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DOCKET 000731-TP - Petition by AT&T Communications of the Southern States, Inc. d/b/a AT&T for arbitration of certain terms and conditions of a proposed agreement with BellSouth Communications, Inc. pursuant to 47 U.S.C. Section 252.

WITNESS: DIRECT TESTIMONY OF GREGORY D. FOGLEMAN, Appearing on Behalf of Florida Public Service Commission

DATE FILED: November 15, 2000

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FPSC-RECORDS/REPORTING

DIRECT TESTIMONY OF GREGORY D. FOGLEMAN

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Q. Please state your name, address, and position with the Florida Public Service Commission.

A. My name is Gregory D. Fogleman. My business address is 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399. I am employed as an Economic Analyst at the Florida Public Service Commission (FPSC) in the Division of Policy Analysis and Intergovernmental Liaison. My duties include developing positions on selected intergovernmental telecommunications issues, preparing comments on behalf of the FPSC in selected federal proceedings, and monitoring national level activities at the Federal Communications Commission (FCC), Congress, federal courts and National Association of Regulatory Utility Commissioners (NARUC). I also serve as a staff member on the Federal-State Universal Service Joint Board, Federal-State Joint Conference on Advanced Services, and as Second Vice Chair of Administration at the NARUC Staff Subcommittee on Telecommunications.

Q. Please describe your background and experience.

A. I graduated from the University of Central Florida (UCF) in 1992 with a Bachelor of Arts Degree in Business Administration, majoring in economics and minoring in computer science. In 1995, I completed the Master of Arts in Applied Economics from UCF. During this time, I also completed an internship with the Florida Department of

1 Commerce, and was later employed by Lakeland Electric and  
2 Water from January 1995 to May 1996. My responsibilities  
3 there included conducting forecasts for service area  
4 population, short-term fuel costs, and water and energy  
5 demand. I was employed by the FPSC in July 1996 in the  
6 Division of Communications as a Regulatory Analyst III. My  
7 responsibilities included preparing and presenting  
8 recommendations concerning telecommunications issues,  
9 researching data regarding the telecommunications market for  
10 the 1996 Florida competition report, and calculating  
11 statewide average rates for taxation purposes. I was  
12 promoted to Regulatory Analyst IV in April 1998. Four  
13 months later, I was promoted to my current classification as  
14 an Economic Analyst. In July 1999, I was transferred to the  
15 Division of Policy Analysis and Intergovernmental Liaison  
16 where I performed the functions previously stated.

17 Q. Have you previously presented testimony before this  
18 Commission?

19 A. No. However, I have presented recommendations at this  
20 Commission's agenda conferences, and briefed Commissioners  
21 and provided draft comments on various telecommunications  
22 issues at Internal Affairs.

23 Q. What is the purpose of your testimony?

24 A. The purpose of my testimony is to discuss the treatment of  
25 Internet Service Provider-bound (ISP-bound) traffic for

1 | purposes of reciprocal compensation. In addition, I have  
2 | summarized this Commission's and the FCC's decisions  
3 | relating to reciprocal compensation.

4 | Q. What is "Reciprocal Compensation"?

5 | A. Section 251(b)(5) of the Telecommunications Act of 1996  
6 | (TA'96 or the Act) obligates all Local Exchange Companies  
7 | (LECs) to establish reciprocal compensation arrangements  
8 | whereby LECs compensate each other for the transport and  
9 | termination of "telecommunications" (i.e., local calls).

10 | Q. What is the "Reciprocal Compensation" issue specific to  
11 | ISP-bound traffic?

12 | A. When an end user of one LEC (LEC #1) calls an ISP within the  
13 | their local calling area, that is an end user of another LEC  
14 | (LEC #2), there is an issue of how the first LEC (LEC #1)  
15 | should compensate the second LEC (LEC #2) for the transport  
16 | and termination of the call to the ISP.

17 | Q. What is your understanding of the purpose of Reciprocal  
18 | Compensation?

