

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of US LEC of Florida Inc. against BellSouth Telecommunications, Inc., for Breach of Terms of Florida Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996, and Request for Relief

DOCKET NO. 990874-TP

FILED: March 30, 2000

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US LEC OF FLORIDA INC.'S MOTION TO STRIKE PORTIONS OF PRE-FILED REBUTTAL TESTIMONY OR, IN THE ALTERNATIVE, TO STAY PORTION OF PENDING HEARING

COMES NOW US LEC of Florida Inc. ("US LEC"), through counsel, and files this Motion to Strike Portions of Pre-Filed Rebuttal Testimony Or, In the Alternative, to Stay A Limited Portion of the pending hearing in this matter. Specifically, US LEC asks the Commission to strike portions of the pre-filed rebuttal testimony of Mr. Jerry Hendrix on the grounds that Mr. Hendrix addresses, for the very first time, a matter that has not been put into issue by the pleadings in this case. Should the Commission decline to strike that portion of Mr. Hendrix's Rebuttal Testimony, then US LEC requests that the Commission delay that portion of the Hearing addressing that testimony. In support of this Motion, US LEC respectfully states as follows:

1. This matter is before the Commission on the Complaint of US LEC, as amended, against BellSouth Telecommunications, Inc. ("BellSouth"). In its Complaint US LEC alleged only that BellSouth breached the parties' first (November 1996) and second (November 1998) interconnection agreements by refusing to compensate US LEC for the transport and termination of calls originated by BellSouth end users to ISPs on US LEC's network. In the Second Amended Complaint US LEC noted that BellSouth was in breach of the parties' third

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(June 1999) interconnection agreement for the same transaction. In each Complaint, US LEC addressed only BellSouth's *liability and obligation* under those contracts to compensate US LEC for **transporting and terminating calls to ESPs, especially ISPs**. [Complaint, paragraphs 25 and 26; Second Amended Complaint, paragraphs 28 and 29.] US LEC did not address and does not request any finding with respect to rates applicable to local traffic.

2. Notably, in its Answer and Response to the initial Complaint and the Second Amended Complaint, BellSouth responded only to the issue of liability raised by US LEC; BellSouth did not raise the issue of the rate to be applied to its reciprocal compensation obligations.

3. BellSouth's failure to raise the applicable rate issue as a defense to US LEC's claims, or as an affirmative counter-claim in its own right, has important practical and legal consequences: there is no claim of any kind at issue in this case regarding the rate to be applied to the parties' obligations under their June 1999 Interconnection Agreement upon which the Commission can grant any form of relief. Indeed, even today, BellSouth has never formally stated the relief that it seeks from the Commission on the rate issue.

4. It was not until February 18, 2000, in pre-filed rebuttal testimony filed by Mr. Hendrix, that BellSouth raised for the first time an issue over the proper rate to be applied in calculating the parties' respective reciprocal compensation obligations under the June 1999 interconnection agreement.

5. From line 10, page 20 to line 2, page 24, including Exhibit JDH-1, of his pre-filed rebuttal, Mr. Hendrix testifies concerning an alleged dispute between BellSouth and US

LEC regarding the contractual reciprocal compensation rate to be applied to local traffic under the Intermedia Agreement US LEC adopted.

6. The rate issue raised by Mr. Hendrix for the first time in his rebuttal testimony apparently deals with a June 3, 1998, amendment to the Intermedia Agreement. On its face, the amendment appears to address the circumstances under which Intermedia will be given multiple tandem access ("MTA") and the rates that will be applied in the event Intermedia avails itself of the opportunity to use those MTA's (the "MTA Amendment"). (A copy of the MTA Amendment is attached hereto as Exhibit 1).

7. In what is becoming a familiar, if tiring, refrain, BellSouth now apparently contends that the MTA Amendment does not mean what it says. Instead, BellSouth claims that the MTA Amendment was intended, by BellSouth, to reduce all rates paid for the transport and termination of local traffic, regardless of whether the interconnecting carrier even avails itself of the opportunity for MTA architecture. In Mr. Hendrix's own words, the MTA Amendment "was designed to incorporate the commission-approved reciprocal compensation rates into the parties' interconnection agreement, which the parties agreed to charge and to pay for the transport and termination of local traffic." [Hendrix Rebuttal Testimony, page 21, lines 20-23.] This, of course, appears nowhere in the MTA Amendment itself.

