

State of Florida



Public Service Commission
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-M-E-M-O-R-A-N-D-U-M-

DATE: JUNE 8, 2001

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO) JUN 8 11 31 AM '01
PSC

FROM: DIVISION OF LEGAL SERVICES (CHRISTENSEN) *CC*
DIVISION OF COMPETITIVE SERVICES (LOGUE) *WJG*

RE: DOCKET NO. 001810-TP - REQUEST FOR ARBITRATION CONCERNING COMPLAINT OF TCG SOUTH FLORIDA AND TELEPORT COMMUNICATIONS GROUP AGAINST BELL SOUTH TELECOMMUNICATIONS, INC. FOR BREACH OF TERMS OF INTERCONNECTION AGREEMENT.

AGENDA: 06/12/01 - REGULAR AGENDA - MOTION TO BIFURCATE AND SUPPLEMENTAL MOTION FOR CONTINUANCE AND MOTION FOR PARTIAL SUMMARY FINAL ORDER - PARTIES MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\001810.RCM

CASE BACKGROUND

On December 20, 2000, TCG South Florida and Teleport Communications Group (TCG) filed a complaint against BellSouth Telecommunications, Inc. (BellSouth) alleging that BellSouth has failed to pay reciprocal compensation for Internet bound traffic and switched access charges for intraLATA toll traffic originated and terminated by TCG under the terms of the Second BellSouth/TCG Agreement. On January 9, 2001, BellSouth filed its response to TCG's complaint. By Order No. PSC-01-0833-PCO-TP, issued March 30, 2001 (Order Establishing Procedure), this matter has been scheduled for an administrative hearing on June 22, 2001.

On May 18, 2001, TCG filed its Motion for Continuance and Rescheduling of Controlling Dates for Prehearing Statements, Prehearing Conference and Final Hearing. On May 25, 2001, BellSouth filed its response in opposition to TCG's Motion for

DOCUMENT NUMBER-DATE

07164 JUN-85

PSC-RECORDS/REPORTING

Continuance. At the prehearing conference held May 30, 2001, TCG's Motion for Continuance was denied for failure to establish good cause on the grounds set forth in its Motion. At the Prehearing Conference, TCG made an *ore tenus* Motion to Continue the Hearing Date. BellSouth renewed its opposition to any continuance of the hearing date. TCG was directed to file a written Motion For Continuance. On June 1, 2001, TCG filed its Motion to Bifurcate and Supplemental Motion for Continuance.

On May 25, 2001, TCG filed a Motion for Partial Summary Final Order. On June 1, 2001, BellSouth filed its response to TCG's Motion for Partial Summary Final Order. The following issues have been identified as pending in this proceeding:

ISSUE 1: What is the Commission's jurisdiction in this matter?

ISSUE 2: Under the Second BellSouth/TCG Agreement, are the parties required to compensate each other for delivery of traffic to ISPs?

ISSUE 3: What is the effect, if any, of Order No. PSC-98-1216-FOF-TP, issued September 15, 1998, in Docket No. 980184-TP (TCG Order), interpreting the First BellSouth/TCG Agreement requiring BellSouth to pay TCG for transport and termination of calls to ISPs, on the interpretation and application of the Second BellSouth/TCG Agreement?

ISSUE 4(a): Has BellSouth breached the Second BellSouth/TCG Agreement by failing to pay TCG reciprocal compensation for transport and termination of Local Traffic as defined in the Second BellSouth/TCG Agreement for calls originated by BellSouth's end-user customers and transported and terminated by TCG to ISPs?

ISSUE 4(b): If so, what rates under the Second BellSouth/TCG Agreement should apply for the purposes of reciprocal compensation?

ISSUE 5(a): Has BellSouth breached the Second BellSouth/TCG Agreement by failing to pay TCG switched access charges for telephone exchange service provided by TCG to BellSouth?

DOCKET NO. 001810-TP
DATE: JUNE 8, 2001

ISSUE 5(b): If so, what rates under the Second BellSouth/TCG Agreement should apply for purposes of originating and terminating switched access charges for intraLATA toll traffic?

Order No. PSC-01-0833-PCO-TP, Attachment "A," page 11. TCG's Motion for Partial Summary Final Order relates specifically to Issues 2, 3, and 4(a).

This recommendation addresses TCG's Motion for Partial Summary Final Order and its Motion to Bifurcate and Supplemental Motion for Continuance.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant TCG South Florida and Teleport Communications Group's Motion for Partial Summary Final Order?

