

JAMES MEZA III  
Attorney

BellSouth Telecommunications, Inc.  
150 South Monroe Street  
Room 400  
Tallahassee, Florida 32301  
(305) 347-5561

June 1, 2001

Mrs. Blanca S. Bayó  
Director, Division of Records and Reporting  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

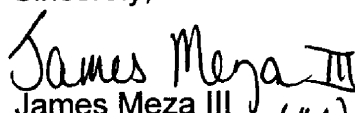
**Re: Docket No. 001810-TP (TCG/Teleport Arbitration)**

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Opposition to TCG's Motion for Partial Summary Final Order, which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

  
James Meza III (KA)

cc: All Parties of Record  
Marshall M. Criser III  
R. Douglas Lackey  
Nancy B. White

DOCUMENT NUMBER-DATE

06917 JUN-16

FPSC RECORDS/REPORTING

**CERTIFICATE OF SERVICE**  
**Docket No. 001810-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via

(\*) Facsimile and U. S. Mail this 1st day of June, 2001 to the following:

Patricia Christensen (\*)  
Staff Counsel  
Florida Public Service  
Commission  
Division of Legal Services  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

Virginia Tate, Esq.  
AT&T Communications of the Southern  
States, Inc.  
1200 Peachtree Street, N.W.  
Suite 8100  
Atlanta, Georgia 30309

Kenneth Hoffman  
Martin P. McDonnell  
Rutledge Law Firm  
P.O. Box 551  
Tallahassee, FL 32302  
Tel. No. (850) 681-6788  
Fax. No. (850) 681-6515  
Represents TCG

  
James Meza III (CA)

Teleport Communications Group Inc.  
Michael McRae, Esq.  
2 Lafayette Centre  
1133 Twenty-First Street, N.W.  
#400  
Washington, D.C. 20036  
Tel. No. (202) 739-0030  
Fax. No. (202) 739-0044  
Represented by Rutledge Firm

Marsha Rule, Esq.  
AT&T Communications of the Southern  
States, Inc.  
101 North Monroe Street  
Suite 700  
Tallahassee, FL 32301

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Complaint of TCG South Florida and )  
Teleport Communications Group for )  
Enforcement of Interconnection Agreement )  
with BellSouth Telecommunications, Inc. )  
\_\_\_\_\_ )

Docket No. 001810-TP

Filed: June 1, 2001

**BELLSOUTH TELECOMMUNICATION INC.'S RESPONSE IN OPPOSITION TO  
TCG SOUTH FLORIDA'S AND TELEPORT COMMUNICATIONS GROUP'S  
MOTION FOR PARTIAL SUMMARY FINAL ORDER**

BellSouth Telecommunications, Inc. ("BellSouth") respectfully requests that the Florida Public Service Commission ("Commission") deny the Motion for Partial Summary Final Order filed by TCG South Florida and Teleport Communications Group (jointly "TCG") on May 25, 2001. TCG seeks summary disposition solely on the issue of "whether BellSouth is required to pay TCG reciprocal compensation for TCG's termination of IPS-bound [sic] traffic under the terms and conditions of the Second TCG-BellSouth Agreement . . . ." Motion at 1.

As the basis for its Motion, TCG suggests that a prior Order<sup>1</sup> of the Commission, interpreting a previous Interconnection Agreement between BellSouth and TCG, is binding on BellSouth and the Commission, thus resulting in an absence of any genuine issues of material fact for the Commission to consider. Further, TCG contends that the prior *TCG Order* collaterally estops BellSouth from defending the allegations raised by TCG. As established below, TCG is wrong on both counts. First, the facts, circumstances, and governing legal principles applicable to TCG's *adoption* of the agreement at issue in this proceeding are vastly different from the facts, circumstances and governing legal principles surrounding the

---

<sup>1</sup> Order No. PSC-98-1216-FOF-TP dated September 15, 1998 ("*Prior TCG Order*").

