

State of Florida



Public Service Commission

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DATE: FEBRUARY 3, 2000

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

FROM: DIVISION OF COMMUNICATIONS (FAVORS, AUBU, BARRETT, BROWN, *ERF A MCB ERF f-TB*  
*WULWOOD, HINTON, OLLILA AMO*)  
DIVISION OF LEGAL SERVICES (CALDWELL) *Owc BK*

RE: DOCKET NO. 990750-TP - PETITION BY ITC^DELTACOM COMMUNICATIONS, INC. D/B/A ITC^DELTACOM FOR ARBITRATION OF CERTAIN UNRESOLVED ISSUES IN INTERCONNECTION NEGOTIATIONS BETWEEN ITC^DELTACOM AND BELLSOUTH TELECOMMUNICATIONS, INC.

AGENDA: FEBRUARY 15, 2000 - REGULAR AGENDA - POST HEARING DECISION - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: VOTE BY CHAIRMAN PURSUANT TO 350.01(5), FLORIDA STATUTES

FILE NAME AND LOCATION: S:\PSC\CMU\WP\990750B.RCM

CASE BACKGROUND

On June 11, 1999, ITC^DeltaCom Communications, Inc., d/b/a ITC^DeltaCom (ITC^DeltaCom) filed a Petition for Arbitration pursuant to 47 U.S.C. 252(b) seeking arbitration of certain unresolved issues in the interconnection negotiations between ITC^DeltaCom and BellSouth Telecommunications, Inc. (BellSouth). On July 6, 1999, BellSouth filed its response. The petition enumerated seventy-two issues. At the issue identification meeting, the parties notified Commission staff that twenty-three issues had been resolved. Eight additional issues were removed at the Prehearing Conference.

An administrative hearing was held on October 27-29, 1999, on the remaining issues. Subsequent to the hearing, the parties filed

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a Joint Motion of the Parties Notifying the Commission of Recently Resolved Issues, by which sixteen additional issues were resolved by the parties through negotiation and thus removed from this arbitration proceeding.

At the Special Agenda Conference held January 11, 2000, the panel disposed of all issues except Issue 23. There was a tie vote on that issue. Section 350.01(5), Florida Statutes, requires that the Chairman will break the tie to dispose of this issue. This is staff's recommendation on Issue 23.

**DISCUSSION OF ISSUES**

**ISSUE 23:** Should BellSouth be required to pay reciprocal compensation to ITC^DeltaCom for all calls that are properly routed over local trunks, including calls to Internet Service Providers (ISPs)?

**RECOMMENDATION:** Staff recommends that the parties should continue to operate under the terms of their current interconnection agreement in regards to this issue until the FCC issues its final ruling on whether reciprocal compensation is due for ISP-bound traffic. **(FAVORS)**

**POSITIONS OF THE PARTIES:**

**ITC^DELTACOM:**

Yes. Where costs are incurred by ITC^DeltaCom for carrying the traffic of a BellSouth customer, BellSouth must compensate ITC^DeltaCom for such carriage, consistent with the principles of cost causation. The fact that an ISP business customer, contrasted with other business customers, is the recipient of such calls makes no difference.

**BELLSOUTH:**

Because ISP-bound traffic is interstate traffic, the Commission should defer to the inter-carrier compensation mechanism established by the FCC for such traffic. While BellSouth has proposed several interim compensation mechanisms that the Commission could adopt, treating ISP-bound traffic as local for reciprocal compensation purposes is contrary to sound public policy.

**STAFF ANALYSIS:**

The issue before the Commission is to determine whether the parties should be required to pay reciprocal compensation for all calls that are properly routed over local trunks, including calls to ISPs. However, staff must point out that payment of reciprocal compensation for local calls that are not bound for ISPs does not seem to be in dispute. The real dispute is over payment of reciprocal compensation for ISP-bound traffic. More specifically, the issue is when an end user of one party calls an ISP that is an

end user of the other party, whether or not the party that serves the customer originating the call should pay reciprocal compensation to the other party which serves the ISP.

