

State of Florida



Public Service Commission

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DATE: JULY 20, 2000

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

FROM: DIVISION OF COMPETITIVE SERVICES (MARSH) *cm*
DIVISION OF LEGAL SERVICES (B. KEATING) *BK usd*

RE: DOCKET NO. 991267-TP - COMPLAINT AND/OR PETITION FOR ARBITRATION BY GLOBAL NAPS, INC. FOR ENFORCEMENT OF SECTION VI(B) OF ITS INTERCONNECTION AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC. AND REQUEST FOR RELIEF

AGENDA: 08/01/00 - REGULAR AGENDA - MOTION FOR RECONSIDERATION - ORAL ARGUMENT NOT REQUESTED - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: PLEASE PLACE ON AGENDA IMMEDIATELY PRECEDING DOCKET NO. 991946-TP

FILE NAME AND LOCATION: S:\PSC\LEG\WP\991267.RCM

CASE BACKGROUND

On August 31, 1999, Global NAPs, Inc. (Global NAPs or GNAPs) filed a complaint against BellSouth Telecommunications, Inc. (BellSouth) for alleged breach of the parties' interconnection agreement. The subject agreement was initially executed by ITC^DeltaCom, Inc., (DeltaCom or ITC^DeltaCom) on July 1, 1997, and was previously approved by the Commission in Docket No. 970804-TP, by Order No. PSC-97-1265-FOF-TP, issued October 14, 1997. DeltaCom's agreement was effective in Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee. On January 18, 1999, GNAPs adopted the DeltaCom agreement in its entirety.

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In its complaint, GNAPs asserted that BellSouth had failed to properly compensate GNAPs for delivery of traffic to Internet Service Providers that are GNAPs' customers. GNAPs also alleged that the terms of the agreement provide for reciprocal compensation for the delivery of local traffic, including ISP traffic. GNAPs stated that BellSouth has failed to comply with specific provisions of the agreement concerning the payment of reciprocal compensation to GNAPs. GNAPs asked for relief, including payment of reciprocal compensation and attorney's fees, plus interest.

On September 27, 1999, BellSouth filed its Answer to GNAPs' complaint. Based on the complaint, and BellSouth's response, this matter was set for hearing.

On November 15, 1999, DeltaCom filed a petition to intervene in this proceeding. By Order No. PSC-99-2526-PCO-TP, DeltaCom's petition was denied. Thereafter, a hearing on GNAPs' complaint was held on January 25, 2000.

By Order No. PSC-00-0802-FOF-TP, issued April 24, 2000, the Commission rendered its post-hearing decision. Therein, the Commission determined that:

we believe that the plain language of the Agreement shows that the parties intended the payment of reciprocal compensation for all local traffic, including traffic bound for ISPs. Therefore, it is not necessary to look beyond the written agreement to the actions of the parties at the time the agreement was executed or to the subsequent actions of the parties to determine their intent.

Order at p. 7.

Subsequently, on May 9, 2000, BellSouth filed a Motion for Reconsideration of the Commission's decision. On May 19, 2000, GNAPs filed a Motion for Extension of Time to Respond to the Motion for Reconsideration. Thereafter, GNAPs filed its response to BellSouth's motion on May 24, 2000. BellSouth did not respond to GNAPs' request for additional time to respond to the Motion for Reconsideration.

This is staff's recommendation on the Motion for Reconsideration and the Motion for Extension of Time.

DISCUSSION OF ISSUES

ISSUE 1: Should GNAPs' Motion for Extension of Time to Respond to BellSouth's Motion for Reconsideration be granted?

RECOMMENDATION: Yes. Staff recommends that the extension be granted. The two-day extension will neither cause any undue burden to any party nor will it give any undue advantage to either party.
(B. KEATING)

STAFF ANALYSIS: GNAPs asserts that neither Commission staff counsel nor counsel for BellSouth oppose its request for a two-day extension to respond to the Motion for Reconsideration. GNAPs contends that the extension will not affect any other time frames in this case.

As noted above, BellSouth did not file a response to the Motion.

Staff recommends that the extension be granted. The two-day extension will neither cause any undue burden to any party nor will it give any undue advantage to either party. Staff notes that the Commission can grant this extension of time to respond to a Motion for Reconsideration, although it cannot extend the time for filing a Motion for Reconsideration in response to a Commission order. Therefore, staff recommends that the Motion for Extension of Time be granted.

