

State of Florida



Public Service Commission

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RECORDED - FPSC

DATE: AUGUST 17, 2000

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

FROM: DIVISION OF LEGAL SERVICES (STERN, FORDHAM) ^{WKS} *St. PK*
DIVISION OF COMPETITIVE SERVICES (T. WATTS, SIMMONS) *ALW SAS*

RE: DOCKET NO. 991534-TP - REQUEST FOR ARBITRATION CONCERNING COMPLAINT OF INTERMEDIA COMMUNICATIONS, INC. AGAINST BELL SOUTH TELECOMMUNICATIONS, INC. FOR BREACH OF TERMS OF INTERCONNECTION AGREEMENT UNDER SECTIONS 251 AND 252 OF THE TELECOMMUNICATIONS ACT OF 1996, AND REQUEST FOR RELIEF.

AGENDA: 08/29/00 - REGULAR AGENDA - POST HEARING DECISION - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\991534.RCM

CASE BACKGROUND

On June 25, 1996, Intermedia Communications Inc. (Intermedia) and BellSouth Telecommunications, Inc. (BellSouth) negotiated a Master Interconnection Agreement (the Agreement) and filed it with this Commission pursuant to Section 252 of the Telecommunications Act of 1996 ("Act"). The Agreement was approved by the Commission on October 7, 1996 in Order No. PSC-96-1236-FOF-TP. On June 3, 1998, Intermedia and BellSouth executed an Amendment to their Agreement (the "Amendment"). The Amendment was filed with this Commission on July 13, 1998 in accordance with Section 252 of the Act and approved in Order No. PSC-98-1347-FOF-TP, issued October 21, 1998.

On October 8, 1999, Intermedia filed a Complaint against BellSouth for breach of the terms of the Agreement and Amendment.

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On November 2, 1999, BellSouth filed its response to Intermedia's Complaint. An administrative hearing was held on June 13, 2000 regarding this matter.

The primary issue in the dispute is over the rate that the parties should use to bill each other for reciprocal compensation. Before the Amendment was signed, reciprocal compensation for all local traffic was billed at a composite rate of \$0.01056 per minute of use (MOU). According to BellSouth, the Amendment requires that reciprocal compensation for all local traffic be billed at elemental rates. According to Intermedia, the Amendment requires that reciprocal compensation for all local traffic be billed at the composite rate unless Intermedia orders multiple tandem access (MTA), in which case elemental rates apply.

During the hearing, BellSouth made an oral motion to strike testimony of Intermedia witness Heather Gold. After Ms. Gold had summarized her rebuttal testimony, BellSouth claimed the summary exceeded the scope of her prefiled rebuttal testimony. The presiding officer postponed ruling on the motion until the transcript was available so the testimony at issue could be clearly identified. The presiding officer stated that to the extent the summary exceeded the scope of the prefiled testimony, it would be stricken. BellSouth filed its written Motion to Strike on June 21, 2000, and Intermedia filed its Response on June 23, 2000.

Also during the hearing, Intermedia was granted leave to submit a late-filed exhibit, numbered 20, in which it was to identify the tandems to which Intermedia was connected at the time the amendment was signed. Exhibit 20 was to be filed before the briefs were due. Although the exhibit was timely filed with the Commission, BellSouth claims it did not receive the exhibit within the specified time frame. Intermedia claims it timely delivered the exhibit to BellSouth. After BellSouth received the exhibit, it responded by letter dated July 7, 2000. The response contained additional arguments but also objections that the "forward" (i.e., preface) attached to Exhibit 20 exceeded the scope granted at the hearing.

The Commission has jurisdiction to resolve this dispute pursuant to Sections 251 and 252 of the Telecommunications Act of 1996. See also Iowa Utilities Bd. V. FCC, 120 F. 3d 753, 804 (8th Cir. 1997) (state commissions' authority under the Act to approve agreements carries with it the authority to enforce the agreements).

ISSUE A: Should the Commission grant BellSouth's Post-Hearing Motion to Strike?

RECOMMENDATION: Yes. The Commission should grant BellSouth's Post-Hearing Motion to Strike because the witness's summary of her prefiled rebuttal testimony exceeded the scope of that which was actually filed. (**STERN, FORDHAM**)

STAFF ANALYSIS: At the hearing, Intermedia witness Heather Gold stated the following in the summary of her prefiled rebuttal testimony:

BellSouth, in fact, told Intermedia personnel that we had to sign the amendment if we wanted BellSouth to stop blocking our traffic in the Norcross tandem in Georgia. (TR 282, lines 22-25)

BellSouth argues that this statement should be stricken because Ms. Gold's prefiled rebuttal testimony made no mention of this problem.