19 | A. The purpose of reciprocal compensation is to compensate one  
20 | LEC for the transport and termination of a call from another  
21 | LEC.

22 | Q. How has the FPSC addressed Reciprocal Compensation for ISP  
23 | traffic in the past?

24 | A. The FPSC decided in the MediaOne/BellSouth arbitration  
25 | (Order No. PSC-99-2009-FOF-TP, issued Oct. 14, 1999 in

1 Docket No. 990149-TP), the ICG Telecom/BellSouth arbitration  
2 (Order No. PSC-00-0128-FOF-TP, issued January 14, 2000 in  
3 Docket No. 990691-TP), the ITC^DeltaCom/BellSouth  
4 arbitration (Order No. PSC-00-0537-FOF-TP, issued March 15,  
5 2000 in Docket No. 990750-TP), and the Intermedia/BellSouth  
6 arbitration (Order No. PSC-00-1519-FOF-TP, issued August 22,  
7 2000 in Docket No. 991854-TP) that parties should continue  
8 to operate under the terms of their current respective  
9 agreements regarding ISP-bound traffic until the FCC made a  
10 final ruling regarding the nature of ISP-bound traffic.

11 Q. Has the FPSC issued an order that specifies the  
12 jurisdictional nature of ISP traffic?

13 A. The FPSC has not issued an order stating that ISP-bound  
14 traffic is specifically local. However, in the most recent  
15 arbitration decision concerning the issue, Global  
16 NAPs/BellSouth, Order No. PSC-00-1680-FOF-TP issued  
17 September 19, 2000 in Docket No. 991220-TP, the FPSC decided  
18 that ISP-bound traffic should be treated as local traffic  
19 for the purposes of reciprocal compensation. The FPSC  
20 stated, "[W]e emphasize that in rendering this decision, we  
21 stop short of determining that ISP-bound traffic is, in fact  
22 local traffic. Herein we find only that this traffic shall  
23 be treated like local traffic for purposes of compensation."  
24 Order No. PSC-1680-FOF-TP at page 14.

25 Q. Has the FPSC made any decisions regarding Reciprocal

1 Compensation that treat ISP-bound traffic as interstate?

2 A. No.

3 Q. Has the FPSC filed comments with the FCC regarding the  
4 jurisdictional nature of ISP-bound traffic?

5 A. Yes. The FPSC filed comments in FCC Docket No. 99-69,  
6 Inter-Carrier Compensation for ISP-Bound Traffic on April 9,  
7 1999, and again on July 21, 2000.

8 Q. In these comments, what did the FPSC specify regarding the  
9 jurisdictional nature of ISP-bound traffic?

10 A. The FPSC endorsed what is known as the "two-call theory."  
11 This divides the call into two components: an intrastate  
12 telecommunications service, provided by one or more LECs,  
13 and an interstate information service, provided by the ISP.

14 Q. What decision has the FCC made regarding reciprocal  
15 compensation and the jurisdiction of this traffic?

16 A. In the FCC's Declaratory Ruling, FCC 99-38, in CC Docket No.  
17 96-98, released on February 26, 1999, the FCC declared that  
18 ISP-bound traffic is jurisdictionally mixed and appears to  
19 be largely interstate in nature. FCC 99-38 at paragraph 1  
20 and 19. Their decision however, preserved the rule that  
21 exempts the Internet and other information services from  
22 interstate access charges. FCC 99-38 at paragraph 34. The  
23 FCC also found that its conclusion regarding the nature of  
24 ISP-bound traffic "does not in itself determine whether  
25 reciprocal compensation is due in any particular instance."

1 | FCC 99-38 at paragraph 1.

2 | Q. Did the FCC make any decision relating to existing  
3 | interconnection agreements?

4 | A. The FCC concluded that, in the absence of federal rules  
5 | regarding the appropriate intercarrier compensation for ISP-  
6 | bound traffic, carriers are bound by their existing  
7 | interconnection agreements, as interpreted by state  
8 | commissions, and thus are subject to reciprocal compensation  
9 | obligations to the extent provided by such agreements or as  
10 | interpreted and enforced by state commissions. FCC 99-38 at  
11 | paragraph 1 and 22.

