

State of Florida



Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: JUNE 24, 1999

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAY)

FROM: DIVISION OF COMMUNICATIONS (FAVORS) *CRF*
DIVISION OF LEGAL SERVICES (BEDELL) *CB*

RE: DOCKET NO. 980986-TP - 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.

AGENDA: 07/06/99 - REGULAR AGENDA - LEGAL ISSUES BRIEFED - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

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CASE BACKGROUND

On August 3, 1998, Intermedia Communications, Inc. (Intermedia) filed a complaint against GTE Florida Incorporated (GTEFL) for breach of the parties' interconnection agreement. Based on the initial complaint and GTEFL's response, this matter was set for hearing.

On February 26, 1999, the FCC released Order FCC 99-38 in CC Docket No. 96-98, its Declaratory Ruling on Inter-Carrier Compensation for ISP-bound Traffic and Notice of Proposed Rulemaking in CC Docket No. 99-68. In light of this FCC Order, the parties to this proceeding informed the Commission of certain procedural stipulations by letter dated March 2, 1999. The parties agreed to stipulate all of the prefiled testimony into the record, waive their right to cross-examination on that testimony, file supplemental, prefiled testimony by March 12, 1999, cancel the hearing set for March 9, 1999, and file briefs as originally scheduled. The Commission granted the parties' request in Order No. PSC-99-0458-PCO-TP, issued on March 4, 1999. In accordance with the parties' stipulation, supplemental testimony was filed on March 9, 1999, addressing the effect of the FCC's Declaratory Ruling on reciprocal compensation.

ISSUE 1: Under their Interconnection Agreement, are Intermedia Communications, Inc. and GTE Florida Incorporated required to compensate each other for transport and termination of traffic to Internet Service Providers? If so, what action, if any, should be taken?

RECOMMENDATION: Yes. The record establishes that neither party intended to exclude ISP traffic from "local traffic" as that term is defined in their Interconnection Agreement. The Commission should require GTE Florida Incorporated to compensate Intermedia Communications, Inc., in accordance with the parties' Interconnection Agreement, for the entire period the balance owed is outstanding, as well as for the remaining life of the contract.
(FAVORS)

POSITION OF THE PARTIES

INTERMEDIA: 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.

GTEFL: No. The FCC has ruled that ISP traffic is jurisdictionally interstate and GTE never agreed to include ISP traffic within the Agreement's local traffic definition. There is no basis for subjecting this non-local traffic to reciprocal compensation obligations that the Agreement applies only to local traffic.

STAFF ANALYSIS

The issue before the Commission is to determine whether, according to the terms of their Interconnection Agreement, Intermedia Communications, Inc. (Intermedia) and GTE Florida Incorporated (GTEFL) are required to compensate each other for transport and termination of traffic to Internet Service Providers (ISP). In order for reciprocal compensation to apply, traffic to ISPs must be considered "local traffic" as that term is defined in

the parties' agreement. As cited in GTEFL's brief, the Commission has addressed this issue previously in other complaint cases. (See Docket Nos. 971478-TP, 980184-TP, 980495-TP, 980499-TP and 981008-TP) In making its decision in these earlier cases, the Commission did not make a determination on the generic question of the jurisdictional nature of ISP traffic. In the first complaint (Dockets 971478-TP, et al), the Commission stated:

...[I]n this decision we only address the issue of whether ISP traffic should be treated as local or interstate for purposes of reciprocal compensation as necessary to show what the parties might reasonably have intended at the time they entered into their contracts. Our decision does not address any generic questions about the ultimate nature of ISP traffic for reciprocal compensation purposes, or for any other purposes. (PSC-98-1216-FOF-TP, p.5)

The FCC has recently issued a Declaratory Ruling regarding the jurisdictional nature of ISP traffic in Order No. FCC 99-38 in CC Docket No. 96-98 released on February 26, 1999. In that Order the FCC concluded that "ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate." (FCC 99-38, ¶1) However, the FCC made no determination as to whether reciprocal compensation is due for ISP-bound traffic. Specifically, the FCC stated:

Currently, the Commission has no rule governing inter-carrier compensation for ISP-bound traffic. In the absence of such a rule, parties may voluntarily include this traffic within the scope of their interconnection agreements under sections 251 and 252 of the Act, even if these statutory provisions do not apply as a matter of law. Where parties have agreed to include this traffic within their section 251 and 252 interconnection agreements, they are bound by those agreements, as interpreted by state commissions. (FCC 99-38, ¶22)

As part of this Order, the FCC issued a Notice of Proposed Rulemaking in CC Docket No. 99-68 seeking comment on inter-carrier compensation for ISP-bound traffic. In the interim the FCC stated that "[u]ntil adoption of a final rule, state commissions will continue to determine whether reciprocal compensation is due for this traffic." (FCC 99-38, ¶28)

In Order FCC 99-38, the FCC recognized that there was no rule in place governing this traffic and that some parties to interconnection agreements may have agreed, for the purposes of reciprocal compensation, to include ISP-bound traffic as local traffic. As quoted above, the FCC left it to state commissions to ascertain the parties' intentions by interpreting existing agreements. Further, the FCC provided a noninclusive list of factors that a state commission may use in ascertaining the parties intentions as it pertains to this traffic. (FCC 99-38, ¶24) Among the factors listed were: 1) whether incumbent LECs serving ESPs (including ISPs) have done so out of intrastate or interstate tariffs; 2) whether revenues associated with those services were counted as intrastate or interstate revenues; 3) whether there is evidence that incumbent LECs or CLECs made any effort to meter this traffic or otherwise segregate it from local traffic; 4) whether, in jurisdictions where incumbent LECs bill their end users by message units, incumbent LECs have included calls to ISPs in local telephone charges; and 5) whether if ISP traffic is not treated as local and subject to reciprocal compensation, incumbent LECs and CLECs would be compensated for this traffic. (FCC 99-38, ¶24) Many of these factors were evaluated by this Commission when deciding previous ISP cases.

Staff notes that in preparing the recommendation for this case, it is considering an existing agreement. The Commission approved the Interconnection Agreement between Intermedia and GTEFL by Order No. PSC-97-0719-FOF-TP, issued June 19, 1997, and also approved an amendment to this agreement by Order No. PSC-97-0788-FOF-TP, issued July 2, 1997, almost two years prior to the FCC issuing its Declaratory Ruling on the jurisdictional nature of ISP traffic. In analyzing the evidence in this case, staff will seek to ascertain what the parties may have reasonably intended at the time they entered into their contract.

The Intermedia-GTEFL Agreement

As mentioned previously, the Commission approved the agreement between Intermedia and GTEFL by Order No. PSC-97-0719-FOF-TP and an amendment to this agreement by Order No. PSC-97-0788-FOF-TP.

Section 1.20 of that agreement defines "local traffic" as traffic:

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 hereafter as "optional EAS."

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.

Regarding reciprocal compensation, Section 3.3.1 of the agreement 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.

In her direct testimony, Intermedia witness Strow argues that traffic to ISPs fits the definition of "local traffic" as that term is defined in their agreement, in that it is originated by a GTEFL end-user, delivered to Intermedia, and terminated on Intermedia's network. (DT p.8) Witness Strow argues in rebuttal testimony that an Internet communication consists of two segments: (1) a local telephone call from an end-user to an ISP; and (2) an enhanced transmission from the ISP over the Internet. (RT p.3) Witness Strow states that for purposes of reciprocal compensation, the call ends when it is delivered to the ISP. (RT p.3) This is generally referred to as the "two-call" theory. Intermedia argues in its complaint that in the Access Charge Reform Order, the FCC declined to allow LECs to assess interstate access charges on ISPs. (Complaint at p.11) GTEFL witness Pitterle counters "[t]hat the Commission exempted ESPs from access charges indicates its understanding that they in fact use interstate access service; otherwise, the exemption would not be necessary." (DT p.8)