RECOMMENDATION: Yes. Staff recommends that the Commission grant TCG's Motion for Partial Summary Final Order. Staff believes that the language of the Second BellSouth/TCG Agreement is clear and calls for the payment of reciprocal compensation for local traffic including ISP-bound traffic. (CHRISTENSEN)

STAFF ANALYSIS: As stated in the Case Background, on May 25, 2001, TCG filed its Motion for Partial Summary Final Order (Motion) in this matter. The issue before the Commission on the Motion is whether under the Second BellSouth/TCG Agreement, the parties are required to compensate each other for delivery of traffic to ISPs.

On July 15, 1996, BellSouth and TCG entered into their first agreement (First BellSouth/TCG Agreement), which was approved by Order No. PSC-96-1313-FOF-TP, issued October 29, 1996. The First BellSouth/TCG Agreement was the subject of a complaint regarding whether BellSouth was required to pay TCG reciprocal compensation for delivery of calls to ISPs served by TCG. By Order No. PSC-98-1216-FOF-TP, issued September 15, 1998 (TCG Order), the Commission interpreted the definition of "Local Traffic" under the First BellSouth/TCG Agreement to include transport and termination of calls made to ISPs. Id. at 23-24.

Prior to the issuance of the TCG Order, BellSouth and AT&T entered into an interconnection agreement approved by Order No. PSC-97-0724-FOF-TP, issued June 19, 1997. On July 14, 1999, TCG adopted the BellSouth/AT&T agreement with amendments, which was approved by Order No. PSC-99-1877-FOF-TP, issued September 21, 1999, becoming the Second BellSouth/TCG Agreement. The Second BellSouth/TCG Agreement terminated on June 10, 2000.

TCG's Motion

In its Motion, TCG alleges that there is no genuine issue as to any material fact and that as a matter of law, the controlling provision in the interconnection agreement at issue has been

previously interpreted by this Commission in favor of TCG. TCG also alleges that as a matter of law, BellSouth is collaterally estopped by this Commission's prior decision from relitigating the issue of whether BellSouth is required to pay reciprocal compensation for calls originated by BellSouth's customers to an ISP served by TCG.

TCG alleges that the BellSouth/AT&T Agreement contained the same definition of "Local Traffic" reflected in the First BellSouth/TCG Agreement. TCG states that the dispute in the First BellSouth/TCG Agreement involved the interpretation and application of the term "Local Traffic" which was defined as follows:

Any telephone call that originates and terminates in the same LATA and is billed by the originating party as a local call, including any call terminating in an exchange outside of BellSouth's area with respect to which BellSouth has a local interconnection agreement with an independent LEC, with which TCG is not directly interconnected.

TCG contends that the definition of "Local Traffic" in the Second TCG Agreement is exactly the same as the definition of "Local Traffic" in the First BellSouth/TCG Agreement. Attachment 11 to the Second BellSouth/TCG Agreement defines "Local Traffic" as follows:

Local Traffic - means any telephone call that originates and terminates in the same LATA and is billed by the originating Party as a local call, including any call terminating in an exchange outside of BellSouth's service area with respect to which BellSouth has a local interconnection agreement with an independent LEC, with which [TCG] is not directly interconnected.

TCG states that the Commission found in interpreting the definition of "Local Traffic" in the First BellSouth/TCG Agreement that:

The preponderance of the evidence shows that BellSouth is required to pay TCG reciprocal compensation for the transport and termination of telephone exchange service local traffic that is handed out by BellSouth to TCG for termination with telephone exchange service end users

that are Internet Service Providers or Enhanced Service Providers under the terms of the TCG and BellSouth Florida Partial Interconnection Agreement. Traffic that is terminated on a local dialed basis to Internet Service Providers or an Enhanced Service Provider should not be treated differently from other local dialed traffic. We find that BellSouth must compensate TCG according to the parties' interconnection agreement, including interest, for the entire period the balance owed is outstanding.

Order No. PSC-98-1216-FOF-TP at 22.

TCG argues that even though the definition of "Local Traffic" is the same in both agreements and that BellSouth has been previously ordered to pay reciprocal compensation for ISP-bound traffic under the definition of "Local Traffic", BellSouth has refused to pay reciprocal compensation to TCG under the Second BellSouth/TCG Agreement. TCG states that BellSouth's position is that its obligation to pay reciprocal compensation ended with the first agreement. TCG also states that BellSouth has defended its refusal to pay by claiming that it made its position opposing payment of reciprocal compensation for ISP-bound traffic publicly-known prior to TCG's adoption of the BellSouth/AT&T agreement. TCG contends that BellSouth's refusal to make such payments is a material breach of the Second BellSouth/TCG Agreement as previously interpreted by the Commission in the TCG Order.