8. Since the issue was not raised in either of BellSouth's Answers, US LEC has not had the opportunity to conduct discovery on the issue from either BellSouth or Intermedia and has not had the opportunity to submit testimony on the issue. It was not necessary to submit any

testimony on the rate to be applied under the June 1999 Agreement because it never was identified as an issue in this case.

9. Intermedia has filed a complaint with this Commission that challenges BellSouth's construction of that Amendment. [Docket 991534-TP.] According to the present procedural schedule, the Commission will hear evidence on June 13, 2000, and will rule on Intermedia's complaint by August 15, 2000.

10. In addition to being severely prejudicial, US LEC submits that litigating the meaning of the MTA Amendment in this case would make little sense in light of section 252(i) of the Telecommunications Act of 1996, which is intended to prevent discrimination among carriers.¹ Under section 252(i), the intent of the original parties to an interconnection agreement, including any negotiated amendments, controls the construction of the agreement as it may be applied to any adopting carrier. Thus, it is the intent of Intermedia and BellSouth in executing the MTA Amendment that must control the way that Amendment is construed by this Commission. US LEC is prepared to be bound by the Commission's ruling in the complaint proceeding brought by Intermedia against BellSouth, and intends to file its own complaint against BellSouth on the rate issue and seek to join that complaint with the pending Intermedia case. The meaning of the MTA Amendment should be resolved by the Commission in a

¹ *Petition of Global NAPs South, Inc. for the Arbitration of Unresolved Issues from the Interconnection Negotiations with Bell Atlantic-Delaware, Inc.*, PSC Docket No. 98-540, Arbitration Award at 5 (Del. P.S.C., Mar. 9, 1999)(section 252(i) "imposes an anti-discrimination constraint on the carrier-to-carrier negotiation process; it restrains an incumbent carrier from treating similarly situated new entrants dissimilarly"), *rev'd on other grounds, Bell Atlantic-Delaware, Inc. v. Global NAPs South, Inc.*, 1999 U.S. Dist. LEXIS 19362 (D. Del. 1999).

separate proceeding—either the one brought by Intermedia or one to be filed by US LEC to address this precise question.

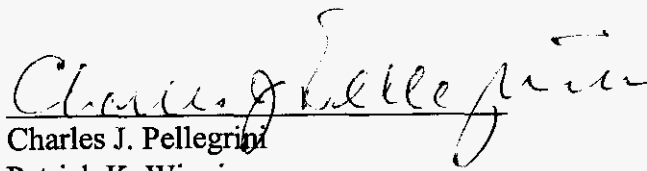
11. The MTA Amendment has nothing whatever to do with whether traffic to ESPs, especially ISPs, is subject to reciprocal compensation, which is the only issue raised by US LEC or BellSouth prior to Mr. Hendrix's rebuttal testimony.

12. BellSouth's attempt to raise the issue of the appropriate reciprocal compensation rate in this proceeding through Mr. Hendrix's rebuttal testimony relative to the MTA Amendment (or in any other way) is entirely inappropriate and should be stricken.

13. Alternatively, if the Commission chooses not to strike the designated portion of Mr. Hendrix's rebuttal testimony at this time, then US LEC asks the Commission to delay taking any testimony on that issue until after the Intermedia case, and any separate US LEC case, has been decided. At that point, the Commission can determine whether any additional evidence is necessary in this case. Any other outcome would severely prejudice US LEC in its ability to obtain proper relief in a timely and procedurally sound manner.

WHEREFORE, for the reasons above, US LEC respectfully urges the Prehearing Officer in this proceeding to grant its Motion to Strike Testimony, thereby striking the rebuttal testimony of BellSouth witness, Jerry Hendrix, from line 10, page 20 to line 2, page 24, including Exhibit JDH-1 or, in the alternative to delay the taking of any testimony on the rate to be paid under the June 1999 Interconnection Agreement until after the meaning of the MTA Amendment to that Agreement has been determined in a separate proceeding.