*negotiation* of the previous agreement. Second, the FCC recently issued an Order<sup>2</sup> addressing the treatment and classification of ISP-bound traffic that directly contradicts TCG's theory of recovery in this proceeding. Third, questions of fact exist because the Commission has indicated that, when interpreting provisions of adopted agreements (such as the agreement at issue in this proceeding), the Commission will look at the intent of the parties to the original agreement, one of which is not even a party to this proceeding.<sup>3</sup> Finally, collateral estoppel is inapplicable to the instance case. TCG's Motion should therefore be denied and the Commission should proceed with the evidentiary hearing currently scheduled for June 22, 2001.

### DISCUSSION

#### **I. The *Prior TCG Order* Has No Effect on the Interpretation of the Second TCG Agreement.**

This dispute primarily revolves around whether TCG and BellSouth intended to pay each other reciprocal compensation for the transport and termination of ISP-bound traffic under the terms of an agreement between TCG and BellSouth effective from July 15, 1999 to June 14, 2000 ("Second TCG Agreement"). TCG and BellSouth previously entered into an agreement that expired on July 14, 1999 ("First TCG Agreement"). During the term of the First TCG agreement, the Commission issued the *Prior TCG Order*, wherein it interpreted the First TCG

---

<sup>2</sup> Order on Remand and Report and Order released April 27, 2001 (FCC Order No. 01-131) ("*FCC Remand Order*").

<sup>3</sup> See PSC Docket No. 991267-TP, Final Order on Complaint (Order No. PSC-00-0802-FOF-TP) dated April 24, 2000 at 7 ("*Global NAPS Order*"); Final Order Granting Extension of Time and Denying Motion for Reconsideration (Order No. PSC-00-1511-FOF-TP) dated August 21, 2000 at 11 ("*Global NAPS Reconsideration Order*").

agreement to require BellSouth to pay TCG reciprocal compensation for ISP-bound traffic under the terms of that specific agreement.

At the expiration of the First TCG Agreement, TCG opted into an Interconnection Agreement between AT&T and BellSouth (“AT&T/BellSouth Agreement), which became the Second TCG Agreement. TCG now claims that, because the First and Second TCG Agreements contained similar definitions of “Local Traffic,” there is no question of material fact and TCG is entitled to a partial final order as a matter of law. TCG is incorrect for the following reasons.

First, it is well settled that the “laws in force at the time of the making of a contract enter into and form a part of the contract as if they were expressly incorporated into it.” *Florida Beverage Corp. v. Division of Alcoholic Beverages and Tobacco, Dept. of Business Reg.*, 503 So. 2d 396, 398 (Fla. DCA 1987). At the time that TCG and BellSouth entered into the Second TCG Agreement, July 1999, the FCC’s February 26, 1999 Declaratory Ruling was in effect and was the governing authority for the treatment of ISP-bound traffic. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 14 FCC Rcd 3689, (FCC Feb. 26, 1999) (*Declaratory Ruling*). In the *Declaratory Ruling*, the FCC held that ISP-bound traffic was not subject to reciprocal compensation because it was largely interstate. *Declaratory Ruling* at ¶ 12 (ISP-bound traffic does not “terminate at the ISP’s local server, as CLECs and ISPs contend, but continues to the ultimate destination or destinations, specifically at an Internet web site that is often located in

another state.”); *see also*, *FCC Remand Order* at ¶ 1 (“We previously found in the *Declaratory Ruling* that [ISP-bound traffic] is interstate traffic subject to the jurisdiction of the Commission under section 201 of the Act and is not, therefore subject to the reciprocal compensation provisions of section 251(b)(5).”).

“Local Traffic” is defined in the Second TCG Agreement as “any telephone call that originates and terminates in the same LATA . . . .” Second TCG Agreement, Attachment 11. Therefore, as a matter of law at the time of the execution of the Second TCG Agreement, the definition of “Local Traffic” could not have included ISP-bound traffic because, according to the *Declaratory Ruling*, ISP-bound traffic was interstate and thus could not “originate[] and terminate[] in the same LATA.”

