the prehearing order, the central issue presented in this action is as follows:

Under their Interconnection Agreement, are Intermedia Communications Inc., and GTEFL Telecommunications, Inc., required to compensate each other for transport and termination of traffic to Internet Service Providers? If so, what action, if any, should be taken?

1. The Applicable Provisions Of The Agreement

There is no dispute as to which provisions of the agreement define the requirement of mutual compensation for Local Traffic. The first provision is found in Section 1.20 of the Agreement defines "Local Traffic" as:

originated by an end user of one Party and terminates to the end user of the other Party within GTE's then current local serving area, including mandatory local calling scope arrangements. A mandatory local calling scope arrangement is an arrangement that requires end users to subscribe to a local calling scope beyond their basic exchange serving area. Local Traffic does not include optional local calling scopes (i.e., optional rate packages that permit the end user to choose a local calling scope beyond their basic exchange serving area for an additional fee), referred to here- after as "optional EAS."

Thus, Intermedia and GTEFL agree as to which provisions of the agreement control. The questions presented here are what is the objective meaning of the language used in these provisions, and how does one determine that objective meaning.

2. The Conventional View Of Local Traffic

For billing purposes, the conventional view is that when a GTEFL end-user places a local call to an ISP that is a customer of a CLEC, the call terminates at the ISP and the ISP begins an enhanced transmission over the Internet. This comports with the common understanding of the term "Local Traffic," the technical and legal definition of the word "terminates" within this context, the structure of the Interconnection Agreement, and the conduct of the parties at and after the execution of the Agreement.

3. GTEFL's View Of Local Traffic

GTEFL's interpretation of Section 1.20 is based on three arguments. First, GTEFL contends that the language of the contract does not control, but merely serves as a "jumping off point for the dispute." [Direct Testimony of Steven J. Pitterle, page 5 (hereafter "Pitterle Direct Testimony")] According to GTEFL one must "jump" from the Agreement to FCC precedent to determine what is local traffic under the Agreement. Second, GTEFL argues that under FCC precedent, the jurisdictional nature of the calls is interstate, and therefore such calls cannot be local within the meaning of the contract. And third, because of the alleged jurisdictional nature of these calls, GTEFL's subjective intent in forming the contract could not have been to treat these calls as local for the purposes of reciprocal compensation.

In sum, GTEFL argues that its interpretation of FCC precedent and its current declaration of its prior intent in executing the Agreement must control the application of that provision. This argument, however, is incompatible with the recent FCC ruling addressing reciprocal compensation for ISP-bound traffic, the law of contract in Florida, and the terms of the Agreement.

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B. GTEFL'S JUSTIFICATION FOR REFUSING TO COMPENSATE INTERMEDIA FOR THE TERMINATION OF LOCAL TRAFFIC TO ISPs FINDS NO SUPPORT IN THE RECENT FCC RULING ON THIS MATTER.

GTEFL has justified its refusal to pay reciprocal compensation for ISP-bound traffic on the basis that such traffic is jurisdictionally interstate, and thus cannot be local. This is a curious argument given that traffic can obviously be both "local" and jurisdictionally interstate at the same time. For example, if a community straddles a state line, a local call could easily be jurisdictionally interstate. Nevertheless, GTEFL apparently hoped that the FCC would declare calls to ISPs to be jurisdictionally interstate and thus not local. The FCC did address the issue, but not the way GTEFL had hoped.

On February 26, 1999, the FCC released Order 99-38, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68 ("Ruling"), addressing inter-carrier compensation for dial-up calls to ISPs. In the Ruling the FCC concluded that ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate. Thus, the FCC did agree with GTEFL - in part. The Ruling, however, rejects the notion that the jurisdictional nature of the traffic determines the meaning of "local" within various interconnection agreements that provide for reciprocal compensation for local traffic.