Intermedia contends that the statement appropriately represents the substance of the prefiled rebuttal testimony. The prefiled testimony includes the following statement:

As I explained in my direct testimony, the MTA Amendment was executed for the sole purpose of making multiple tandem access available to Intermedia upon our election for the alleviation of traffic congestion. There were no provisions in our then existing interconnection agreement that addressed multiple tandem access. Because of this, it was necessary to establish applicable rates when this different type of access is elected by Intermedia. (TR 288)

Intermedia contends that the purposes of this testimony were: 1) to rebut BellSouth's claim as to the purpose of the Amendment; and 2) to point out that if an MTA arrangement was needed to alleviate congestion, it would have to be incorporated into an agreement specifying the terms and conditions of that arrangement. Intermedia further contends that, in her summary at the hearing, Ms. Gold explains that Intermedia came to understand these two points when congestion occurred in early 1998 at the Norcross tandem. That is, the "traffic congestion" in the prefiled testimony refers to the blockage at Norcross. For this reason,

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Intermedia contends that Ms. Gold was furthering the explanation of the circumstances that gave rise to the MTA Amendment.

The prefiled rebuttal testimony of Ms. Gold addresses the issue of who initiated the request for MTA and makes reference to congestion problems. However, the prefiled testimony does not assign any special significance to the Norcross tandem and in fact does not mention that location. More importantly, the prefiled testimony does not suggest that the blockage at Norcross resulted from an intentional act of BellSouth. In light of these facts, staff recommends that the portion of witness Gold's summary contained on lines 22-25 on page 282 of the hearing transcript, should be stricken.

ISSUE B: Should the Forward to Exhibit 20 be stricken from the record?

RECOMMENDATION: Portions of the Forward should be stricken because they exceed the scope granted at the hearing. Specifically, paragraphs 3 and 4 should remain and paragraphs 1-2, and 5-6 should be stricken. (**STERN, FORDHAM**)

STAFF ANALYSIS: As described in the Case Background, BellSouth claims it did not receive Exhibit 20 by the June 20, 2000, deadline. Intermedia filed the exhibit with the Commission on June 19, and claims to have delivered it to BellSouth on the same day. Intermedia was not aware of the problem until BellSouth stated, in its post-hearing brief, that it never received the exhibit. Intermedia immediately delivered the exhibit to BellSouth. BellSouth addressed the exhibit in a letter dated July 7, 2000, in which it asked that only the foreward of the Exhibit be stricken.

As specified at the hearing by the presiding officer, the purpose of Exhibit 20 was to clarify the tandems to which Intermedia was connected when the amendment was signed. (TR 299) The first two paragraphs of the Forward describe the events that lead up to the presiding officer's request for the late-filed exhibit. Paragraph three describes the types of diagrams and the spreadsheet included in the exhibit. Paragraph 4 provides a brief summary of the information conveyed in the diagrams and spreadsheet. The last two paragraphs address alleged problems with BellSouth's ability to adequately track Intermedia's trunking arrangements. Only paragraphs three and four fall within the scope of the exhibit and therefore the other paragraphs should be stricken.

ISSUE 1: What is the applicable rate(s) that Intermedia and BellSouth are obligated to use to compensate each other for transport and termination of local traffic in Florida pursuant to the terms of their Interconnection Agreement approved by the Commission?

PRIMARY RECOMMENDATION: The elemental rates should be applicable in those LATAs in which Intermedia has ordered and BellSouth has provisioned MTA. For all other circumstances, the composite rate of \$0.01056 per MOU should be applicable. (T. WATTS, M. STERN)

ALTERNATIVE RECOMMENDATION: The elemental rates should be applicable for transport and termination of all local traffic, in all LATAs, regardless of whether Intermedia has ordered and BellSouth has provisioned MTA. (SIMMONS)

POSITION OF THE PARTIES:

INTERMEDIA: Performance under the parties' Interconnection Agreement as amended has always required reciprocal compensation payments for the transport and termination of local traffic in Florida on the basis of the composite tandem switching rate of \$0.01056 per minute of use in Attachment B-1 of the Interconnection Agreement.

BELLSOUTH: Based on the clear, unequivocal language of paragraphs 3 and 4 of the Amendment and the conduct of the parties, the Commission should order reciprocal compensation to be paid between the parties at the elemental rates (with the requested rate amendment) in Attachment A to the Amendment.