12 | Q. What was the theoretical basis of the FCC's decision that  
13 | ISP-bound calls are primarily interstate in nature?

14 | A. The FCC used an "end-to-end" analysis of these calls.  
15 | Specifically, the FCC concluded that ISP-bound calls do not  
16 | terminate at the ISP's local server, but instead continue on  
17 | to one or more Internet websites that are often located in  
18 | another state. FCC 99-38 at paragraphs 10-19.

19 | Q. Does the FCC have rules relating to Inter-carrier  
20 | Compensation for ISP-bound traffic?

21 | A. No. The FCC acknowledged in its Declaratory Ruling in CC  
22 | Docket No. 96-98 (FCC 99-38, par. 1, 9, 19, 21-22), released  
23 | on February 26, 1999, that there are no federal rules  
24 | establishing an inter-carrier compensation mechanism for  
25 | such traffic or governing what amounts, if any, should be

1 |       paid.

2 | Q.    What action has the FCC taken to establish rules?

3 | A.    As part of the FCC's February 26, 1999, Declaratory Ruling  
4 |       in CC Docket No. 96-98, the FCC issued a Notice of Proposed  
5 |       Rulemaking to develop an adequate record upon which to adopt  
6 |       a rule regarding inter-carrier compensation for ISP-bound  
7 |       traffic.    FCC 99-38 at paragraph 28.    The FCC has not  
8 |       currently adopted a rule regarding this issue.

9 | Q.    Did the FCC indicate what should be done until it was able  
10 |       to adopt rules?

11 | A.    Yes.    The FCC specifically stated in paragraph 28 of the  
12 |       Declaratory Ruling that "until adoption of a final rule,  
13 |       state commissions will continue to determine whether  
14 |       reciprocal compensation is due for this traffic."

15 | Q.    Was the FCC's declaratory ruling challenged in court?

16 | A.    Yes.    As a result of the challenge, on March 24, 2000, the  
17 |       United States Court of Appeals for the D.C. Circuit in Bell  
18 |       Atlantic Telephone Companies v. Federal Communications  
19 |       Commission, 2000 U.S. App. LEXIS 4685 (D.C. Cir. March 24,  
20 |       2000) vacated certain provisions of the FCC's Declaratory  
21 |       Ruling, and remanded the matter to the FCC.

22 | Q.    What were the findings of the court?

23 | A.    The Court ruled that the FCC had not adequately justified  
24 |       the application of its jurisdictional analysis in  
25 |       determining whether ISP-bound traffic is subject to the



1 reciprocal compensation. The Court stated the following:  
2 Because the Commission has not provided a  
3 satisfactory explanation why LECs that  
4 terminate calls to ISPs are not properly  
5 seen as "terminating ... local  
6 telecommunications traffic," and why such  
7 traffic is "exchange access" rather than  
8 "telephone exchange service," we vacate the  
9 ruling and remand the case to the  
10 Commission. Id. at 26.

11 However, the Court further noted that:

12 We do not reach the objections of the  
13 incumbent LECs--that § 251(b)(5) preempts  
14 state commission authority to compel  
15 payments to the competitor LECs; at present  
16 we have no adequately explained  
17 classification of these communications, and  
18 in the interim our vacatur of the  
19 Commission's ruling leaves the incumbents  
20 free to seek relief from state-authorized  
21 compensation that they believe to be  
22 wrongfully imposed. Id. at 26-27.

23 Q. Does this conclude your testimony?

24 A. Yes it does.

25

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by AT&T  
Communications of the Southern  
States, Inc. d/b/a AT&T for  
arbitration of certain terms and  
conditions of a proposed  
agreement with BellSouth  
Communications, Inc. pursuant to  
47 U.S.C. Section 252.


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Staff's  
Direct Testimony of Gregory D. Fogleman, have been served VIA-U.S.  
MAIL, this 15th day of November, 2000, to the following:

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