The Ruling acknowledged that the FCC has been unclear on how to handle compensation when two interconnecting carriers deliver traffic to an ISP. Consequently, parties negotiating interconnection agreements and state commissions interpreting them were left to determine the appropriate compensation mechanism as a matter of first impression. Thus, the Commission further concluded that, in the absence to date of a federal rule regarding the appropriate inter-

carrier compensation for ISP-bound traffic, the parties should be bound by their existing interconnection agreements as interpreted by state commissions.

Noting that state commissions have treated ISP-bound traffic as though it were local and that LECs have characterized associated expenses and revenues as intrastate for separations purposes, the FCC affirmed that a state commission could reasonably find that ISP-bound traffic should be treated in the same manner as local traffic for purposes of reciprocal compensation. Moreover, the FCC suggested several reasons that a state commission could construe an interconnection agreements as requiring reciprocal compensation for ISP-bound calls. These include the fact that:

- 1) negotiations were undertaken in the context of the Commission's longstanding policy of treating ESP/ISP traffic as local;
- 2) LECs serve ISPs out of local tariffs;
- 3) revenues associated with ISP services are booked to intrastate accounts;
- 4) LECs and CLECs made no effort to meter or otherwise segregate ISP traffic for purposes of billing one another for reciprocal compensation;
- 5) if LECs bill end users by message units, they have included ISP calls in local charges; and
- 6) LECs and CLECs would not be compensated for ISP traffic if it were not treated as local traffic and subject to reciprocal compensation.

As noted by Ms. Strow in her Supplemental Direct Testimony at page 2:

The effect of the Ruling is to close the last door through which GTE hopes to justify its breach of our interconnection agreement. Specifically, the Ruling rejects GTE's fundamental position that because some of the traffic at issue is jurisdictionally interstate there is no basis for subjecting it to reciprocal compensation under the

local interconnection agreement. As we have said all along, there are numerous reasons that the interconnection agreement objectively requires reciprocal compensation for Internet Service Provider ("ISP")-bound traffic and this Commission is the proper authority to hear our complaint. The Ruling provides fundamental support for both the merits of Intermedia's claim for relief and its choice of forum.

In sum, GTEFL argues that the language of the interconnection agreement is only the "jumping off" point for resolving this dispute with FCC precedent being the landing zone. The FCC, however, bounced GTEFL back to where it should have stayed: the language of the interconnection agreement that creates the obligation of reciprocal compensation and the applicable criteria for determining the objective meaning of that language, e.g., other provisions of the Agreement, how the parties implemented the Agreement, how the parties bill for their own ISP traffic, etc.

C. GTEFL'S REFUSAL TO COMPENSATE INTERMEDIA FOR THE TERMINATION OF LOCAL TRAFFIC TO ISPs VIOLATES ITS OBLIGATIONS UNDER THE UNAMBIGUOUS TERMS OF THE INTERCONNECTION AGREEMENT

1. The terms of the Interconnection Agreement Control

Although GTEFL's begins its defense in this action by urging the Commission to ignore unambiguous terms of the agreement in favor of FCC precedent, it also argues that its current declaration of its prior intent in forming the contract should control the meaning of the provisions in dispute.

This argument raises a fundamental question of contract law: which shall control, the plain terms of a contract or what a party later says it intended after entering into a contract? The answer is simple: the terms of the contract control, not the shifting subjective intentions of the parties.

Indeed, Justice Holmes once observed that "The making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs - not on the parties having meant the same thing, but on the parties having said the same thing." *The Path of Law*, 10 *Harvard Law Review* 457 (1896). Thus, GTEFL's obligations under the Agreement are defined by the terms of the agreement, not by its declared intent after executing the agreement.¹

If the supremacy of the written word were not the rule, then there would be no binding contracts because the evolving interests and malleable memories of the parties would eviscerate even the plainest of terms previously agreed upon. Thus, where a contract has been formed validly, courts are obligated to enforce the terms of the contract according to the plain meaning of the words

¹ GTEFL's argument is grounded in an absolute "subjective theory" of contract formation. Under this theory, if GTEFL executed the contract with a different understanding of the Agreement than did Intermedia then there was no mutual assent and thus no binding obligation on either party to compensate the other for Local ISP traffic. As reflected in the two cases discussed *infra*, Florida emphasizes the written terms of the contract and thus leans toward the "objective theory" of contract formation as espoused by Justice Holmes, *supra*.