STAFF ANALYSIS: The issue before the Commission is to determine the applicable rate(s) that Intermedia and BellSouth are obligated to use to compensate each other for transport and termination of local traffic in Florida pursuant to the terms of their Interconnection Agreement. The dispute stems from an amendment made to the Interconnection Agreement dated June 3, 1998, and approved by the Commission in Order No. PSC-98-1347-FOF-TP. The central issue in this dispute is whether the Amendment modifies the rates at which the parties pay reciprocal compensation for local traffic on a global basis or only in situations where Intermedia has elected multiple tandem access (MTA). Therefore, in order to resolve the dispute, the Commission must determine whether the amendment requires that elemental rates be used for reciprocal compensation between the parties for the transport and termination of all local traffic throughout Florida or just local traffic in

those LATAs (Local Access and Transport Areas) where Intermedia has elected MTA.

BellSouth witness Milner describes MTA as one form of interconnection available to Intermedia.

The MTA option provides for LATA wide transport and termination of a facility based Alternative Local Exchange Carrier's (ALEC's) originated IntraLATA toll traffic and local traffic. Such traffic is transported by BellSouth on behalf of the ALEC. The ALEC establishes a Point of Interconnection (POI) at a single BellSouth access tandem with BellSouth providing additional transport and routing through other BellSouth access tandems in that same LATA as required. The facility-based ALEC must establish Points of Interconnection at each BellSouth access tandem where the facility-based ALEC's NXX'S are "homed". If the facility-based ALEC does not have NXX's homed at a given BellSouth access tandem within a LATA and elects not to establish Points of Interconnection at such a BellSouth access tandem, the facility-based ALEC can instead order MTA in each BellSouth access tandem within the LATA where the ALEC does have a Point of Interconnection and BellSouth shall terminate traffic to end-users served through those BellSouth access tandems where the facility-based ALEC does not have a Point of Interconnection. (TR 332)

He further explains that MTA does not provide for handling switched access traffic that transits the BellSouth network to an Interexchange Carrier (IXC). Switched access traffic shall be delivered to and from IXCs based on the facility-based ALECs NPA/NXX code access tandem homing arrangement as specified by the national Local Exchange Routing Guide (LERG). For a facility-based ALEC's originated local traffic and intraLATA toll traffic that BellSouth transports but is destined for termination by a third party network (transit traffic), MTA is available if the use of multiple BellSouth access tandems is necessary to deliver the call to the third party network. (TR 333)

Intermedia witness Thomas describes MTA as a means by which congested traffic may be "alternate routed." He continues that MTA

is not, however, an efficient use of network facilities, since calls transported over MTA architectures are switched many more times than if they were to be transported over direct trunks to the called party's end office. (TR 101)

BellSouth witness Milner responds that with MTA, when an ALEC sends a call to a BellSouth Access Tandem that is destined for an end user customer served by an office subtending another BellSouth Access Tandem, only one additional switching function is required. (TR 334) He further argues that while MTA can be used to alternate route traffic, this is not the purpose for which MTA was designed. Instead, the witness contends that MTA allows an ALEC to minimize the points of interconnection between the ALEC's network and BellSouth's network. (TR 335)

As stated in the issue, the dispute in this complaint is whether the agreement calls for elemental rates or composite rates. Elemental rates break down reciprocal compensation into several components that reflect various network functions. BellSouth witness Hendrix provides a description of elemental rates:

Elemental rates at a very high level means that you pay for what you actually use. In other words, if you use local switching and you have, let's say, 10 miles of transport, then you would pay for 10 miles of transport. If you have more than one tandem switch, then you pay for each tandem switch as well as the transport between those tandems. (TR 183)

Composite rates, on the other hand, are made up of averages. (TR 183) He further explains:

. . . (W)e just came up with averages and came up with one single rate for a tandem routed arrangement versus the end office routed arrangement. (TR 183)

Neither Intermedia nor BellSouth believe the MTA Amendment (see EXH 3 attached) is ambiguous. Intermedia interprets the Amendment as a conditional contract. "If" Intermedia elects and BellSouth provides MTA, "then" the elemental rates in Attachment A will be used to bill and compensate each other for the transport and termination of all local traffic within the LATA in which MTA is provisioned. (TR 3-4) Intermedia maintains that all the paragraphs in the Amendment are interrelated and should be read collectively. In other words, the Amendment outlines the

conditions under which Intermedia can obtain MTA from BellSouth. Therefore, according to Intermedia witness Gold, the only circumstance under which the rates in Attachment A would apply is if Intermedia were to order, implement and use multi-tandem access in a given LATA. (TR 43) Intermedia witness Thomas adds that it is Intermedia's preference to directly trunk to access tandems, rather than using MTA, so that Intermedia is not dependent upon anyone else. (TR 95)

In contrast, BellSouth interprets the Amendment as a quid pro quo between the parties. In exchange for BellSouth agreeing to provide Intermedia multi-tandem access when requested, Intermedia would give BellSouth elemental rates for all local traffic in all of the BellSouth states. (TR 180,182)