ISSUE 2: Should BellSouth's Motion for Reconsideration be granted?

RECOMMENDATION: No. BellSouth has failed to identify any fact overlooked by the Commission or any mistake of law made by the Commission in rendering its decision. **(B. KEATING, MARSH)**

STAFF ANALYSIS: The proper standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v.

Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

MOTION FOR RECONSIDERATION

BellSouth contends that the Commission should reconsider its decision because it has failed to consider or overlooked points of fact and law. BellSouth argues that this is the result of the Commission rendering a decision based on facts outside the record, contrary to the law of the case as set forth by the prehearing officer in this case, and contrary to federal law.

First, BellSouth argues that the Commission based its decision on facts outside the record. BellSouth references statements in the Commission's Order wherein the Commission indicates that the relevant intent in interpreting an adopted agreement is the intent of the original parties and that the original and adopted agreement should receive the same interpretation.¹ BellSouth contends that these statements result in an inconsistent decision.

Based on the Commission's statements, BellSouth argues that the GNAPs/BellSouth agreement must receive the same interpretation as the DeltaCom agreement. BellSouth emphasizes that the Commission has, however, not yet interpreted the DeltaCom/BellSouth agreement. Thus, BellSouth argues that the Commission has either prejudged the outcome of the DeltaCom complaint, which is currently being addressed in a separate docket, or it has made a decision contrary to its own interpretation of Section 252(i) of the Act by requiring BellSouth to pay reciprocal compensation under an adopted agreement, when BellSouth may not be required to do so under the terms of the underlying agreement. Regardless, BellSouth contends the Commission has strayed from the law of the case as set forth by the prehearing officer when DeltaCom was excluded from this proceeding.

¹Order at p. 7-8.

BellSouth further argues that the prehearing officer specifically stated in his order denying DeltaCom intervention in this proceeding:

. . . our decision in this case will consider only the GNAPs/BellSouth agreement and evidence relevant to that agreement. Our final decision will apply only to GNAPs and BellSouth. Therefore, any decision in this case will be based on evidence presented by the parties to this case and as such, will have no precedential value for any other case involving the same terms and conditions of an agreement between different parties. . .

Order No. PSC-99-2526-PCO-TP at pp. 5-6.

BellSouth contends that the Commission's final determination that the GNAPs/BellSouth agreement and DeltaCom/BellSouth agreement must be interpreted the same is inconsistent with the holding of the prehearing officer. BellSouth argues that the Commission changed the process and evidentiary standard established by the prehearing officer, i.e. the "law of the case," in rendering its final decision. Therefore, BellSouth argues that it was denied due process to address the intent of the parties in negotiating the DeltaCom/BellSouth agreement.

BellSouth also argues that the Commission's decision departs from prior Commission decisions on compensation for ISP traffic. BellSouth notes that in this case, the Commission stated that evidence of intent was not necessary, while in previous Commission decisions, the Commission analyzed evidence regarding the intent of the negotiating parties. BellSouth adds that even though the Commission stated that it did not believe evidence of intent was necessary in this case, it still included an analysis of facts reflecting the parties' intent, including a criticism of BellSouth for failing to seek modification of the agreement before allowing GNAPs to adopt it. BellSouth contends that this analysis is not only based upon an erroneous understanding of the facts, but also upon a misunderstanding of BellSouth's obligations under Section 252(i) of the Act.

BellSouth further contends that had the Commission applied the same analysis in this case that it used in prior decisions in cases regarding reciprocal compensation, then BellSouth would have prevailed. BellSouth emphasizes that here, there was evidence that BellSouth did not intend to treat ISP traffic as if it were local,

and GNAPs even admitted that it knew BellSouth did not believe it should be treated as local. BellSouth adds that the Commission seems to improperly "infer" negative intent on behalf of BellSouth because BellSouth did not clarify the language in the agreement before executing the adoption by GNAPs. BellSouth argues that this inference is inconsistent with the testimony of BellSouth's witness Shiroishi, who explained that GNAPs adopted the DeltaCom/BellSouth agreement to circumvent the negotiation process and to obtain reciprocal compensation language different from the standard language proposed by BellSouth.