ITC^DeltaCom witness Rozycki explains that there are multiple parts to each Internet session. He states:

Assuming the call is initiated over standard phone lines, the initial part of the call, its delivery to the Internet service provider or ISP, may be handled by one or more carriers. Each of these carriers plays a role in delivering the call to its destination, and as such, each should be compensated. (TR 76)

BellSouth witness Varner states that "as previously confirmed by the FCC's Declaratory Ruling, ISP-bound traffic is jurisdictionally interstate; therefore, reciprocal compensation for ISP-bound traffic under Section 251 is not applicable." (TR 704) ITC^DeltaCom witness Rozycki agrees that the FCC did find that ISP-bound traffic is interstate in nature, but he argues that the appropriate level of compensation for ISP-bound traffic is not simplified by this finding. (TR 97) Witness Rozycki further states that ITC^DeltaCom should be paid for delivering ISP-bound traffic for BellSouth regardless of the jurisdictional nature of that traffic. (TR 118) He states that "since ITC^DeltaCom uses the same facilities to deliver those calls as it does to deliver any other local call, then it is appropriate to charge exactly the same rate for the delivery of either type of traffic." (TR 118) He further states that the only way that ITC^DeltaCom can recover those costs is through reciprocal compensation. (TR 118)

BellSouth witness Varner argues that ISPs are carriers and that the service provided to them is access service. Because of this, he believes that this eliminates any possible claim for reciprocal compensation. (TR 710) ITC^DeltaCom witness Rozycki counters that ISPs do not currently obtain certificates of authority to provide telecommunications services in Florida nor are they regulated as carriers by the FCC. (TR 94)

Witness Rozycki also states that ITC^DeltaCom believes in the "calling party pays" concept. In other words, the party or company responsible for originating a call is responsible for the costs associated with that call. (TR 75) BellSouth witness Taylor counters that the principle of cost causation requires that the ISP customer pay at least the cost its call imposes on the circuit-switched network. (TR 925)

BellSouth witness Varner does not believe that state commissions should address this issue. In regards to the FCC's recent Declaratory Ruling, he states:

. . . the FCC has, will retain, and will exercise jurisdiction over this traffic. As a practical matter, it appears fruitless for state commissions to deal with this issue at this time. Although the FCC appears to temporarily give states the authority to create an interim compensation arrangement until the FCC establishes rules, the FCC's authority to confer this ability on the states is being challenged in court. Consequently, states could find that they do not have the authority to create even an interim compensation arrangement. Even if the states do have the authority, such authority is valid only until the FCC completes its rulemaking on the subject. (TR 703)

Witness Varner also states that compensation for ISP traffic is not subject to a Section 252 arbitration. He argues that reciprocal compensation in the Act is limited to "local traffic," and that the FCC, in its Declaratory Ruling, makes clear that traffic to ISPs is interstate in nature. (TR 704) ITC^DeltaCom witness Rozycki disagrees and states that the FCC Declaratory Ruling provides the authority for state commissions to arbitrate this issue, and that the FCC tentatively concluded "that even if the FCC ultimately adopts a federal policy, states should still set inter-carrier compensation rates for ISP-bound traffic." (TR 100)

#### FCC Declaratory Ruling

The FCC issued a Declaratory Ruling and Notice of Proposed Rulemaking regarding inter-carrier compensation for ISP-bound traffic in Order FCC 99-38, issued in CC Docket No. 96-98, released on February 26, 1999. (EXH 1) In that Order, the FCC concluded that "ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate." (FCC 99-38, ¶2) However, the FCC did not make a determination as to whether reciprocal compensation is due for ISP-bound traffic. Instead, it acknowledged that it currently does not have a rule governing inter-carrier compensation for ISP-bound traffic, and until it adopts a final rule, state commissions may continue to determine whether reciprocal compensation is due for this traffic. (FCC 99-38, ¶22, ¶28)

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Further, in addressing the nature of ISP-bound traffic, the FCC explained:

Generally speaking, when a call is completed by two (or more) interconnecting carriers, the carriers are compensated for carrying that traffic through either reciprocal compensation or access charges. When two carriers jointly provide interstate access (e.g., by delivering a call to an interexchange carrier (IXC)), the carriers share access revenues received from the interstate service provider. Conversely, when two carriers collaborate to complete a local call, the originating carrier is compensated by its end user and the terminating carrier is entitled to reciprocal compensation pursuant to section 251(b)(5) of the Act. 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. (FCC 99-38, ¶9)