The purpose of the June 3, 1998, Amendment was twofold. First, it provided for Intermedia Multiple Tandem Access ("MTA"). . . . Second, the Amendment incorporated new reciprocal compensation rates that the parties agreed to charge and to pay for the transport and termination of local traffic. (TR 173)

BellSouth witness Hendrix contends that the elemental rates are not tied to MTA. (TR 182) Instead, he states, the new reciprocal compensation rate structure and rates as set forth in the Amendment replaced the composite rates set forth in the original Interconnection Agreement. (TR 175) BellSouth witness Hendrix further clarifies that paragraphs three and four of the Amendment are to be interpreted independently because they are separately numbered paragraphs that were intended to accomplish a specific purpose -- namely, the establishment of cost-based reciprocal compensation rates. (TR 326) He further recalls:

In 1996, when Intermedia and BellSouth entered into their Interconnection Agreement, the standard rate structure for reciprocal compensation was a composite rate. Subsequent to that time, State Commissions began ordering elemental rates, which BellSouth then incorporated into the BellSouth Standard Interconnection Agreement. Thus, when Intermedia requested an Amendment to the Interconnection Agreement to incorporate Multiple Tandem Access, BellSouth took the opportunity to request that Intermedia amend the Interconnection Agreement to also

incorporate the new elemental rates and rate structure for reciprocal compensation for all local traffic established by the Florida Public Service Commission. (TR 174)

Witness Hendrix maintains that the parties agreed to the two separate provisions and as such, executed the Amendment. (TR 174) He further argues that Intermedia witness Gold did not join the company until three months after the execution of the MTA Amendment, while he was actively involved in the negotiation sessions and actually signed the Amendment. Therefore, witness Hendrix contends that witness Gold's testimony is not credible because she cannot speak to the intent of the parties first hand. (TR 185-186)

Intermedia witness Gold agrees that to the best of her knowledge Ms. Julia Strow, who is no longer with company, was the only person from Intermedia who participated in the negotiation process of the Amendment. (TR 30) Witness Gold adds, however, that Ms. Strow worked for her for 15 months and directly reported to her. Therefore, witness Gold states she is clearly aware of the circumstances and negotiations of the Amendment. (TR 32-33) Also, it is worth noting that, in a letter dated March 25, 1999, Ms. Julia Strow wrote to BellSouth expressing that she believed elemental rates only applied to MTA. (EXH 4)

While both parties contend that their respective interpretations of the MTA Amendment are supported by its plain and unequivocal language, staff believes there is some room for interpretation. The MTA Amendment does not clearly state the rates for reciprocal compensation, but instead refers to Attachment A as containing the applicable rates. There is a statement at the top of Attachment A to the Amendment which reads: "MTA shall be available according to the following rates for local usage:" In contrast, paragraph three of the Amendment specifies that "(t)he Parties agree to bill Local traffic at the elemental rates specified in Attachment A," with no mention of MTA. Paragraph three of the amendment thus, could be read to require elemental rates for all local traffic. In addition, paragraph four of the amendment states "(t)his amendment will result in reciprocal compensation being paid between the Parties based on the elemental rates specified in Attachment A." Each statement refers to the same set of rates.

After thoroughly reviewing the Amendment, staff believes that the June 3, 1998 MTA Amendment is ambiguous. Therefore, staff will

look to the intent of the parties as extrinsic evidence which may favor one interpretation over the other.

When the language of a contract is ambiguous or unclear, evidence extrinsic to the contract may be used to determine the intent of the parties at the time the contract was executed. See Gulf Cities Gas Corp. v. Tangelo Park Service Company, 253 So. 2d 744, 748 (Fla. 4th DCA 1971). The intent of the parties to a contract should govern interpretation of the contract. See Florida Power Corp. v. City of Tallahassee, 154 So. 2d 638, 643-4 (Fla. 1944); American Home Assurance Co. v. Larkin General Hospital, Ltd., 593 So. 2d 195, 197.

In determining the intent of the parties when they executed their contract, we may consider circumstances that existed at the time the contract was entered into, and the subsequent actions of the parties. In James v. Gulf Life Insur. Co., 66 So.2d 62, 63 (Fla. 1953) the Florida Supreme Court cited with favor Contracts, 12 Am.Jur. § 250, pages 791-93, as a general proposition concerning contract construction in pertinent part as follows:

Agreements must receive a reasonable interpretation, according to the intention of the parties at the time of executing them, if that intention can be ascertained from their language. . . . Where the language of an agreement is contradictory, obscure, or ambiguous, or where its meaning is doubtful, so that it is susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes a rational and probable agreement must be preferred. . . . An interpretation which is just to both parties will be preferred to one which is unjust.