BellSouth also argues that the Commission's decision violates federal law. BellSouth states that the Commission found the language in the agreement is clear and only calls for reciprocal compensation for local traffic. Order at p. 6. Thus, based on this statement, BellSouth believes that it should have prevailed because the FCC has stated that traffic to ISPs is interexchange traffic, not local traffic. BellSouth contends that the Commission deviated from its own prior orders and rendered a legal determination that traffic to ISPs is "local traffic," and as such, is subject to reciprocal compensation. BellSouth argues that this decision is clearly erroneous and should, therefore, be reconsidered.

In addition, BellSouth argues that the Commission's decision will have extensive negative consequences because every adopted agreement will have to be interpreted consistent with the original agreement. BellSouth emphasizes that the prehearing officer in this case denied intervention by the original party to the agreement, consistent with Commission policy on the handling of complaints under the Act. Thus, BellSouth contends that the Commission will have to determine the rights of the parties to original agreements, before addressing complaints regarding adopted agreements, and will have to do so without the benefit of evidence regarding the actions and intent of the original parties. BellSouth argues that this will either violate the ALEC's due process rights, or the Commission will have to reconsider its policy against intervention in complaint proceedings, unless it decides to refrain from rendering decisions on complaints regarding adopted agreements until the underlying agreement has been interpreted.

BellSouth also maintains that the Commission's policy is discriminatory to BellSouth, because BellSouth will never be able to amend any mistakes it may have made in the original agreements, and those mistakes will be carried over to the adopted agreements.

ALECs, however, will be able to opt into another agreement if they determine that they have made a bad deal with BellSouth.

Finally, BellSouth argues that the Commission should not feel reassured that "mistakes" will only be perpetuated as long as the original agreement is in effect. BellSouth notes that while the Commission acknowledged, in this case, that the underlying agreement in this case expired last year, in other reciprocal compensation cases, the Commission has, essentially, perpetuated reciprocal compensation provisions beyond the life of the agreement by requiring the parties in arbitrations to "handle the [reciprocal compensation] issue consistent with the prior agreement."² Even though the provisions may not be specifically perpetuated in adopted agreements beyond the life of the original agreement, BellSouth argues that the Commission is consistently perpetuating them through the arbitration process.

For all these reasons, BellSouth asks that the Commission reconsider its decision in this case.

RESPONSE

In its response, GNAPs argues that BellSouth has not met the standard for reconsideration in that it has not identified any mistake of fact or law made by the Commission in rendering its decision in this case. Thus, GNAPs contends that the Motion should be denied.

Specifically, GNAPs argues that the Commission's decision was based exclusively on facts in the record of this case. GNAPs contends that BellSouth has not identified any extra-record facts relied upon by the Commission. GNAPs further emphasizes that the Commission clearly identified all of the facts upon which its decision is based and that all such facts are in the record.

GNAPs argues that the Commission concluded that the Agreement does not differentiate between traffic bound for ISPs and "local traffic" and does not contain a mechanism to compensate for traffic to ISPs apart from reciprocal compensation. Therefore, the Commission determined that the language in the agreement was clear in that it provides for reciprocal compensation for all local traffic, including traffic bound for ISPs. GNAPs adds that because the Commission looked only at the plain language of the agreement,

²Citing Dockets Nos. 990149-TP, 990691-TP and 990750-TP.

there was no need to further examine the subjective intent of the parties.

GNAPs further contends that BellSouth's argument that the Commission relied upon the intent of the parties to the DeltaCom/BellSouth agreement, and therefore, upon extra-record facts, is inaccurate. GNAPs explains that the Commission very clearly stated that it did not need to look to substantive intent in this case. The Commission merely added, as dicta, an explanation that if it did have to look to additional evidence of intent in a case addressing a less clearly worded agreement, then the relevant intent would be the intent of the original parties to the agreement. GNAPs emphasizes that the Commission applied "hornbook law" to conclude that evidence of subjective intent is necessary only when a contract is ambiguous. In this case, however, the Commission found that the contract was not ambiguous, and therefore, the Commission did not look beyond the language in the contract.

GNAPs also maintains that even if the Commission did look to evidence of the intent of the original parties to the DeltaCom/BellSouth agreement, there was some evidence in the record regarding that intent. GNAPs explains that its witness Rooney provided an exhibit at hearing that was the testimony of a relevant DeltaCom employee presented in a dispute regarding this same contract before the Alabama Commission. GNAPs contends that this is direct evidence in this record as to the intent of the original parties to the agreement. GNAPs also notes that BellSouth also presented evidence that BellSouth had developed language to clarify its agreement, but never incorporated the clarification into the DeltaCom/BellSouth agreement. GNAPs believes, therefore, that it is reasonable to infer that BellSouth intended the plain meaning of the original contract language to prevail.