TCG asserts that under the Second BellSouth/TCG Agreement, the parties have agreed to pay reciprocal compensation to each other for all traffic that originates on one company's network and terminates on the other's network in accordance with the rates set forth in Part IV, Table I of the agreement. TCG states that the Mutual Compensation provision governing the payment of reciprocal compensation reads, in pertinent part:

The Parties shall bill each other reciprocal compensation in accordance with the standards set forth in this Agreement for Local Traffic terminated to the other Party's customer. Such Local Traffic shall be recorded and transmitted to [TCG] and BellSouth in accordance with this Attachment. When a [] [TCG] Customer originates traffic and [TCG] sends it to BellSouth for termination, [TCG] will determine whether the traffic is local or intraLATA toll. When a BellSouth Customer originates

traffic and BellSouth sends it to [TCG] for termination, BellSouth will determine whether the traffic is local or intraLATA toll. Each Party will provide the other with information that will allow it to distinguish local from intraLATA toll. At a minimum, each Party shall utilize NXXs in such a way that the other Party shall be able to distinguish local from intraLATA toll traffic.

Attachment 6, Section 5.1, Second BellSouth/TCG Agreement.

TCG contends that BellSouth's defense in refusing to pay reciprocal compensation because it had made its opposition to pay such compensation publically known prior to the adoption of the Second BellSouth/TCG Agreement is unsupportable. TCG asserts that BellSouth raised the same defense in the Global NAPS case, and it was rejected by this Commission.¹ TCG asserts that similar to the instant case, in Global NAPS BellSouth maintained that it had made its opposition to the payment of reciprocal compensation publically known prior to Global NAPS' adoption of the ITC DeltaCom/BellSouth Agreement. TCG further contends that the Commission rejected BellSouth's position, noting that BellSouth never modified the language of the ITC DeltaCom/BellSouth Agreement. Moreover, TCG states that in Global NAPS the Commission emphasized the importance of maintaining consistency in its interpretation of interconnection agreements.

TCG states that support for its Motion is found under parallel facts in the Commission's enforcement decision in the ITC DeltaCom/BellSouth Agreement.² TCG asserts that the Commission in the ITC DeltaCom case framed the issue as one of contract interpretation. TCG states that the Commission found that the

¹Order No. PSC-0802-FOF-TP, issued April 24, 2000, in Docket No. 991267-TP, In re: 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, (Global NAPS).

²Order No. PSC-00-1540-FOF-TP, issued August 24, 2000, in Docket No. 991946-TP, In re: Request for Arbitration Concerning Complaint of ITC DeltaCom Communications, Inc. against BellSouth Telecommunication, Inc. for Breach of Interconnection Terms, and Request for Immediate Relief, (ITC DeltaCom).

language at issue in the ITC DeltaCom/BellSouth Agreement did not segregate ISP bound traffic from local traffic nor did the agreement address ISP bound traffic elsewhere. TCG further states based upon its finding that the language of the agreement was clear and unambiguous, the Commission properly found as a matter of law and granted summary final order. TCG contends that as a matter of law, the TCG Order reflects the governing and controlling law at the time the parties entered into the Second BellSouth/TCG agreement. TCG asserts that the TCG Order renders the language of the Second BellSouth/TCG Agreement clear and unambiguous and precludes the consideration of extrinsic evidence outside the four corners of the agreement.

TCG states that where there is no genuine issue of material fact and the same issue of law has been previously decided, either expressly or implicitly, contrary to the defendant's position, summary judgement is proper.³ Thus, TCG argues that in the instant case summary final order is appropriate because there are no genuine material issues of law or fact. TCG asserts that as a matter of law and under the doctrine of *stare decisis*, its Motion should be granted.

TCG also argues that under the doctrine of collateral estoppel, BellSouth is barred from relitigating the same issue. TCG asserts that in the instant case the same parties, BellSouth and TCG, are litigating the same issue, the interpretation and application of the same definition of "Local Traffic" which resulted in the TCG Order.