Second, the *Prior TCG Order* and other previous decisions cited by TCG, all of which were executed prior to the *Declaratory Ruling*, have no bearing on this specific case. In those decisions, the Commission, in finding that the parties intended to pay reciprocal compensation for ISP-bound traffic, focused on the fact that there was no express intent to exclude ISP-bound traffic from the definition of “Local Traffic.” Namely, the Commission stated that there was nothing in those agreements that specifically addressed ISP-bound traffic nor any mechanism to account for such traffic. *See Global NAPS Order* at 7; *In re: Request for Arbitration Concerning Complaint of ITC DeltaCom Communications, Inc. Against BellSouth Telecommunications, Inc. for Breach of Interconnection Terms and Request for Immediate Relief*, Docket No. 991946-TP,

Order No. PSC-00-1540-FOF-TP (Aug. 24, 2000) (“*DeltaCom Order*”). Thus, under the standard articulated in these decisions, the Commission found that ISP-bound traffic was subject to reciprocal compensation unless the agreement explicitly stated otherwise.

That standard or analysis must now change in light of the FCC’s Remand Order. Under that Order, the FCC confirmed that ISP-bound traffic is not subject to the reciprocal compensation provisions of Section 251(b)(5) and that it is predominately interstate access traffic under Section 251(g). *FCC Remand Order* at ¶¶ 1, 34, 36, and 44. Additionally, in the *FCC Remand Order*, the FCC initiated steps to limit the regulatory arbitrage that resulted from the payment of reciprocal compensation for ISP-bound traffic. *Id.* at ¶ 2. As a result, pursuant to binding authority, the only way parties to an interconnection agreement can now owe each other reciprocal compensation for the transport and termination of ISP-bound traffic is if they explicitly included such a provision in the agreement. Without it, federal law requires that any state commission interpreting an agreement find that reciprocal compensation is not owed for ISP-bound traffic.

Indeed, there is a serious question as to whether the Commission has jurisdiction to order anything other than that reciprocal compensation is not owed for ISP-bound traffic. *See FCC Remand Order* at ¶ 82 (“Because we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, however, state commissions will no longer have authority to address this issue.”).<sup>4</sup> Simply put, to follow the analysis set forth in

---

<sup>4</sup> This jurisdictional question is further complicated for opt in agreements because the *FCC Remand Order* prohibits

the *Global NAPS Order*, *DeltaCom Order*, and *TCG Prior Order* would require this Commission to violate federal law and the FCC's expressed goal to limit the regulatory arbitrage that has resulted from the payment of reciprocal compensation for ISP-bound traffic.

The FCC's statement that the *Remand Order* does not "preempt any state commission decisions regarding compensation for ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here," does not require a different conclusion. *FCC Remand Order* at ¶ 82. As made clear by its express terms, the *FCC Remand Order* does not preempt "any state commission *decisions*." This Commission has yet to issue a decision regarding compensation for ISP-bound traffic for the Second TCG Agreement. Thus, it applies to the Commission's interpretation of that agreement.

Third, assuming that the Second TCG Agreement is ambiguous and that the foregoing analysis does not apply, questions of fact exist as to the parties' intent regarding the treatment of reciprocal compensation. Because this is an opt in agreement, the Commission's decision in the *Global NAPS Order* applies. In that decision, the Commission held that when interpreting an opt in agreement, the relevant intent is the intent of the original parties and not the parties adopting the agreement. *Global NAPS Order* at 7-8. The Commission reasoned that to hold otherwise would allow original and adopting parties to an agreement to "receive differing interpretations of the same Agreement, which is not consistent with the purpose of Section 252(i) of the Act." *Id.*