When interpreting a contract, the circumstances in existence at the time the contract was made should be considered in ascertaining the parties' intentions. Triple E Development Co. v. Floridagold Citrus Corp., 51 So.2d 435, 438, rhq. den. (Fla. 1951). What a party did or omitted to do after the contract was made may be properly considered. Vans Agnew v. Fort Myers Drainage Dist., 69 F.2d 244, 246 (Fla. 5CA 1934), rhq. den. 292 US 643, 78 L. Ed. 1494, 54 S. Ct. 776. Courts may look to the subsequent action of

the parties to determine the interpretation that they themselves place on the contractual language. Brown v. Financial Service Corp., Intl., 489 F.2d 144, 151 (5th Cir.) citing LaLow v. Codomo, 101 So.2d 390 (Fla. 1958). Although recitals and titles are not operative components of a contract, they may be used to ascertain intent when the operative components are ambiguous. See Johnson v. Johnson, 725 So. 2d 1209, 1213 (Fla. 3d DCA 1999). Ambiguous terms in a contract should be construed against the drafter. Vans Agnew v. Fort Myers Drainage Dist., 69 F.2d 244, 246 (Fla. 5CA 1934); Sol Walker & Co. v. Seaboard Coast Line Railroad Co., 362 So. 2d 45, 49; MacIntyre v. Green's Pool Service, 347 So. 2d 1081, 1084; City of Homestead v. Johnson, No. SC91820, ___ So.2d ___, 25 Fla. Law W. § 206 (Mar. 16, 2000).

In its brief, BellSouth argues that titles and recitals in a contract are not operative clauses and should therefore not be considered when interpreting the contract. See Johnson v. Johnson, 725 So. 2d 1209, 1212 (Fla. 3d DCA 1999). BellSouth claims that the language at the top of Attachment A is a title or recital and should not be considered when interpreting the Amendment. Staff contends that the language at the top of Attachment A provides instruction on how to apply the elemental rates and is as operative a part of the Amendment as the rates.

Both parties, Intermedia and BellSouth, have conflicting testimony of the circumstances that led to the execution of the MTA Amendment. According to Intermedia witness Thomas, in early 1998, BellSouth cut off terminating local traffic from Intermedia end users destined for BellSouth end users near Atlanta, Georgia, that subtended their Norcross tandem. He explained that since Intermedia did not have an outgoing trunk group in place to the Norcross tandem, BellSouth informed Mr. Craig Shandley, Intermedia's engineer manager at that time, that there was nothing that could be done by BellSouth to alleviate the problem outside of Intermedia requesting an MTA arrangement between the Buckhead and Norcross tandem and making the necessary amendment to their Agreement. (TR 129) Intermedia witness Thomas further explained that in response to BellSouth's proposed resolution, Intermedia requested the MTA Amendment. He also explained that Intermedia ordered an outgoing trunk from Intermedia to Norcross so that Intermedia could be directly trunked to the Norcross tandem. (TR 130) According to witness Thomas, the plan was to go with whatever happened first in order to satisfy their customers. In the interim, however, Intermedia resolved the problem by redirecting the traffic that was destined to the end offices off of the Norcross tandem to the IXC or long distance side of the BellSouth

switch at an access or long distance rate in order to take care of their customers. (TR 130)

According to BellSouth witness Hendrix, Intermedia initially came to BellSouth wanting MTA. He stated that the reason Intermedia wanted MTA was to reduce trunking costs. Witness Hendrix alleges that Intermedia foresaw MTA as a vehicle that would give them lower tandem and trunking costs since Sprint won on this very same issue in Georgia. (TR 182)

BellSouth witness Scollard argues that at no time has BellSouth's Carrier Access Billing System (CABS) had the capability to base billing on differing rate structures to the same ALEC in the same state based on the manner in which individual calls are routed through the network. He further explains that, in the state of Florida, CABS could either bill an ALEC reciprocal compensation using a composite rate structure or using an elemental rate structure, but not both. (TR 259,262) Therefore, BellSouth's intent, as far as the MTA Amendment was concerned, was for only one rate structure to be in effect. (TR 269) Hence, MTA and elemental rates would not be interrelated and elemental rates would apply to reciprocal compensation for all local traffic. (TR 259)

In regard to the elemental rates established by the Florida Public Service Commission, Intermedia witness Gold responds:

In the first place, in Order No. PSC-96-1579-FOF-TP ("AT&T" Order), the Commission set forth its rulings in the arbitration proceedings of AT&T and MCIMetro against BellSouth. Those rulings without question had the limited effect of resolving the issues in dispute in AT&T's and MCIMetro's negotiations of their interconnection agreements with BellSouth. The rulings are in no way generic, as BellSouth now appears to suggest. . . There is nothing to vindicate importing any provisions of the AT&T Order, on a wholesale or a piece part basis, to the Intermedia and BellSouth interconnection agreement. (TR 24)