According to TCG, BellSouth's affirmative defenses of the statute of limitations and laches are without merit. TCG contends that the statute of limitations for contracts is contained in Section 95.11(2)(b), Florida Statutes. TCG states Florida law requires that a legal or equitable action on a contract, or obligation or liability founded on a written instrument, be commenced within five years. TCG argues that because the Second BellSouth/TCG Agreement was not adopted until July 14, 1999, TCG would not be precluded from filing a complaint for breach of the agreement until July 14, 2004, even if the civil statute of

³Forte Towers, Inc. v. City of Miami Beach, 360 So.2d 81(Fla. 3d DCA 1978).

limitations applies in a Commission proceeding (an issue which the Commission need not reach).

TCG states that the doctrine of laches would not bar its proceeding on its complaint because, as codified in Section 95.11(6), Florida Statutes, laches will bar an action unless it is commenced within the time provided for legal actions concerning the same subject matter. TCG asserts that while it is questionable whether the Commission even has authority to grant equitable relief, the Commission need not reach a decision on this matter. TCG argues that under the statutory laches provision, laches would not bar its complaint because under the statutes of limitations, it has until July 14, 2004, to file. Further, TCG contends that an essential element of the doctrine of laches is the defendant's lack of knowledge that the plaintiff will assert the right upon which the suit is based. TCG asserts that under the facts of the instant case, any assertion by BellSouth that it lacked knowledge that TCG would bring an action for enforcement is patently absurd.

TCG concludes that the instant case is a simple matter of contract interpretation. TCG states that the admission of extrinsic evidence to interpret a contract is improper unless the language of the contract is ambiguous, and the language in the Second BellSouth/TCG Agreement is not ambiguous. TCG asserts that the Commission found that the definition of "Local Traffic" in the TCG Order includes ISP bound traffic, particularly where there is no other provision addressing ISP bound traffic; therefore, reciprocal compensation is owed. TCG asserts that the Commission's previous interpretation of "Local Traffic" in the TCG Order governs the Second BellSouth/TCG Agreement because the contract language is the same. Further, TCG asserts that the doctrine of collateral estoppel precludes BellSouth from relitigating the definition of "Local Traffic." Therefore, TCG asserts that BellSouth has breached the Second BellSouth/TCG Agreement by failing to pay TCG reciprocal compensation.

BellSouth's Response

On June 1, 2001, BellSouth filed its Response in Opposition to TCG's Motion For Partial Summary Final Order (Response). In its Response, BellSouth states that the Commission should deny the Motion for Partial Summary Final Order because there are genuine issues of material fact for the Commission to consider and collateral estoppel does not apply.

BellSouth contends that the facts, circumstances and legal principles which govern the adopted Second BellSouth/TCG Agreement are vastly different from the First BellSouth/TCG Agreement. BellSouth asserts that the FCC recently has issued an Order⁴ which addresses the treatment of ISP bound traffic and contradicts TCG's theory of recovery in this proceeding. Moreover, BellSouth contends that in accordance with the Global NAPS decision when interpreting an adopted agreement, the Commission will look at the intent of the original parties to the agreement, one of which is not a party to this proceeding. Finally, collateral estoppel is inapplicable to the instant case.

BellSouth asserts that the First BellSouth/TCG Agreement has no effect on the interpretation of the Second BellSouth/TCG Agreement. BellSouth does not dispute that the parties had a dispute as to whether reciprocal compensation should be paid for the First BellSouth/TCG Agreement. Nor does BellSouth dispute that at the expiration of the First BellSouth/TCG Agreement, TCG adopted the BellSouth/AT&T Agreement, which became the Second BellSouth/TCG Agreement. However, BellSouth contends that the status of the law had changed at the time TCG opted into the BellSouth/AT&T Agreement. Specifically, BellSouth states that when TCG adopted the agreement, the FCC's Declaratory Ruling, released February 26, 1999⁵, was in effect. BellSouth cites the Declaratory Ruling at paragraph 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." BellSouth also cites the FCC Remand Order at paragraph 1, "We previously found in the Declaratory Ruling that [ISP-bound traffic] is interstate traffic subject to the jurisdiction of the Commission under section

⁴Order on Remand and Report and Order, CC Docket No. 96-98, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Inter-Carrier Compensation for ISP-Bound Traffic Order No. FCC 01-131 (April 27, 2001) (FCC Remand Order).

⁵Declaratory Ruling, CC Docket No. 96-98, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Inter-Carrier Compensation for ISP-Bound Traffic, Order No. FCC 99-38, (February 26, 1999), (Declaratory Ruling)

201 of the Act and is not, therefore subject to the reciprocal compensation provisions of section 251(b)(5)."