---

carriers from opting into an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic. *FCC Remand Order* at ¶ 82. The FCC held that Section 252(i) applies "only to agreements arbitrated or approved by state commissions pursuant to section 252; it has no application in the context of an



Thus, the relevant inquiry in this case is AT&T's and BellSouth's intent in executing the AT&T/BellSouth Agreement regarding reciprocal compensation for ISP-bound traffic, not BellSouth's and TCG. As presented by Mr. Shiroishi in her direct and rebuttal testimony, AT&T filed comments with the FCC at the time of the execution of the AT&T/BellSouth Agreement that establishes that, like BellSouth, it believed that ISP-bound traffic was interstate traffic. Shiroishi Direct at 5; Rebuttal at 6. Accordingly, it appears that AT&T and BellSouth both intended not to compensate each other for the transport and termination of ISP-bound traffic because it was interstate and not local traffic. This conclusion is buttressed by the fact that AT&T has not brought a claim against BellSouth for the payment of reciprocal compensation. Shiroishi Direct at 5. Therefore, at a minimum, a partial summary order is improper because questions of fact exist as to the intent of the original parties to the AT&T/BellSouth Agreement.

Even if the *Global NAPS* analysis does not apply, questions of fact still exist. In determining the parties' intent to a contract, the Commission should look at the circumstances in existence at the time the agreement was made as well as the subsequent action of the parties. *Triple E Develop. Co. v. Floridagold Citrus Corp.*, 51 So. 2d 435, 438 (Fla. 1951); *Global NAPS Order* at 6. As made clear by Beth Shiroishi's direct testimony, BellSouth did not intend to pay TCG reciprocal compensation for ISP-bound traffic under the terms of the Second TCG Agreement. Shiroishi Direct at 3, 6. Just as the Commission did in the prior TCG Order, it must hear evidence of and rule on the intent of the parties to the Second TCG Agreement. The

---

intercarrier compensation regime set by this Commission pursuant to section 201." *Id.*

Commission cannot automatically assume that the intent of the parties in the prior TCG Order is the same as in the Second TCG Agreement. For this reason alone, TCG's Motion for Partial Summary Order should be denied.<sup>5</sup>

## **II. Collateral Estoppel Does not Apply.**

Collateral estoppel, or estoppel by judgment, is a judicial doctrine which prevents identical parties from relitigating issues that have been previously decided between them. *Mobil Oil Corp. v. Shelvin*, 354 So. 2d 372 (Fla. 1997). The essential elements of collateral estoppel are that "the parties and issues be identical and that the particular matter be fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction." *Weiss v. Courshon*, 768 So. 2d 2, 4 (Fla. 3<sup>rd</sup> DCA 2000).

Collateral estoppel does not apply to the instant matter for several reasons. First, the issues are not the same. While it is true that the Commission previously ordered BellSouth to pay TCG reciprocal compensation pursuant to the terms of the First TCG Agreement, as admitted by TCG,<sup>6</sup> however, the facts and issues surrounding that decision are different than TCG's current claim for reciprocal compensation. For instance, the First TCG Agreement was a negotiated agreement while the Second TCG Agreement was an opt in agreement. This fact

---

<sup>5</sup> TCG's claim that there are no material questions of fact is specious given the fact that (1) on May 10, 2001, TCG served BellSouth with a set of interrogatories and requests for production; (2) TCG filed a Motion to Compel on the same day that it filed its Motion for Partial Summary Order; and (3) TCG stated in its recent Motion for a Continuance that it intended to depose BellSouth's witnesses. If there truly were no genuine issues of material facts, why would TCG issue and pursue discovery?