Witness Gold further states that the AT&T Order established rates for a number of other elements and resolved a number of other issues; however, BellSouth gives no reason why it makes sense to import only the switching and transport rates from the Order. (TR 25)

Intermedia witness Gold recalls that even before the execution of the Amendment, BellSouth withheld payments against Intermedia's invoices for local traffic compensation, claiming that compensation for traffic terminated to Internet service providers (ISPs) was not eligible for reciprocal compensation under the Interconnection Agreement. To resolve the dispute, Intermedia filed a complaint against BellSouth on April 6, 1998, two months prior to the Amendment, for Breach of its Interconnection Agreement. (TR 21) Intermedia witness Gold also testifies that at the time of the MTA Amendment, BellSouth owed Intermedia in excess of \$7.5 million, \$7 million of it in Florida. She contends that Intermedia would never have agreed to a two-thirds reduction in reciprocal compensation rates, going forward, without implementing the MTA trunking option and without settlement of this outstanding balance. (TR 17,284). Subsequently, on September 15, 1998, in Order No. PSC 98-1216-FOF-TP, the Commission ruled that BellSouth was required to pay for traffic originating from a BellSouth end user to ISPs on Intermedia's network in the same local calling area.

Intermedia witness Thomas points out that prior to the Commission determining that BellSouth must pay Intermedia for reciprocal compensation and for several months following the Amendment, BellSouth paid Intermedia reciprocal compensation for local traffic, except for traffic terminated to ISPs, based on the composite rate established in the interconnection agreement. (TR 92, 105) After the Commission ruling on ISP traffic, BellSouth sent Intermedia a check on July 2, 1999 for approximately \$12.7 million to satisfy its debt through April 1999 to Intermedia, now using the elemental rates for its calculations. According to Intermedia, whose calculations reflected the composite rates, at that time BellSouth owed Intermedia \$37.7 million. (TR 22)

Intermedia further notes that in Georgia, under a federal court order to make deposits into the court's registry of the amounts invoiced by Intermedia for ISP traffic, BellSouth made deposits after the execution of the Amendment based on the composite rates. (EXH 15) This is inconsistent with BellSouth's claim that the reduced elemental rates were in effect starting June 1998 for all local traffic in all other states. (TR 180)

It is also worth noting that in its filing of the Amendment in Georgia and North Carolina, BellSouth characterized the Amendment as a single purpose provision, providing only for MTA. (EXH 13, 14) The transmittal letter for Georgia reads:

This Amendment reflects that BellSouth will,
upon request, provide and Intermedia will

accept and pay for, Multiple Tandem Access, otherwise referred to as Single Point of Interconnection. . .All other provisions of the Interconnection Agreement, dated July 1, 1996, shall remain in full force and effect. (EXH 14)

The transmittal letter for North Carolina reads:

On October 10, 1996, the Commission approved and interconnection agreement between BellSouth and ICI. I enclose an amendment to that agreement that provides for Multiple Tandem Access. (EXH 13)

BellSouth also makes arguments regarding billing inconsistencies. BellSouth alleges that Intermedia never came to BellSouth after the Amendment questioning why BellSouth was billing Intermedia the elemental rates. BellSouth claims that as of June 1998, they billed Intermedia using the elemental rates, making the invoices to Intermedia 20 to 30% less than they had been prior to the Amendment. (TR 57)

After the execution of the Amendment there was some correspondence between the parties regarding rates and billing. On June 4, 1998, one day after the Amendment was made, BellSouth sent Intermedia a letter responding to an inquiry about a possible error in an end office switching rate. (TR 51; EXH 4) BellSouth noted that the letter made it apparent that rates had, at least, been discussed during the negotiations of the Amendment. Intermedia witness Heather Gold agreed, but made clear that the letter did not say or contemplate that MTA was ever implemented. (TR 51) Intermedia never responded to the letter.