BellSouth asserts that because the definition of "Local Traffic" in the Second BellSouth/TCG Agreement refers to "any telephone call that originates and terminates in the same LATA . . .", as a matter of law under the Declaratory Ruling, ISP-bound traffic could not have been included in the meaning of "Local Traffic" because it is interstate and would not originate and terminate within the same LATA.

BellSouth states that the TCG Order and all other previous decisions cited by TCG were executed prior to the Declaratory Ruling and have no bearing on this specific case. BellSouth contends that the standard and analysis set forth in the Commission decisions in Global NAPS and ITC Deltacom must now change in light of the FCC Remand Order. BellSouth asserts that under the FCC Remand Order, the FCC confirmed that ISP-bound traffic is predominately interstate access traffic under Section 251(g). FCC Remand Order at paragraphs 1, 34, 36, and 44. BellSouth states that in the FCC Remand Order, the FCC initiated steps to limit the regulatory arbitrage that resulted from the payment of ISP bound traffic. *Id.* at paragraph 2. BellSouth further states that as a result of the FCC's decision, the only way parties to an interconnection agreement can now owe each other reciprocal compensation for ISP-bound traffic is if the parties explicitly include such a provision in the agreement. Thus, BellSouth asserts that without such a provision federal law requires a state commission interpreting an agreement to find that reciprocal compensation is not owed for ISP-bound traffic.

Further, BellSouth questions whether under the FCC Remand Order a state commission still has authority to order payment for reciprocal compensation. BellSouth cites the FCC Remand Order at paragraph 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." Therefore, BellSouth contends that following the Global NAPS, ITC DeltaCom, and TCG Order decisions would require the Commission to violate federal law and the FCC's express goal to limit regulatory arbitrage resulting from the payment of reciprocal compensation for ISP-bound traffic. BellSouth states that the FCC's statement in its FCC 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 paragraph 82. BellSouth contends that the Commission has not made a decision in the instant case; therefore, the FCC Remand Order applies to the Commission interpretation in this case.

In addition, BellSouth argues that assuming the Second BellSouth/TCG Agreement is ambiguous and that BellSouth's interpretation of the FCC's decisions does not apply, questions of fact exist as to the parties' intent to pay reciprocal compensation. BellSouth states that under the Global NAPS decision, it is the intent of the original parties to the agreement (AT&T and BellSouth) that is relevant, not that of TCG and BellSouth. BellSouth asserts that according to its witness 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. BellSouth contends that AT&T's comments establish that, like BellSouth, AT&T believed that ISP-bound traffic was interstate traffic. (Shiroishi Direct testimony at page 5, Rebuttal testimony at page 6). BellSouth states that it appears that both AT&T and BellSouth intended not to compensate each other for the transport and termination of ISP-bound traffic because it was interstate and not local. BellSouth asserts that its position is buttressed by the fact that AT&T has not brought a claim against BellSouth for payment of reciprocal compensation. (Shiroishi Direct testimony at page 5). Therefore, BellSouth contends that a question of fact exists as to the intent of the original parties.

Further, BellSouth argues that even if the Global NAPS analysis does not apply, question of fact still exists. BellSouth contends that to determine the intent of the parties at the time of the contract, the Commission should consider the circumstances at the time of the agreement as well as the subsequent actions of the parties. BellSouth contends that, as made clear in the direct testimony of witness Shiroishi, BellSouth did not intend to pay reciprocal compensation for ISP-bound traffic under the terms of the Second BellSouth/TCG Agreement. BellSouth asserts that the Commission must hear evidence of and rule on the intent of the parties to the Second BellSouth/TCG Agreement. BellSouth states that the Commission cannot automatically assume that the intent of the parties in the First BellSouth/TCG Agreement is the same in the Second BellSouth/TCG Agreement. Thus, BellSouth asserts that the Motion for Partial Summary Final Order should be denied.

BellSouth contends that collateral estoppel does not apply for several reasons. BellSouth asserts that the issues are not the same because the facts and issues surrounding the First BellSouth/TCG Agreement are different than the current claim. BellSouth states that the First BellSouth/TCG Agreement was negotiated, while the second agreement was an opt-in agreement. BellSouth claims that under Global NAPS this changes the dynamics of this case because only the original parties' intent is relevant. Therefore, BellSouth states that the focus of this proceeding is whether AT&T and BellSouth intended to pay reciprocal compensation, whereas in the TCG Order the focus was whether TCG and BellSouth intended to pay reciprocal compensation for ISP-bound traffic.