GNAPs also disputes BellSouth's conclusion that the Commission has prejudiced BellSouth in its ongoing dispute with DeltaCom by rendering a decision in this case. GNAPs contends, however, that BellSouth has not been precluded by the Commission's decision from making any argument it may see fit to make in the DeltaCom case. Therefore, BellSouth has not demonstrated any error made by the Commission.

GNAPs adds that there is also no basis for the Commission to delay ruling until the DeltaCom case has been concluded, because the Commission has already determined that the agreement is clear. Therefore, the Commission should resist any attempts by BellSouth to delay implementation of the agreement terms.

As for BellSouth's reliance upon the prehearing officer's Order Denying Intervention, GNAPs argues that BellSouth has failed to note that the prehearing officer's order was issued three days after the parties had already filed rebuttal testimony in this case. GNAPs contends that regardless of the prehearing officer's decision, BellSouth had already decided not to present detailed evidence of the subjective intent of the parties to the underlying agreement. Therefore, GNAPs argues that BellSouth's contention that the Commission somehow changed the evidentiary standard of this case is without merit. BellSouth simply chose to stick with one strategy for presenting its case, while GNAPs took a "cover the bases" approach. GNAPs maintains that just because BellSouth has now realized that it may have "dropped the ball," does not mean that the Commission made a mistake in rendering its decision, or that BellSouth was somehow denied due process.

GNAPs notes that BellSouth has even attached the affidavit of Jerry Hendrix to its Motion for Reconsideration in an attempt to get the Commission to consider additional testimony in this case. GNAPs contends that this testimony could have been presented at hearing, includes no new facts, and is simply BellSouth's attempt to rectify its own strategic mistakes. GNAPs further argues that in order to reopen the record of a case, there must be a significant change of circumstances not present at the time of the proceedings, or a demonstration that a great public interest will be served.³ GNAPs argues that BellSouth has failed to demonstrate any basis for reopening the record to admit evidence that could and should have been a part of the original proceeding. GNAPs adds that if BellSouth were allowed to admit the evidence, then GNAPs would have to have an opportunity to cross-examine and rebut the testimony, which would lead to a perpetuation of this case, which the doctrine of administrative finality was designed to prevent except in the most extreme circumstances.

GNAPs also disagrees with BellSouth's contention that the prehearing officer's ruling somehow placed a substantive constraint on how the Commission could rule on the merits of this dispute. GNAPs argues that the doctrine of "law of the case" simply holds that the highest jurisdictional decision controls, as opposed to the prehearing officer's decision controlling the decision of the

³Citing Austin Tupler Trucking, Inc. v. Hawkins, 377 So. 2d 679 (Fla. 1979), and Peoples Gas System v. Mason, 187 So. 2d 335 (Fla. 1966).

Commission.⁴ GNAPs argues that under the "law of the case" doctrine, the Commission could conclude, as a matter of law, that the DeltaCom/BellSouth agreement is unambiguous, based on the decision in this case. GNAPs explains that BellSouth would not be prejudiced in any way, because it has already had an opportunity in this case to contest the clarity of the language in the contract. However, under BellSouth's theory of the "law of the case," GNAPs emphasizes that the prehearing officer's denial of DeltaCom's petition to intervene would be a substantive determination that the Commission could not find that the contract is unambiguous. GNAPs contends that this is clearly not the intent of the prehearing officer's ruling.

In addition, GNAPs argues that the Commission based its decision on the clear language in the agreement and upon fundamental principles of contract interpretation. GNAPs emphasizes that although the Commission took a slightly different approach than that taken by the Commission in previous cases addressing reciprocal compensation provisions, the contract at issue here is a different contract.