Whether allegation of mutual misunderstanding defeats manifestation of mutual assent has been long debated in English and American jurisprudence. Some modern theorists attempt to balance the objective and subjective approaches. For example, The Second Restatement of Contracts (Restatement 2d) emphasizes that interpretation of a contractual term is to be based on the common meaning of the language attached by the parties, not that declared by the court. But where material differences in meaning trigger a contract dispute, the Restatement 2d would enforce the contract according to the court's objective interpretation of the disputed terms unless the party alleging misunderstanding can demonstrate that it was without fault in the misunderstanding.

To demonstrate the failure of mutual assent under this "fault" approach, GTEFL would have to demonstrate that neither Intermedia nor it knew or had a reason to know the interpretation held by the other. Restatement 2d, Section 20. GTEFL, of course, made no such demonstration. On the contrary, GTEFL had ample reason to know that Intermedia did not contemplate subcategories of Local Traffic for which there would be no compensation. (See this brief's argument in Section B. 2., *supra*.) In sum, neither Florida case law nor academic authority support GTEFL's subjective theory of the manifestation of mutual assent.

used to prescribe those terms. This Commission can do no less.

Florida endorses this general rule. For example, in Gendzier v. Bielecki, 97 So.2d 604 (Fla. 1957), the Supreme Court of Florida emphasized the terms of the contract must control in interpretation:

The rule is well established in this state as well as everywhere else that when competent parties reduce their engagements to writing in terms that create a legal obligation without any uncertainty as to the object or extent of the engagement as between them, it is conclusively presumed that the whole engagement and the extent and manner of their undertaking is contained in the writing. The writing itself is the evidence of what they meant or intended by signing it. The test of the meaning and intention of the parties is the content of the written document. Id. at 608.

In a more recent case, Gilmore v St. Paul Fire & Mar. Ins., 708 So. 2d 679 (Fla. App. 1st DCA 1998), the First DCA was required to interpret contractual language in an insurance policy. The Court emphasized that as in the instant case the interpretation would be controlled by the written contract, not extraneous evidence, and that the interpretation involved a question of law, not fact:

The interpretation of a document generally is a question of law rather than a question of fact. 'If an issue of contract interpretation concerns the intention of parties, that intention may be determined from the written contract, as a matter of law, when the nature of the transaction lends itself to judicial interpretation.' Peacock Construction Co., Inc. v. Modern Air Conditioning, Inc., 353 So.2d 840, 842 (Fla. 1977) . . . Id.

Thus, in the instant dispute the interpretation of the Agreement is a question of law, the resolution of which must be controlled by the applicable language of the agreement.

**2. All Reciprocal Local Traffic Requires Mutual Compensation;
There Are No Subcategories Of Local Traffic That Do Not
Require Compensation**

GTEFL's jurisdictional argument must fail because it is incompatible with the language of the Agreement, conventional industry understanding, and common sense.

GTEFL says that a local call to the ISP does not terminate at the ISP but rather continues as an interexchange communication. As explained by Mr. Pitterle:

It is indisputable that most Internet traffic does not stay within local exchange calling areas. Rather as Mr. Jones describes in his direct testimony, it is switched through the ISP gateway, routed to the Internet backbone, and ultimately to the World Wide Web. For this Commission to impose reciprocal compensation obligations under a local interconnection agreement then it must determine that some portion of this Internet communication is jurisdictionally local. If the FCC rules that ISP traffic cannot be parsed into functionally distinct pieces, there's no separate component over which the state may exercise jurisdiction. It must all be jurisdictionally interstate and under the FCC's control. [Pitterle Direct Testimony, p 5]

Curiously GTEFL argues that treating this traffic as local within the meaning of the agreement requires "parsing" of the call for jurisdictional analysis, yet ignores that treating the traffic as interexchange under the agreement requires more than mere parsing. Rather it requires that the Interconnection Agreement itself recognize that some traffic delivered as local is compensable and some traffic delivered as local is not. The Interconnection Agreement, however, makes no such distinctions.