This 30th day of March, 2000.



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Counsel for US LEC of Florida Inc.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request by BellSouth Telecommunications, Inc. for approval of amendment to interconnection agreement with Intermedia Communications, Inc. pursuant to Sections 251, 252, and 271 of the Telecommunications Act of 1996.

DOCKET NO. 980879-TP
ORDER NO. PSC-98-1347-FOF-TP
ISSUED: October 12, 1998

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA
E. LEON JACOBS, JR.

ORDER APPROVING AMENDMENT TO EXISTING
INTERCONNECTION AGREEMENT

BY THE COMMISSION:

On July 13, 1998, BellSouth Telecommunications, Inc. (BST) and Intermedia Communications, Inc. (Intermedia) filed a request for approval of an amendment to the existing interconnection agreement under 47 U.S.C. §252(e) of the Telecommunications Act of 1996 (the Act). The amendment to the existing agreement is attached to this Order as Attachment A and incorporated by reference herein.

Both the Act and Chapter 364, Florida Statutes, encourage parties to enter into negotiated agreements to bring about local exchange competition as quickly as possible. Under the requirements of 47 U.S.C. § 252(e), negotiated agreements must be submitted to the state commission for approval. Section 252(e)(4) requires the state to reject or approve the agreement within 90 days after submission or it shall be deemed approved.

The existing agreement governs the relationship between the companies regarding local interconnection and the exchange of

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traffic pursuant to 47 U.S.C. § 251. Upon review of the proposed amendment to the existing agreement, we believe that it complies with the Telecommunications Act of 1996; thus, we hereby approve it. The Commission's approval of this agreement should not be construed as a determination that BST has met the requirements of Section 271 of the Act. BST and Intermedia are also required to file any subsequent supplements or modifications to their agreement with the Commission for review under the provisions of 47 U.S.C. § 252(e).

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the amendment to the existing interconnection agreement between BellSouth Telecommunications, Inc. and Intermedia Communications, Inc., as set forth in Attachment A and incorporated by reference in this Order, is hereby approved. It is further

ORDERED that any supplements or modifications to this agreement must be filed with the Commission for review under the provisions of 47 U.S.C. § 252(e). It is further

ORDERED that this Docket shall be closed.

By ORDER of the Florida Public Service Commission, this 12th day of October, 1998.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review in Federal district court pursuant to the Federal Telecommunications Act of 1996, 47 U.S.C. § 252(e)(6).

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ATTACHMENT A

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AMENDMENT
TO
MASTER INTERCONNECTION AGREEMENT BETWEEN
INTERMEDIA COMMUNICATIONS, INC. and
BELLSOUTH TELECOMMUNICATIONS, INC.
DATED JULY 1, 1996

Pursuant to this Agreement (the "Amendment"), Intermedia Communications, Inc. ("ICI") and BellSouth Telecommunications, Inc. ("BellSouth") hereinafter referred to collectively as the "Parties" hereby agree to amend that certain Master Interconnection Agreement between the Parties effective July 1, 1996 ("Interconnection Agreement").

NOW THEREFORE, in consideration of the mutual provisions contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, ICI and BellSouth hereby covenant and agree as follows:

1. The Parties agree that BellSouth will, upon request, provide, and ICI will accept and pay for, Multiple Tandem Access, otherwise referred to as Single Point of Interconnection, as defined in 2. following:
2. This arrangement provides for ordering interconnection to a single access tandem, or, at a minimum, less than all access tandems within the LATA for ICI's terminating local and intraLATA toll traffic and BellSouth's terminating local and intraLATA toll traffic along with transit traffic to and from other ALECs, Interexchange Carriers, Independent Companies and Wireless Carriers. This arrangement can be ordered in one way trunks and/or two way trunks or Super Group. One restriction to this arrangement is that all of ICI's NXXs must be associated with these access tandems; otherwise, ICI must interconnect to each tandem where an NXX is "homed" for transit traffic switched to and from an Interexchange Carrier.
3. The Parties agree to bill Local traffic at the elemental rates specified in Attachment A.
4. This amendment will result in reciprocal compensation being paid between the Parties based on the elemental rates specified in Attachment A.
5. The Parties agree that all of the other provisions of the Interconnection Agreement, dated July 1, 1996, shall remain in full force and effect.
6. The Parties further agree that either or both of the Parties is authorized to submit this Amendment to the respective state regulatory authorities for approval subject to Section 252(e) of the Federal Telecommunications Act of 1996.