GTEFL witness Jones explains in his direct testimony how the Internet works and contends that traffic to ISPs is jurisdictionally interstate. (DT pp.3-8) Witness Pitterle states that the FCC's ruling in the GTE ADSL Order, FCC 98-292, to tariff GTE's ADSL service at the federal level, proved that ISP traffic was jurisdictionally interstate. (DT p.6) However, staff observes that in that Order the FCC specifically stated that "[t]his Order does not consider or address issues regarding whether local exchange carriers are entitled to receive reciprocal compensation when they deliver to information service providers, including Internet service providers, circuit-switched dial-up traffic originated by interconnecting LECs." (FCC 98-292, ¶2)

Both parties attempt to prove their case by arguing the jurisdictional nature of ISP traffic. The recent ruling by the FCC now asserts that ISP-bound traffic is jurisdictionally mixed but appears to be largely interstate. However, the FCC recognized that its record regarding the treatment of this traffic may not have always been clear, as it stated:

Until now, however, it has been unclear whether or how the access charge regime or reciprocal compensation applies when two interconnecting carriers deliver traffic to an ISP. . . . Moreover, the Commission has directed states to treat ISP traffic as if it were local, by permitting ISPs to purchase their PSTN links through local business tariffs. As a result, and because the Commission had not addressed inter-carrier compensation under these circumstances, parties negotiating interconnection agreements and the state commissions charged with interpreting them were left to determine as a matter of first impression how interconnecting carriers should be compensated for delivering traffic to ISPs, leading to the present dispute. (FCC 99-38, ¶9)

In order to determine whether the parties considered ISP traffic to be local for purposes of reciprocal compensation, staff believes that one must look at the plain language of the contract, the intent of the parties at the time the contract was executed, and the subsequent actions of the parties. As for the arguments that the parties presented in an attempt to determine the state of the law regarding the jurisdictional nature of ISP traffic at the time they entered into their agreement, this Commission has already addressed them in the earlier proceedings. In the first ISP complaint case involving Worldcom Technologies, Inc., Teleport Communications Group, Inc., Intermedia Communications, Inc., and MCI Metro Access Transmission Services, Inc. against BellSouth (Docket No. 971478-TP et. al) the Commission ruled that "[t]hus, while there is some room for interpretation, we believe that current law weighs in favor of treating the traffic as local, regardless of jurisdiction, for purposes of the Interconnection Agreement." (PSC-98-1216-FOF-TP, p.20) Staff notes that BellSouth has appealed the Commission's decision to federal district court. (Case No. 4:98CV352-RH BellSouth Telecommunications, Inc. vs. WorldCom Technologies, Inc. etc, et al) Intermedia and GTEFL entered into their agreement in roughly the same time frame as the

parties in the previous complaint cases. The FCC concurs with this ruling. In its recent Order it stated:

. . . Since then, the Commission has maintained the ESP exemption, pursuant to which it treats ESPs as end users under the access charge regime and permits them to purchase their links to the PSTN through intrastate local business tariffs rather than through interstate access tariffs. As such, the Commission discharged its interstate regulatory obligations through the application of local business tariffs. Thus, although recognizing that it was interstate access, the Commission has treated ISP-bound traffic as though it were local. (FCC 99-38, ¶23)

In evaluating the actions of the parties, staff notes that neither party discussed ISP traffic during negotiations. (Strow RT 9) Intermedia witness Strow argues that nothing in the agreement creates a distinction pertaining to calls placed to telephone exchange end-users that happen to be ISPs. (DT p.8) GTEFL argues in its brief that it has always correctly understood that ISP traffic is jurisdictionally interstate and thus outside the scope of local interconnection obligations. GTEFL further argues that its longstanding corporate position with regard to the jurisdictional nature of ISP traffic is a prominent matter of public record. (BR 6) GTEFL, however, did not provide any evidence to substantiate this latter claim. GTEFL also argues in its brief that during negotiations, Intermedia showed no signs of differing with GTEFL's well-known position on the jurisdictional nature of ISP traffic. (BR 8)