GNAPs explains that the Commission's decision is also consistent with federal law. GNAPs contends that every federal court that has considered a state decision finding that reciprocal compensation is due for traffic to ISPs has determined that the state decision is consistent with federal law.⁵ GNAPs further notes that BellSouth lost on this same issue in federal court in Atlanta five days before filing its Motion for Reconsideration with this Commission. GNAPs states that the federal court acknowledged the DC Circuit's recent reversal of the FCC's Reciprocal Compensation Order, and explained that the DC Circuit had vacated the FCC's Order because the FCC had failed to explain why the FCC's end-to-end analysis for determining whether a call to an ISP is local

. . . is relevant to discerning whether a call
to an ISP should fit within the local call

⁴Citing Brunner Enterprises v. Department of Revenue, 452 So. 2d 550 (Fla. 1984), and Greene v. Massey, 384 So. 2d 24 (Fla. 1980).

⁵Citing Southwestern Bell Telephone v. Texas PUC, 208 F.3d 475, 483 (5th Cir. 2000); Illinois BellTel. v. WorldCom, 179 F.3d 566, 572 (7th Cir. 1999); and US West Communications v. MFS Intelenet, 196 F. 3d 1112, 1122-1123 (9th Cir. 1999).

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model of two collaborating LECs or the long-distance model of a long-distance carrier collaborating with two LECs.

BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc., 2000 U.S. Dist. LEXIS 6743 at **10-11 (N.D. Ga. 2000). Thus, GNAPs contends that the DC Circuit determined that the portions of the FCC's Reciprocal Compensation Order upon which BellSouth relies do not really make much sense. As such, GNAPs believes that this Commission's decision is consistent with federal law.

Finally, GNAPs argues that the Commission's decision is not discriminatory to BellSouth and will not place BellSouth in a situation in which it can never correct a mistake until the agreement expires. GNAPs emphasizes that BellSouth will only be held to these contracts for as long as the contracts last. GNAPs states that this is no different than any other business that wishes it had made a better deal for itself. GNAPs contends that BellSouth was allowed to freely negotiate the underlying contract in accordance with the provisions of the Act. While Section 252(i) may amplify any mistake BellSouth may have made in those negotiations, that is a part of the process contemplated by Congress and considered by the FCC in its rulemaking to implement the Act. GNAPs points out that the FCC developed Rule 47 C.F.R. §51.809 specifically to address situations in which the LEC has made a deal so detrimental to itself that successive CLECs should be prevented from obtaining the same deal through Section 252(i) adoptions.

As for the issue of whether the Commission has erred in other dockets by requiring the parties to continue to operate under the terms of their prior agreements until the FCC renders a final decision on compensation for traffic to ISPs, GNAPs argues that this appears to be an appropriate policy. Nevertheless, GNAPs argues that BellSouth should raise that issue in ongoing arbitration dockets, instead of in this case, because the argument is not a basis for reconsideration in this matter.

For all of these reasons, GNAPs asks that BellSouth's Motion for Reconsideration be denied.

ANALYSIS AND RECOMMENDATION

BellSouth argues that the Commission erred by: 1) considering facts outside the record; 2) straying from the "law of the case," as established by the prehearing officer; 3) departing from prior Commission decisions on this issue; 4) deciding the issue contrary to federal law; and 5) rendering a decision which is discriminatory in its consequences to BellSouth. Staff addresses each of these points below.

1. Consideration of Facts in Evidence

BellSouth contends that simply by indicating which parties' intent is the relevant intent when interpreting an agreement, the Commission somehow considered facts outside the record of this case. BellSouth adds that in doing so, the Commission not only strayed from the record of this case, but rendered a potentially inconsistent decision in that the agreement between ITC^DeltaCom and BellSouth has not yet been interpreted. Staff disagrees. While the Commission did indicate that the intent of the original parties to an agreement is the relevant intent in interpreting an agreement, the Commission also stated that in this particular case, the language is clear as to what that intent was. Therefore, there was no need for the Commission to look to further evidence, such as the actions of the original parties, in order to determine the underlying intent. Instead, the Commission found that the evidence that is in the record of this proceeding, the agreement language, is clear and provides a sufficient basis upon which the Commission determined that the parties intended for the payment of reciprocal compensation to include traffic bound for ISPs. BellSouth has not demonstrated that the Commission's decision is inconsistent, much less in error. As such, BellSouth has failed to identify a basis for reconsideration of the Commission's decision.