<sup>6</sup> TCG admits in its motion that its current claim is "a different claim for reciprocal compensation because it involves a different interconnection agreement than the one interpreted by the Commission in the *TCG Order*." Motion at 4.

changes the dynamics of the case because, under the *Global NAPS Order*, the intent of the original parties to the Second TCG Agreement, AT&T and BellSouth, is only relevant to the Commission's analysis. As a result, in the *Prior TCG Order*, the issue the Commission focused on was whether TCG and BellSouth intended to pay reciprocal compensation for ISP-bound traffic. In this proceeding, the Commission must focus on whether AT&T and BellSouth intended to pay reciprocal compensation for ISP-bound traffic.

Second collateral estoppel is inapplicable because the *Prior TCG Order* is on appeal in the United States District Court for the Northern District of Florida, Case No. 4:98 CV 3520RH, and thus is not a final judgment giving it preclusive effect. See *Cohn v. City of Stuart*, 702 So. 2d 255, 255 (Fla. 4<sup>th</sup> DCA 1997); see also, *DeltaCom Order* at 7 (in rejecting DeltaCom's collateral estoppel argument, noting that the prior case DeltaCom was relying on was still on appeal in Alabama).

Third, collateral estoppel does not apply because the *Declaratory Ruling* and the *FCC Remand Order* changed the law on which the *Prior TCG Order* was based. A change or development in the controlling legal principles may prevent the application of collateral estoppel even though an issue has been litigated and decided. *North Georgia Elec. Membership Corp. v. City of Calhoun, Georgia*, 989 F.2d 429, 433 (11<sup>th</sup> Cir. 1993) (citing *Commissioner v. Sunnen*, 333 U.S. 591, 599, 69 S.Ct. 715, 720, 92 L.Ed. 898 (1948)). The basis for this rule is that "modifications in 'controlling legal principles,' could render a previous determination

inconsistent with prevailing doctrine.” *Montana v. United States*, 440 U.S. 147, 161, 99 S.Ct. 970, 977, 59 L.Ed.2d 210 (1979) (quoting *Sunnen*, 333 U.S. at 599).

This is exactly the case here. The *Prior TCG Order* was issued prior to the *Declaratory Ruling* and the *FCC Remand Order*, both of which definitively established that ISP-bound traffic was interstate in nature and not subject to reciprocal compensation. Clearly, the *Prior TCG Order* is inconsistent with these controlling legal principles because it required the payment of reciprocal compensation for ISP-bound traffic. Accordingly, assuming *arguendo* that the *Prior TCG Order* is final, collateral estoppel does not apply. To hold otherwise would violate federal law.

### **III. Affirmative Defenses Are Subsumed Within the Stated Issues.**

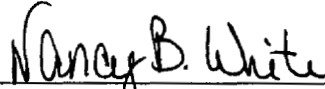
In response to TCG’s complaint, BellSouth raised several affirmative defenses, including statute of limitations for specific performance (which runs for one year), because TCG waited until six months after the termination of the Second TCG Agreement to file its complaint. These affirmative defenses have been subsumed within the issues identified in the Procedural Order. Therefore, a dismissal of these defenses is not necessary.

CONCLUSION

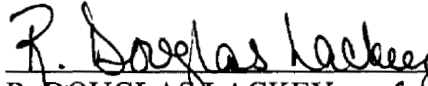
Although TCG desires to avoid a hearing, BellSouth is entitled to discovery and an opportunity to present its case and to cross-examine TCG's witnesses. Accordingly, the Commission should deny TCG's Motion and proceed to hearing in accordance with the Order Establishing Procedure.

Respectfully submitted this 1<sup>st</sup> day of June 2001.

BELLSOUTH TELECOMMUNICATIONS, INC.



\_\_\_\_\_  
NANCY B. WHITE (lls)  
JAMES MEZA III  
c/o Nancy H. Sims  
150 So. Monroe Street, Suite 400  
Tallahassee, FL 32301  
(305) 347-5555



\_\_\_\_\_  
R. DOUGLAS LACKEY (lls)  
E. EARL EDENFIELD JR.  
Suite 4300  
675 W. Peachtree St., NE  
Atlanta, GA 30375  
(404) 335-0747