As explained, carriers share access revenues received from IXCs for delivering interstate traffic. In the case of ISP traffic, the FCC has given enhanced service providers (ESPs), of which ISPs are a subset, an exemption from paying interstate access charges even though it recognized that ESPs use interstate access services. The FCC explains that this exemption was adopted at the inception of the interstate access charge regime to protect certain users of access services, such as ESPs, that had been paying the generally much lower business service rates from the rate shock that would result from immediate imposition of carrier access charges. (FCC 99-38, ¶5, footnote 10) In 1997, the FCC decided that retaining the ESP exemption would avoid disrupting the still-evolving information services industry and advance the goals of the 1996 Act to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services." (FCC 99-38, ¶6) Thus the FCC, as recently as 1997, decided to continue the access charge exemption for ESPs.

Further, the FCC directed the states to treat ISP traffic as if it were local, by permitting ISPs to purchase their public switched telephone network (PSTN) links through local business tariffs. (FCC 99-38, ¶9) Therefore, an ISP need only subscribe to services from a LEC's local business tariffs to receive incoming calls from its customers. In addition, incumbent LEC expenses and

revenues associated with ISP-bound traffic traditionally have been characterized as intrastate for separations purposes.

This treatment of ISP traffic as "local" seems to be the point of contention between ILECs and ALECs. The FCC readily admits in its recent Declaratory Ruling that it has treated ISP-bound traffic as local traffic even though it was aware that ISPs used interstate access services. The FCC even states that it "continues to discharge its interstate regulatory obligations by treating ISP-bound traffic as though it were local." (FCC 99-38, ¶5)

The FCC has realized the problems that its treatment of this traffic has caused throughout the country. 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. . . . 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)

However, the FCC stated that it currently has no rule governing inter-carrier compensation for ISP-bound traffic, but believes that adopting such a rule to govern prospective compensation would serve the public interest. (FCC 99-38, ¶28) To this end, the FCC has issued a Notice of Proposed Rulemaking seeking comments on two proposals for a rule.

Staff agrees with ITC^DeltaCom witness Rozycki that state commissions may determine that reciprocal compensation is due for ISP-bound traffic. The FCC stated:

A state commission's decision to impose reciprocal compensation obligations in an arbitration proceeding -- or a subsequent state commission decision that those obligations encompass ISP-bound traffic -- does not conflict with any Commission rule regarding ISP-bound traffic. (FCC 99-38, ¶26)

However, staff recommends that the parties continue to operate under the terms of their current interconnection agreement in regards to this issue until the FCC issues its final rule on this matter. Staff acknowledges that the FCC has claimed jurisdiction over this traffic as it stated:

We emphasize that the Commission's decision to treat ISPs as end users for access charge purposes and, hence, to treat ISP-bound traffic as local, does not affect the Commission's ability to exercise jurisdiction over such traffic. (FCC 99-38, ¶16)

As mentioned earlier, the FCC does intend to adopt a final rule to govern inter-carrier compensation for ISP-bound traffic. Therefore, any decision the Commission makes will only be an interim decision. As such, staff recommends that the parties should continue to operate under the terms of their current interconnection agreement until the FCC issues its final ruling on whether ISP-bound traffic should be defined as local or whether reciprocal compensation is due for this traffic.

### Conclusion

Staff recommends that the parties continue to operate under the terms of their current interconnection agreement until the FCC issues its final ruling on whether ISP-bound traffic should be defined as local or whether reciprocal compensation is otherwise due for this traffic. The root of the problem stems from the FCC's treatment of this traffic. On the one hand, the FCC has recently ruled that ISP-bound traffic is jurisdictionally mixed and largely interstate. On the other hand, it has recognized that it has treated this traffic as local, but retains jurisdiction over this traffic. The FCC has also determined that a rule concerning prospective inter-carrier compensation for this traffic would be in the public interest. To this end, it has issued a Notice of Proposed Rulemaking seeking comments on two proposals for such a rule. Therefore, any decision this Commission makes presumably will be preempted if it is not consistent with the FCC's final rule.