a. **The Language Of The Interconnection Agreement Creates No Subcategories Of Local Traffic For Which Compensation Is Not Due**

There is no dispute that when a GTEFL end-user calls a local ISP served by Intermedia the traffic is handled between GTEFL and Intermedia just as if it were any other local call. Thus, under GTEFL's argument, the Agreement contemplates subcategories of local traffic, with some categories being eligible for reciprocal compensation and at least one subcategory not. There is, however, not one word in the Agreement that suggests such an approach. Moreover, nothing in the agreement creates a distinction for calls placed to telephone exchange end-users that happen to be

ISPs. [Strow Direct Testimony, p 8] GTEFL's understanding of Section 1.20 of the Agreement is based not on interpretation but on invention. GTEFL's argument must be rejected because it violates the fundamental principle that the shifting subjective intentions of the parties do not control the determination of the objective meaning of the terms of a contract.

b. **There Is No System In Place To Distinguish Between Subcategories Of Local Traffic**

If ISP traffic is not local as GTEFL contends, it would have been imperative for the parties, and GTEFL in particular, to develop a system to identify and measure ISP traffic, because there is no ready mechanism in place for tracking local calls to ISPs. The calls at issue are commingled with all other local traffic and are indistinguishable from other local calls. If GTEFL intended to exclude traffic terminated to ISPs from other local traffic, it would have needed to develop a way to measure traffic that distinguishes such calls from all other types of local calls with long-holding times, such as calls to airlines and hotel reservations, and banks. [Strow Direct Testimony p 8] In fact, there is no such agreed-upon system in place today. Thus, if GTEFL's position was that local traffic to ISPs should be considered as something other than local, it was incumbent on GTEFL to raise as an issue a system for accounting and removing that traffic from all other local traffic at the time of negotiating the Agreement.

3. **GTEFL's Arguments For Refusing To Pay Reciprocal Compensation Has Been Rejected Twice By This Commission, As Well As By Other Decisional Authority**

As stated previously, the Agreement is clear that the parties owe each other reciprocal compensation for any local traffic terminated on the other's network, and there is no exception for calls to ISP customers. This Commission and at least two federal courts have reached the

conclusion that calls from an end-user to an ISP are local traffic subject to reciprocal compensation. The persuasive authority of these cases is consistent with this Commission's historic treatment of services provided to ISPs. Moreover, these holdings support the conclusion in this case that the term "local traffic" includes calls from end-users to ISPs, which is consistent with the way it was used in the Agreement and as understood by those in the industry and by regulatory bodies.

a. **GTEFL'S Approach Was Rejected By This Commission In Substantially Identical Disputes Involving BellSouth**

Intermedia v. BellSouth

As the Commission is aware it rejected arguments similar to GTEFL's in determining the earlier substantially identical dispute between BellSouth and Intermedia on this issue. [Order No. PSC-98-1216-FOF-TP, issued September 15, 1998, in Complaints of WorldCom Technologies, Inc., Teleport Communications Group, Inc./TCG South Florida, Intermedia Communications Inc., and MCI Metro Access Transmission Services, Inc. against BellSouth Telecommunications, Inc. for breach of terms of interconnection agreement under Section 251 and 252 of the Telecommunications Act of 1996, and request for relief, Dockets Nos. 971478-TL, 980184-TP, 980495-TP, and 980499-TP("BST ISP Order)) In Order No. PSC-98-1216-FOF-TP, issued September 15, 1998, the Commission resolved reciprocal compensation disputes concerning traffic to ISPs that had arisen between BellSouth and Intermedia, TCG, WorldCom and MCI metro. The Commission ruled that in each case, based on the plain meaning of the parties' interconnection agreements and the effective law at the time of the agreements, 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.² The Commission treated the disputes as contract disputes that would require it to determine what the parties might reasonably have intended at the time they entered into their interconnection agreements. The Commission pointedly declined to address the jurisdictional nature of ISP traffic.