On March 3, 1999, BellSouth sent Intermedia another letter noticing its mistake in the end office switching rate and indicating to Intermedia that the correct rate should be \$0.002. BellSouth also indicated in the letter that it would be back billing this corrected rate to June 3, 1998, since that rate should have been in effect at the same time as the MTA Amendment. (TR 53; EXH 4)

In a letter dated March 25, 1999, Intermedia responded to BellSouth's March 3rd letter, stating that while Intermedia was open to the rate correction, Intermedia was confused by BellSouth's statement about back billing Intermedia's invoices using the

elemental rates since Intermedia had not implemented MTA. (TR 54,56; EXH 4)

On April 2, 1999, BellSouth explained to Intermedia, in a letter, that pursuant to the Amendment, the elemental rates in the Attachment apply to all local traffic, regardless of whether or not MTA had been provided. (TR 55; EXH 4) Intermedia filed this complaint with the Commission on October 9, 1999. (TR 56)

PRIMARY RECOMMENDATION:

A recital is a "formal statement or setting forth of some matter of fact, in any deed or writing, in order to explain the reasons upon which the transaction is founded." Black's Law Dictionary (West Publishing Co., 4th ed.). Recitals usually appear at the beginning of a contract and start with the word 'whereas.' See id.; Johnson v. Johnson, 725 So. 2d at 1212. The language in Attachment A does not provide the reasons for which parties agreed to the Amendment. Rather, the language provides instruction on how to apply the elemental rates. Note that the statement "Multiple Tandem access shall be available according to the following rates for local usage:" is concluded with a colon and followed by two numbered subsections. Subsection 1. explains how local usage will be determined, information which is not provided elsewhere in the Amendment. The language in Attachment A does not assume the form or provide the function of a recital and should not be construed as a recital.

For similar reasons, the language in Attachment A is not a title. The language conveys much more detailed information than a title. Furthermore, the language is not capitalized or punctuated like a title.

Staff maintains that the language in Attachment A is best characterized as instruction on how to calculate rates and is therefore operative. Because it is operative, its meaning must be accounted for when interpreting the Amendment.

Primary staff believes that both parties had an incentive to enter into the MTA Amendment based on their testimony. In fact, BellSouth witness Hendrix admits that BellSouth had a motive and claims that the parties were able to come to terms and include in the Agreement the elemental rates in exchange for MTA. (TR 181) BellSouth witness Hendrix testified that, by signing the MTA Amendment, Intermedia was knowingly agreeing to elemental rates for reciprocal compensation for all local traffic on a state-by-state basis for all nine states. (TR 226) Similarly, Intermedia admits

that their advantage to having MTA would be significant transport and trunking cost savings. (TR 104)

Primary staff does not believe Intermedia knowingly agreed to elemental rates for reciprocal compensation for all local traffic. Hypothetically, in the event that Intermedia did initially request the MTA Amendment according to the terms described by BellSouth witness Hendrix, primary staff does not believe that Intermedia would have bothered to directly trunk to all of BellSouth's access tandems in Florida in all the areas in which it provided service prior to the signing of the Amendment. (TR 93; EXH 20) Intermedia globally reducing their revenue by agreeing to elemental rates and, at the same time, increasing their costs by directly trunking to each of BellSouth's access tandems not only defeats the purpose of having MTA, but also certainly does not seem cost efficient. In other words, if Intermedia requested the MTA arrangement, but never ordered MTA, then BellSouth would be getting something, namely elemental rates, for nothing. Primary staff does not believe that Intermedia would have agreed to an Amendment that would reduce its revenues by approximately 60 percent in exchange for the mere ability to order MTA, especially in light of the parties' pending litigation regarding reciprocal compensation for ISP traffic. It is simply not a reasonable interpretation of the Agreement based upon the record.

BellSouth states that this Commission established new elemental rates for reciprocal compensation in Order No. PSC-96-1579-FOF-TP as further proof of its interpretation of the Amendment. (TR 174) Primary staff is not persuaded by that statement since the rulings in that Order were not generic, and therefore only apply to the parties involved in that particular docket. Intermedia was not a party to that case.

Primary staff is also not persuaded by BellSouth's argument that CABS is presently incapable of billing based on differing rate structures, because the system can, at any time, be revised in order to provide that capability. (TR 264) Furthermore, the record shows that after the execution of the MTA Amendment, BellSouth made payments to Intermedia for reciprocal compensation in Georgia, based on composite rates. (EXH 15)

BellSouth pointed out, and Intermedia admitted, that in their current arbitration, Intermedia is agreeing to elemental rates that are identical to those in Attachment A for all local traffic on a statewide basis. (TR 314) However, primary staff believes the extrinsic evidence that surrounded the MTA Amendment at the time it was executed carries more weight than the parties' current

negotiations for a new contract. In interpreting ambiguous language in a contract, one must determine the intent of the parties at the time they entered into the contract, not some later intent. Therefore, even in light of their current negotiations, primary staff does not believe it was Intermedia's understanding that the MTA Amendment consisted of two separate provisions, one of which would apply elemental rates to all local traffic across all nine states given the circumstances surrounding the MTA Amendment at that time. Furthermore, in filing the Amendment for approval with the North Carolina and Georgia Commissions, BellSouth described the Amendment to the Agreement in its transmittal statements as solely providing MTA -- not as reducing reciprocal compensation rates which BellSouth witness Hendrix testifies was the second purpose of the Amendment. (TR 173; EXH 13,14)