In addition, BellSouth states that the TCG Order is currently on appeal to the United States District Court for the Northern District of Florida, Case No. 4:98 CV 352-RH, and thus not a final judgement giving it preclusive effect.⁶ In addition, BellSouth argues that the Declaratory Ruling and the FCC Remand Order changed the law upon which the TCG Order was based. BellSouth asserts that 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.⁷ BellSouth states that the basis for this rule is that "modifications in 'controlling legal principles,' could render a previous determination inconsistent with prevailing doctrine."⁸ BellSouth contends that such is the case here because the TCG Order was issued prior to the Declaratory Ruling and the FCC Remand Order, which establish that ISP bound traffic is interstate in nature and not subject to reciprocal compensation. Thus, BellSouth contends that the TCG Order is inconsistent with these controlling legal principles because it requires the payment of reciprocal compensation. BellSouth argues that even assuming the TCG Order is final, collateral estoppel does not apply because to hold otherwise would violate federal law.

⁶Cohen v. City of Stuart, 702 So.2d 255 (Fla. 4th DCA 1997) and ITC DeltaCom Order at 7.

⁷North Georgia Elec. Membership Corp. v. City of Calhoun, Georgia, 989 F.2d. 424, 433 (11th Cir. 1993) (citing Commissioner v. Sunnen, 333 U.S. 591, 599 (1948)).

⁸Montana v. United States, 440 U.S. 147 (1979) (quoting Sunnen, 333 U.S. at 599)

BellSouth also states that it raised several affirmative defenses, including statutes of limitation for specific performance which runs for one year, because TCG waited until six months after the termination of the Second BellSouth/TCG Agreement to file its complaint. BellSouth contends that it is unnecessary to dismiss its affirmative defenses because they have been subsumed within the issues identified in the Procedural Order.

Analysis

Rule 28-106.204(4), Florida Administrative Code, provides:

Any party may move for summary final order whenever there is no genuine issue as to any material fact. The motion may be accompanied by supporting affidavits. All other parties may, within seven days of service, file a response in opposition, with or without supporting affidavits. A party moving for summary final order later than twelve days before the final hearing waives any objection to the continuance of the final hearing.

The purpose of summary judgment, or in this instance summary final order, is to avoid the expense and delay of trial when no dispute exists concerning the material facts. The record is reviewed in the most favorable light toward the party against whom the summary judgment is to be entered. When the movant presents a showing that no material fact on any issue is disputed, the burden shifts to his opponent to demonstrate the falsity of the showing. If the opponent does not do so, summary judgment is proper and should be affirmed. The question for determination on a motion for summary judgment is the existence or nonexistence of a material factual issue. There are two requisites for granting summary judgment: first, there must be no genuine issue of material fact, and second, one of the parties must be entitled to judgment as a matter of law on the undisputed facts. (See Trawick's Florida Practice and Procedure, §25-5, Summary Judgment Generally, Henry P. Trawick, Jr. (1999).)

The first question is whether the record shows an absence of disputed material facts under the substantive law applicable to the action. To decide the question, the applicable substantive law must be determined and then compared with the facts in the record.

If the comparison shows a genuinely disputed material factual issue, summary judgment must be denied and the court cannot decide the issue. Even though the facts are not disputed, a summary judgment is improper if differing conclusions or inferences can be drawn from the facts. (Id.)

Staff believes that the following facts are not in dispute. On July 15, 1996, BellSouth and TCG entered into the First BellSouth/TCG Agreement, which was approved by Order No. PSC-96-1313-FOF-TP, issued October 29, 1996. The First BellSouth/TCG Agreement was the subject of a complaint. The Commission in the TCG Order issued September 15, 1998, interpreted the definition of "Local Traffic" under the First BellSouth/TCG Agreement to include the transport and termination of calls made to ISPs. Global NAPS at 23-24.

Prior to the issuance of the TCG Order, BellSouth and AT&T entered into an interconnection agreement approved by Order No. PSC-97-0724-FOF-TP, issued June 19, 1997. On July 14, 1999, TCG adopted the BellSouth/AT&T agreement with amendments, the Second BellSouth/TCG Agreement approved September 21, 1999. The Second BellSouth/TCG Agreement terminated on June 10, 2000. Therefore, the only remaining question before the Commission is whether the Second BellSouth/TCG Agreement on its face is clear that reciprocal compensation is due for ISP-bound traffic, which as noted by TCG is a matter of contract interpretation.