Intent

First, the Commission rejected BellSouth's contention that it would have been economically irrational for it to have agreed to pay reciprocal compensation for traffic to ISPs. It noted that BellSouth's interconnection agreements specified compensation rates as low as 0.2¢/mou (potentially favorable to BellSouth) to nearly 1.0¢/mou (potentially unfavorable to BellSouth), and concluded that BellSouth became aware of its "problem" only when CLEC bills revealed large compensation imbalances.³ Second, the Commission took note of the fact that BellSouth treats calls to ISPs that are its customer as local calls. Third, the Commission found that no tracking systems existed that would serve to distinguish ISP traffic from other local traffic, observing that BellSouth, not the CLECs, would have been the party one would expect to require such a system had it been on its mind to separate ISP traffic from the interconnection agreement reciprocal compensation provisions.⁴ Fourth, no language in the agreements serves in

² The Commission did not consider the decisions of regulatory commissions in numerous other states resolving substantially the same dispute in favor of CLECs.

³ Although the Commission never says so explicitly, it was apparent to them that it simply did not occur to BellSouth to distinguish ISP traffic as something other than local traffic for reciprocal compensation purposes, perhaps because BellSouth failed to foresee that interconnecting CLECs would quickly and aggressively pursue the ISP market. The Commission observed that it would be entirely inappropriate to permit ILECs to meet competitive successes by raising objections of the kind in these proceedings.

⁴ This finding the Commission described as "perhaps the most telling."

any way to characterize ISP traffic as anything other than local traffic subject to reciprocal compensation. The Commission concluded that “a party to a contract cannot be permitted to impose unilaterally a different meaning than the one shared by the parties at the time of execution when it later becomes enlightened or discovers unintended consequences.”

Effective Law

In 1989, the Commission declared that “connections to the local exchange network for the purpose of providing an information service should be treated like any other local exchange service.”⁵ Until these proceedings, the Commission had not since then again addressed this issue.

At the time of the agreements, the FCC had repeatedly determined that ISPs (or ESPs, more broadly) provide information or enhanced services, not Title II telecommunications services.⁶ While at that time, the FCC had not declared ISP traffic to be local, or not, for purposes of reciprocal compensation, it had a number of times declared that such traffic should be treated as though local and exempt from access charges.⁷ The Commission found that treating ISP traffic as local for purposes of local traffic reciprocal compensation was consistent with the FCC’s treatment of ISP traffic at the time of the agreements.

⁵ Order No. 21815, issued September 5, 1989.

⁶ E.g., Universal Service and Access Reform Orders, May 1997.

⁷ Even in its recent declaratory ruling, the FCC, while determining that ISP traffic is jurisdictionally interstate, declined to find that it was or was not subject to §251(b)(5) reciprocal compensation obligations. Instead, it acknowledged that compensation obligations should be determined from the provisions of interconnection agreements

e.spire v BellSouth

In a more recent case, the Commission also ruled that reciprocal compensation is due for ISP-bound traffic. On April 6, 1999, the Commission issued Order No. PSC-99-0658-FOF-TP, in which it found that under the terms of BellSouth's interconnection agreement with e.spire Communications, Inc., traffic terminated to ISPs is local traffic for purposes of reciprocal compensation. The Commission stated that:

We note that the issue of the jurisdictional nature of traffic to ISPs is a matter that has recently been considered by the FCC. Nevertheless, it is not necessary for us to determine the jurisdictional nature of this traffic in order to resolve this complaint. We only need to determine the intent of the parties regarding ISP traffic during the negotiation of their agreement ...

As we emphasized in Order No. PSC-98-1216-FOF-TP, circumstances that existed at the time the contract was entered into by BellSouth and e.spire, and the subsequent actions of the parties should be considered in determining what the parties intended. Order at 6-7.