Primary staff is not persuaded by BellSouth's interpretation of the Amendment. The record indicates that before, during and after the execution of the MTA Amendment, Intermedia was directly trunked to every BellSouth access tandem in the local calling areas where Intermedia provided service in Florida. Therefore, it is primary staff's belief that MTA offered no value to Intermedia during that time other than the security of having such an arrangement in place if Intermedia ever needed it. Primary staff believes that the circumstances surrounding the execution of the MTA Amendment are more consistent with Intermedia's interpretation of the Amendment: that is, the Amendment modifies the rates at which the parties pay reciprocal compensation for local traffic only in LATAs where Intermedia has elected MTA. Furthermore, if "[t]he parties agree to bill local traffic at the elemental rates specified in Attachment A" was meant for all local traffic, then why was it necessary to preface Attachment A with "MTA shall be available according to the following rates for local usage." Therefore, primary staff recommends that the applicable rates that Intermedia and BellSouth are obligated to use to compensate each other for transport and termination of local traffic in Florida should be both elemental and composite rates, depending upon MTA deployment. Primary staff recommends that the elemental rates be applicable in those LATAs in which Intermedia has ordered and BellSouth has provisioned MTA. For all other circumstances, the composite rate of \$0.01056 per MOU should be applicable.

ALTERNATIVE RECOMMENDATION:

While witness Thomas testified that Intermedia was direct trunked to all applicable tandems in Florida prior to the signing of the amendment, this was not the case in Georgia. (TR 93,130) Indeed, witness Thomas testified that Intermedia requested an MTA

amendment to the Agreement which was regional, while also investigating other options to allow its customers to call exchanges subtending the Norcross, Georgia tandem. (TR 129,130). In addition, Intermedia witness Thomas and BellSouth witness Milner agree that MTA may be used to alternate route traffic. (TR 101,335) Thus, even with direct trunking to all applicable tandems, Intermedia might still have had an interest in MTA. Consequently, alternative staff believes that Intermedia could have knowingly entered into an amendment which required elemental rates for all local traffic, even though this constituted a significant reduction in reciprocal compensation revenue.

Alternative staff also notes that BellSouth witness Hendrix participated in negotiations and signed the agreement, while the Intermedia witnesses were not involved in the process. As a result, staff believes that the testimony of witness Hendrix must be given more weight, particularly since his interpretation could be valid based on the above mentioned circumstances in Georgia at the time and the possible use of MTA for alternate routing.

In addition, alternative staff believes that the language of the agreement, while somewhat ambiguous, is more consistent with BellSouth's interpretation. If the statement in the Amendment which reads "(t)he Parties agree to bill Local traffic at the elemental rates specified in Attachment A," was intended to apply only in the MTA context, this dependency should have been clearly stated; it was not. The same is true for the statement in the Amendment which reads "(t)his amendment will result in reciprocal compensation being paid between the Parties based on the elemental rates specified in Attachment A." Alternative staff believes that a more reasonable interpretation is that the statement was designed to show that the rates had generic applicability to all local traffic, not merely for local traffic in those LATAs where MTA was requested and provided.

Finally, this conclusion is consistent with BellSouth witness Scollard's testimony regarding CABS. The witness alleges that CABS does not have the capability to bill based on the manner in which calls are routed. (TR 259,262) Alternative staff believes it would be awkward to bill local traffic in one LATA differently from local traffic in another LATA, since this would necessitate comparing originating and terminating telephone numbers (area code and prefix) to determine the LATA. In addition, local traffic can be interLATA, which raises the question of which rate(s) would apply if MTA has been provided in one LATA and not the other.

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DATE: AUGUST 17, 2000

Based on the above, alternative staff recommends that elemental rates should be applicable for transport and termination of all local traffic, in all LATAs, regardless of whether Intermedia had ordered and BellSouth has provisioned MTA.

DOCKET NO. 991534-TP
DATE: AUGUST 17, 2000

ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes, if the Commission approves staff's recommendation in Issues A, B and 1, this docket should be closed.
(STERN, FORDHAM)

STAFF ANALYSIS: If the Commission approves staff's recommendation in Issues A, B and 1, this docket should be closed.

**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.

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.

James F. Geiger
Signature

James F. Geiger
Name
SENIOR VICE PRESIDENT
SALES AND MARKETING
Title

6/3/98
Date

BellSouth Telecommunications, Inc.

Jerry D. Hendrix
Signature

Jerry D. Hendrix
Name
Director-Interconnection Services
Title

6/3/98
Date

ATTACHMENT A

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

1. 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.
2. 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.