2. Impact of Prehearing Officer's Decision on Petition to Intervene

BellSouth also contends that when the prehearing officer in this case denied ITC^DeltaCom intervention in this proceeding, that decision precluded the Commission from considering the intent of the underlying parties to the agreement in rendering its final decision. BellSouth argues that it based its presentation of its own case upon the prehearing officer's decision; thus, BellSouth believes it has been denied due process to address the intent of the underlying parties. On this point, staff agrees with GNAPs. While the Commission did explain at pages 7 and 8 of the Order that

it believes that the relevant intent in interpreting an Agreement is the intent of the original parties, not the adopting party, those statements are not the basis for the decision in the case, nor are they responsive to any issues presented for consideration by the Commission. Furthermore, although the Commission's statements in its final order are somewhat contrary to the prehearing officer's determination in denying ITC^DeltaCom intervention, the decision to deny intervention did not abrogate BellSouth's right to due process in this case. In fact, the specific issue the Commission was asked to address was:

Under their Florida Partial Interconnection Agreement, are Global NAPs, Inc. and BellSouth Telecommunications, Inc. required to compensate each other for delivery of traffic to Internet Service Providers (ISPs)? If so, what action, if any, should be taken?

In order to answer this question, the Commission did not find it necessary to analyze evidence as to the subjective intent of the parties, beyond its finding that the plain language of the agreement itself provides the best evidence of what the agreement requires. That is the only finding rendered in the Commission's Final Order. Discussion in the Order of the relevant intent when interpreting an adopted agreement is clearly dicta intended to provide all parties with guidance in the future as to how the Commission intends to approach the interpretation of adopted agreements, particularly when the language at issue is not as clear as it is in this case. The prehearing officer's decision did not prevent BellSouth from making any argument that the language is not clear, nor did it prevent BellSouth from putting on any evidence of the intent of the parties to the underlying agreement.

In denying ITC^DeltaCom intervention, the prehearing officer simply stated that only evidence presented by BellSouth and GNAPs would be considered in this proceeding. The Order Denying Intervention did not, however, preclude either of the parties from presenting evidence of the intent of the original parties, nor did it restrict the Commission's ability to resolve the substantive issue in this case. In addition, staff also notes, as has GNAPs, that the Order Denying Intervention to ITC^DeltaCom was issued after BellSouth had already filed its rebuttal testimony. Thus, that decision could not have had any impact on the preparation of BellSouth's case. For these reasons, staff does not believe that BellSouth has identified a mistake of fact or law made by the Commission in rendering its decision in this case.

3. Departure from Prior Commission Decisions on this Issue

BellSouth further argues that the Commission's decision in this case departs from the Commission's prior analysis and decisions regarding reciprocal compensation provisions in interconnection agreements. BellSouth emphasizes that in previous cases, the Commission looked to evidence regarding the actions of the parties at the time they entered into agreements in order to determine the underlying intent. In this case, however, the Commission only looked to the language in the agreement. BellSouth adds that even though the Commission stated that it did not need to look to additional evidence of intent, the Commission still analyzed and commented on matters that went beyond the language in the agreement.

Staff emphasizes that BellSouth's arguments on this point do not identify anything that the Commission did in this case that was in error. BellSouth has merely pointed out that the Commission's decision takes a somewhat different approach than that taken in past Commission decisions on similar issues. The Commission did, however, acknowledge in its Final Order that it was taking a different approach than that taken in past decisions, and explained its basis for doing so. The Commission is not required to follow prior decisions in arbitrating complaints under the Act, particularly when the contract at issue is a different contract than those previously interpreted.

As for the comments in the Order that BellSouth believes demonstrate an analysis of intent, staff notes that the Commission clearly stated in its Final Order that the extraneous analysis was not the basis of its decision. As for noting that BellSouth never amended the agreement, even though amendatory language had apparently been developed, this merely indicates that the Commission acknowledged that the language at issue was the language from the original ITC^DeltaCom/BellSouth Agreement. There is no indication in the Order that the Commission drew any inferences regarding intent based upon BellSouth's failure to amend the agreement, negative or otherwise. Even if the Commission did draw some "negative inference," it would not constitute a mistake of fact or law in the Commission's decision. Although the Commission had already clearly stated in the Order that its decision was based on the clear language of the Agreement, the Commission was not precluded from "covering all the bases" and further addressing all the arguments presented. As such, BellSouth has not identified any mistake of fact or law made by the Commission in rendering its decision.

4. Decision Not Contrary to Federal Law

BellSouth also contends that the Commission's decision is contrary to the FCC's decision that traffic to ISPs is not local traffic. BellSouth contends that the Commission's decision clearly determines that traffic to ISPs is local traffic; therefore, it is in error. Staff, however, disagrees. As the FCC specifically acknowledged in its Reciprocal Compensation Order, Order 99-38 at ¶ 26,

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 (FCC) rule regarding ISP-bound traffic.