Staff believes that BellSouth's position that the Commission should hear evidence of and rule on the intent of the parties to the Second BellSouth/TCG Agreement is based upon a flawed assumption that the language of the agreement is ambiguous. The Commission has found in previous decisions that where the language is clear and unambiguous, the Commission need not look beyond the the agreement to determine the intent of the parties. Global NAPS at 7-8, ITC DeltaCom at 13-14.

Further, staff agrees with TCG that under Global NAPS, it is not the intent of the parties to an adopted agreement that is relevant, but rather the intent of the original parties to the underlying agreement - - if intent is to be considered. Global NAPS at 8-9. The Commission made clear that to consider the intent of the adopting parties could result in the original and adopting parties receiving different interpretations of the same agreement, which would be inconsistent with the purposes of Section 252(i).

Id. at 9. However, one need not look to extrinsic evidence of intent if the parties' intent is clearly expressed in the unambiguous language of the contract. ITC DeltaCom at 13-14.

Staff emphasizes that the language used to define "Local Traffic" is virtually identical in the instant case as that addressed in the TCG Order. Addressing the various agreements at issue in the TCG Order, the Commission found that:

We therefore conclude on the basis of the plain language of the Agreement and of the effective law at the time the Agreement was executed, that the parties intended that calls originated by an end user of one and terminated to an ISP of the other would be rated and billed as local calls; else one would expect the definition of local calls in the Agreement to set out an explicit exception. . . . No exceptions have been made to the definition of local traffic to exclude ISP traffic. The facts surrounding [BellSouth/TCG] Agreement, and the arguments made by the parties, are essentially the same as the WorldCom Agreement, and we will not reiterate them here. Our decision is the same.

TCG Order at 21-22, 23. BellSouth argues that the TCG Order is the subject of an appeal, therefore it should not be controlling in this case. Staff notes that on June 1, 1999, Judge Hinkle denied BellSouth's request for a stay of the TCG Order in Case No. 4:98cv352-RH, and therefore the TCG Order should be given full force and effect. Staff believes that like the language addressed in the TCG Order, the language of the Second BellSouth/TCG Agreement for "Local Traffic" is clear and unambiguous. As in the TCG Order, the Second BellSouth/TCG Agreement does not segregate out ISP traffic for different treatment nor is it addressed elsewhere in the agreement. Thus, staff believes that the plain language of the Second BellSouth/TCG Agreement calls for the payment of reciprocal compensation for ISP-bound traffic.

As for BellSouth's arguments regarding the state of the law, staff notes that the Declaratory Ruling, released February 26, 1999, was not vacated and remanded by the D.C. Circuit Court of

Appeals until March 24, 2000.⁹ However, the FCC in the Declaratory Order states "Nothing in this Declaratory Ruling, therefore, necessarily should be construed to question any determination a state commission has made, or may make in the future, that parties have agreed to treat ISP-bound traffic as local traffic under existing interconnection agreements." Id. at paragraph 24. Further, the FCC states that:

We tentatively conclude that, as a matter of federal policy, the inter-carrier compensation for this interstate telecommunications traffic should be governed prospectively by interconnection agreements negotiated and arbitrated under sections 251 and 252 of the Act. Resolution of failures to reach agreement on inter-carrier compensation for interstate ISP-bound traffic then would occur through arbitrations conducted by state commissions.

Id. at paragraph 30. Staff believes that it is clear that the FCC intended to allow the resolution of the reciprocal compensation issue to remain with the state commissions. Further, staff believes that the language of the Declaratory Ruling does not preclude a finding that reciprocal compensation is owed under an interconnection agreement as BellSouth contends. Additionally, in the FCC Remand Order, the FCC stated that ". . . carriers may no longer invoke section 252(i) to opt into an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic." Staff believes that in the Declaratory Ruling, the FCC could have included the same language if the intent was to exclude payment for ISP-bound traffic in opt-in agreements made after the Declaratory Ruling was released, but it did not.

Further, in the FCC Remand Order, the FCC states:

The interim compensation regime we establish here applies as carriers re-negotiate expired or expiring interconnection agreements. It does not alter existing contractual obligations, except to the extent that parties are entitled to invoke contractual change-of-law

⁹Bell Atlantic v. Federal Communication Commission, et. al., 206 F.3d 1(D.C. Cir 2000).

provisions. This Order does not preempt any state commission decision regarding compensation for ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here.