In reaching its conclusion 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," the Commission relied on several factors to establish the objective meaning of the contract. These included the following:

- (1) that BellSouth did not have the capability of tracking traffic to ISPs;
- (2) that the parties did not discuss ISP traffic during negotiations;
- (3) that BellSouth did not notify e.spire of its decision not to pay reciprocal compensation for ISP traffic until more than a year after entering into the interconnection agreement; and
- (4) that BellSouth treats its own ISP traffic as local traffic.

The Commission acknowledged that the FCC determined that this traffic is "jurisdictionally

mixed and appears to be largely interstate” in its February 26, 1999, declaratory ruling. It concluded, however, that the “current state of the law has no impact on our resolution of this complaint.

b. GTEFL's Approach Has Been Rejected In Federal Cases

The U.S. District Court in Texas held in 1998 that "as end-users, ISPs may receive local calls that terminate within the local exchange network." Southwestern Bell Telephone Company v. PUC of Texas, et. al, (Western District of Texas, filed June 16, 1998, (MO-98-CA-43)) The Court found that "[i]n the instant case, the "call" from Southwestern Bell's customers to Time Warner's ISPs terminates where the telecommunications service ends at the ISPs facilities. As a technically different transmission, the ISPs' information service cannot be a continuation of the "call" of a local customer." [Id.] The Court determined that the PUC correctly interpreted the interconnection agreement as unambiguous, and correctly ordered Southwestern Bell to comply with the agreement's reciprocal compensation terms for termination of local traffic. [Strow Direct Testimony, Exhibit JOS-8, pp 15-27]

Similarly, in Illinois Bell Telephone Company d/b/a Ameritech v. Worldcom Technologies Inc., et al (Northern District of Illinois, No. 98 C 1925, July 23, 1998), the District Court also affirmed the Illinois Commerce Commission's decision that Internet calls are "local traffic" within the meaning of the interconnection agreements between Ameritech and various CLECs. Particularly significant to the Court was the fact that Ameritech had consistently billed its customers for their calls to ISPs as local calls. Thus the Court concurred "with the ICC's "conclusion that the Ameritech billing scheme warrants a finding that such calls are subject to reciprocal compensation." Id. at p 13 [Strow Direct Testimony, Exhibit JOS-8 at p 13]

4. Mutual Compensation Is Designed To Fairly Compensate For The Termination Of Reciprocal Traffic Irrespective Of Whether Competition Produces Transitional Traffic Imbalances.

GTEFL makes an additional policy argument against reciprocal compensation that merits a response. Specifically, it argues that such compensation is unfair because of asymmetrical traffic patterns. Under reciprocal compensation the carrier is being compensated for the costs incurred in terminating the traffic, and this termination is of value to the originating carrier. Given the this Commission approved the rates as appropriate, it should not matter to GTEFL whether there are imbalances or not. And to the extent there are imbalances, these are transitional patterns that will change as these competitive markets mature. In short, existing traffic patterns are not fixed and they do not make mutual compensation unfair.

D. CONCLUSION

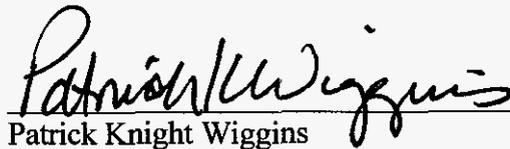
Under the GTEFL-Intermedia Agreement, all calls that terminate within a local calling area, regardless of the identity of the end-user, are local calls for which reciprocal compensation is due. Nothing in the Agreement creates a distinction for calls placed to telephone exchange end-users that happen to be ISPs. As a matter of law, GTEFL owes reciprocal compensation to Intermedia for all such calls, including those that terminate to Intermedia's local ISP end-users.

GTEFL attempts to circumvent its contractual obligation by declaring that local calls to ISPs are jurisdictionally interstate and thus cannot be considered as local under the interconnection agreement. This argument has been rejected by every decisional authority to address it including the FCC.

The Commission must enforce the Interconnection Agreement by ordering GTEFL to pay Intermedia for terminating such local traffic under the reciprocal compensation provisions of the

Agreement and by granting such other relief as the Commission deems appropriate.

Respectfully submitted this 30th day of April 1999.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 30TH day of April, 1999, to the following:

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