While the U.S. Court of Appeals for the District of Columbia Circuit (DC Circuit or Court) recently vacated the FCC's decision in Order 99-38, the Court specifically stated that it did not reach a decision on the arguments raised by the ILECs regarding the state commissions' jurisdiction to compel payments for traffic to ISPs. Thus, there is still no indication at any level that state commissions are prevented from making their own determinations regarding the appropriate compensation for this traffic. Instead, the DC Circuit stated that it was vacating the FCC's ruling because the FCC had not satisfactorily explained why LECs that terminate calls to ISPs are not viewed

. . . as 'terminating . . . local telecommunications traffic,' and why such traffic is 'exchange access' rather than 'telephone exchange service'

Bell Atlantic Telephone Companies v. FCC, 206 F.3d 1, 9 (D.C. Cir. 2000). As GNAPs points out, these same statements taken from the FCC's Order 99-38 and this rationale are the primary basis that BellSouth has relied upon for its arguments that the traffic sent to ISPs should not be considered "terminated" for purposes of reciprocal compensation.

In this case, the Commission determined that the language in the agreement was clear and that the parties intended to include traffic to ISPs within the definition of "local traffic." In reaching this conclusion, the Commission emphasized that there is nothing in the Agreement to indicate that traffic to ISPs should be

treated otherwise. Without some indication in the agreement that traffic to ISPs was intended to be treated differently or somehow segregated from "local traffic," although dialed by the customer as a local call, staff can find no basis for BellSouth's contention that the definition of "local traffic" is not clear. Certainly, the DC Circuit's ruling impairs, at a minimum, any basis for BellSouth's argument to the contrary. Regardless, BellSouth has not demonstrated that the Commission's decision conflicts with federal law, and as such, it has failed to identify an error of fact or law in the Commission's decision. Furthermore, as BellSouth points out in its own motion at page 8, fn. 6, much of this same argument was already presented to and considered by the Commission in its Final Order.

5. Decision Not Discriminatory to BellSouth

As for BellSouth's contentions that the Commission's decision is discriminatory and will "amplify the effect on BellSouth of errors in business judgment," staff notes much of BellSouth's argument goes to procedural difficulties that may arise in future cases. Such argument does not identify an error in the Commission's decision in this case. In fact, in discussions at the Agenda Conference when the Commission considered staff's post-hearing recommendation in this case, it was pointed out that in future cases, it may be necessary to allow intervention by the original party to the agreement--particularly if the agreement is not clear--if the party that has adopted an agreement files a complaint before an interpretation of that agreement has been rendered for the original parties.

BellSouth also contends that any perceived error in the agreements will be passed on to other ALECs that adopt the agreement. While this is true, it does not identify an error in the Commission's decision, although it may be a cautionary point for BellSouth to consider in its future negotiations.

Finally, BellSouth argues that the Commission has been perpetuating these reciprocal compensation terms beyond the life of the agreements in some arbitration cases by telling the companies to continue operating under the terms of their prior agreements until the FCC reaches a decision regarding traffic to ISPs. Staff emphasizes that in referencing Commission decisions in other cases, BellSouth has not identified an error in the Commission's decision in this case. Staff also notes that the Commission has not yet rendered a decision on the pending arbitration case (Docket No. 991220-TP) between these two companies. Thus, the terms of this agreement have not been extended through arbitration. In addition,

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the decisions referenced by BellSouth were based upon the evidence presented in those particular arbitration cases and upon the state of the law at the time of the Commission's decisions in those cases. Thus, BellSouth has not identified a basis for reconsideration of the decision in this case.

CONCLUSION

Based on the foregoing, staff recommends that BellSouth's Motion for Reconsideration be denied. BellSouth has failed to identify any mistake of fact or law made by the Commission in rendering its decision in this case.

ISSUE 3: Should this Docket be closed?

RECOMMENDATION: Yes. If the Commission approves staff's recommendation in Issues 1 and 2, this Docket should be closed. **(B. KEATING)**

STAFF ANALYSIS: If the Commission approves staff's recommendation in Issues 1 and 2, no further action is required in this docket. Therefore, this Docket should be closed upon issuance of the Order.