The most significant piece of evidence in determining the parties' intent is that neither party had a means of measuring ISP traffic. Intermedia witness Strow argues that had GTEFL intended to exclude ISP traffic, a system to identify and measure ISP traffic would have had to been discussed by the parties. (RT p.9) Witness Strow further states that neither company can currently distinguish these types of calls. (RT p.10) The evidence of record supports these statements. GTEFL did not provide its first

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proposal to measure this traffic until February 5, 1998, which was some time after their agreement had been approved by the Commission. (EXH JOS-4, p.2) Moreover, the method proposed by GTEFL to measure this traffic was to "estimate" based on call holding-times. GTEFL provided no evidence that it could measure actual usage of calls to ISPs. Staff believes that had GTEFL intended to exclude calls to ISPs from "local traffic," knowing that ISP-bound calls would go across local trunks, they would have had a method in place to measure this traffic, or during contract negotiations they would have discussed a means to "estimate" this traffic with Intermedia. Staff also notes that GTEFL offered this proposed method to measure ISP traffic only after it received bills for reciprocal compensation. (EXH JOS-2)

FCC Order

Both parties point to the recent FCC Order in an attempt to help their case. Intermedia's primary argument is that a call to an ISP consists of two parts: (1) a local telephone call from an end-user to an ISP; and (2) an enhanced transmission from the ISP over the Internet. (Strow RT p.3) The FCC specifically repudiated this "two call" theory and stated:

We disagree with those commenters that argue that, for jurisdictional purposes, ISP-bound traffic must be separated into two components: an intrastate telecommunications service, provided in this instance by one or more LECs, and an interstate information service, provided by the ISP. As discussed above, the Commission analyzes the totality of the communication when determining the jurisdictional nature of a communication. (FCC 99-38, ¶13)

GTEFL's primary argument is that ISP-bound traffic is jurisdictionally interstate, not local, and is not subject to reciprocal compensation.

Staff does not believe that the FCC's Declaratory Ruling is dispositive of the issue before the Commission. While the FCC did

rule that ISP-bound traffic was jurisdictionally mixed and appeared to be largely interstate, it did not rule that reciprocal compensation was not due for this traffic. (FCC 99-38, ¶1) In making its determination the FCC recognized that its policy on ISP traffic may have been unclear because of its own treatment of ISP traffic. The FCC even stated:

While to date the Commission has not adopted a specific rule governing the matter, we note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic. (FCC 99-38, ¶25)

The Order provided for state commissions to interpret existing agreements, such as this one, and, until a final rule is adopted, to determine whether reciprocal compensation should apply for this traffic.

Conclusion

Based on the record, staff concludes that GTEFL has failed to establish that the parties intended to exclude ISP-bound traffic from "local traffic" as that term is defined in their Interconnection Agreement. Staff attempted to ascertain what the parties may have reasonably intended at the time the parties entered into their contract by evaluating the plain language of the contract and the subsequent actions of the parties, as evidenced in the record.

The subsequent actions of the parties also do not show that either party intended to exclude ISP traffic from "local traffic." While GTEFL vehemently argues that it had a longstanding corporate position on the jurisdictional nature of ISP traffic, it did not provide any evidence to substantiate its claim. In fact the record shows that GTEFL never considered ISP traffic as anything other than local until it received bills for reciprocal compensation from Intermedia. Further, GTEFL had no means of tracking ISP traffic. Staff cannot reconcile how GTEFL could have

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had a longstanding corporate policy on ISP traffic, knowing the "local" characteristics of this traffic (i.e., it appears as "local traffic" on their network), and not have had a means in place to measure this traffic in order to calculate reciprocal compensation obligations. Based on staff's conclusion that the agreement contemplated ISP traffic to be local, staff recommends that the Commission should require GTEFL to compensate Intermedia according to the parties' Interconnection Agreement for the entire period the balance owed is outstanding.

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes. (BEDELL)

STAFF ANALYSIS: Upon approval of Issue 1, there is no further action to be taken in this docket. Therefore, the docket should be closed.