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IN WITNESS WHEREOF, the Parties hereto have caused this Amendment to be executed by their respective duly authorized representatives on the date indicated below.

Intermedia Communications, Inc.

BellSouth Telecommunications, Inc.

James F. Leigs
Signature

Jerry D. Hendrix
Signature

Name

Jerry D. Hendrix
Name

Title

Director-Interconnection Services
Title

Date

6/3/98
Date

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ATTACHMENT A

Multiple Tandem Access shall be available according to the following rates for local usage:

- Each Party's local usage will be determined by the application of its reported Percent Local Usage ("PLU") to its intrastate terminating minutes of use as set forth in Paragraph 1.D. in ICI's February 24, 1997, Amendment to its Interconnection Agreement.
- The Parties agree to bill Local traffic at the elemental rates specified below:

ELEMENT	AL	FL	GA	KY	LA
Local Switching					
End Office Switching, per MOU	\$0.0017	\$0.0175	\$0.0016333	\$0.002562	\$0.0021
End Office Switching, add'l MOU ⁽¹⁾	NA	\$0.005	NA	NA	NA
End Office Interoffice Trunk Port - Shared, MOU	NA	NA	NA	NA	\$0.0002
Tandem Switching, per MOU	\$0.0015	\$0.00029	\$0.0006757	\$0.001096	\$0.0008
Tandem Interoffice Trunk Port - Shared	NA	NA	NA	NA	\$0.0003
Tandem Intermediary Charge, per MOU ⁽²⁾	\$0.0015	NA	NA	\$0.001096	NA
Local Transport					
Shared, per mile, per MOU	\$0.00004	\$0.000012	\$0.000008	\$0.0000049	\$0.0000083
Facility Termination, per MOU	\$0.00036	\$0.0005	\$0.0004152	\$0.000426	\$0.00047

ELEMENT	MS	NC	SC	TN
Local Switching				
End Office Switching, per MOU	\$0.00221	\$0.0040	\$0.00221	\$0.0019
End Office Switching, add'l MOU ⁽¹⁾	NA	NA	NA	NA
End Office Interoffice Trunk Port - Shared, MOU	NA	NA	NA	NA
Tandem Switching, per MOU	\$0.003172	\$0.0015	\$0.003172	\$0.000676
Tandem Interoffice Trunk Port - Shared	NA	NA	NA	NA
Tandem Intermediary Charge, per MOU ⁽²⁾	NA	NA	NA	NA
Local Transport				
Shared, per mile, per MOU	\$0.000012	\$0.00004	\$0.000012	\$0.00004
Facility Termination, per MOU	\$0.00036	\$0.00036	\$0.00036	\$0.00036

(1) This rate element is for use in those states with a different rate for additional minutes of use.

(2) This charge is applicable only to intermediary traffic and is applied in addition to applicable switching and/or interconnection charges.

CERTIFICATE OF SERVICE

Docket No. 990874-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing via hand delivery* or Federal Express for overnight delivery** this 30th day of March, 2000, to the following:

Donna Clemons*
Staff Counsel
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Nancy B. White
Michael Goggin
c/o Nancy H. Sims*
BellSouth Telecommunications, Inc.
150 South Monroe Street
Room 400
Tallahassee, Florida 32301

R. Douglas Lackey**
Bennett L. Ross**
BellSouth Telecommunications, Inc.
675 W. Peachtree Street, NE
Atlanta, Georgia 30375


Charles J. Pellegrini

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