FCC 01-131 at paragraph 82. Staff believes that the FCC's intent in its Remand Order is to have its compensation scheme apply prospectively. Staff believes that the language contained in paragraph 82 of the FCC Remand Order clearly exempts any decision to be made on agreements in existence prior to the release of this Order. Staff notes that to do otherwise would create inconsistent results with prior Commission decisions on similar facts based solely on the timing of the Commission's decision rather than the status of the law at the time the contract was in force. Thus, staff is not persuaded that as a matter of federal law the Commission is precluded from ordering the payment of reciprocal compensation for ISP-bound traffic under agreements entered into prior to the issuance of the FCC Remand Order.

We also note that the parties and issues are similar, if not the same, in this case as in the first TCG/BellSouth dispute but involve a different agreement. However, staff does not believe that the Commission need reach a determination on the collateral estoppel issue raised by TCG because the language itself is clear. Nor, does staff believe that the Commission needs to specifically address the affirmative defenses raised by BellSouth in its Response to the complaint.

Staff notes, however, that it is not persuaded that just because AT&T has not filed a complaint against BellSouth under its agreement that this demonstrates that AT&T did not intend to recover reciprocal compensation under its agreement. Further, staff notes that BellSouth does not assert that AT&T is barred from bringing such a claim in the future, only that they have not done so at this point. Staff notes that assuming that AT&T has the right to bring a contractual action within 5 years, it appears this time has not expired. Staff also is not persuaded by BellSouth's agreement that AT&T filed comments at the FCC regarding reciprocal compensation. Nevertheless, we emphasize that if the language of the contract is clear and unambiguous, the issue of reciprocal compensation for ISP-bound traffic should be decided as a matter of law based on the language without any reference to extrinsic

DOCKET NO. 001810-TP

DATE: JUNE 8, 2001

testimony or other evidence regarding intent. ITC DeltaCom at 13-14.

Based on the foregoing, staff recommends that the Commission grant TCG's Motion for Partial Summary Final Order. Staff believes that the language of the Second BellSouth/TCG Agreement is clear and calls for the payment of reciprocal compensation for local traffic including ISP-bound traffic.

ISSUE 2: Should the Commission grant TCG's Motion to Bifurcate and Supplemental Motion for Continuance?

RECOMMENDATION: Staff recommends denying, in part, and granting, in part, TCG's Motion to Bifurcate and Supplemental Motion for Continuance. Staff recommends denying bifurcation of the issues to separate hearing dates, and granting a continuance of the hearing date until the first available date on the Commission's calendar after the October 16, 2001, Agenda Conference.

STAFF ANALYSIS: As stated in the Case Background, at the prehearing on May 30, 2001, TCG made an *ore tenus* Motion to Continue to the Hearing Date. BellSouth renewed its opposition to any continuance of the hearing date. TCG was directed to file a written Motion For Continuance. On June 1, 2001, TCG filed its Motion to Bifurcate and Supplemental Motion for Continuance (Motion).

In support of its Motion, TCG states that the predominant portion of the prefiled testimony and exhibits that have been filed in this proceeding address the issue of whether BellSouth has breached the Second Agreement by failing to pay reciprocal compensation. TCG asserts that the resources of the parties and the Commission would be efficiently utilized by first addressing the Motion for Partial Summary Final Order before the final hearing. TCG states that if the Motion for Partial Final Summary Order is granted, then the issues for final hearing will be significantly reduced, and if it is denied, no party will be prejudiced.

Further, TCG states that should the Motion for Partial Final Summary Order be granted, Issues 1 through 4(a) would be resolved. TCG contends that it would be appropriate to bifurcate Issues 1 through 4(a) into one hearing process, and Issue 4(b), Issue 5(a) and Issue 5(b) into a second hearing process. TCG states that if its partial summary final order is denied, then it would request to go forward on Issues 1 through 4(a) on June 22, 2001, or reschedule the hearing date on those issues to no later than 60 days after June 22, 2001.

TCG also contends that bifurcation and rescheduling of Issues 4(b), 5(a) and 5(b), would increase the prospect of settlement and resolution of this docket *in toto*. TCG asserts that should TCG's Motion for Partial Summary Final Order be granted, the only issues

remaining involve the amount owed on reciprocal compensation for "Local Traffic;" and intrastate switched access charges due to TCG from BellSouth. TCG states that the critical issue that remains is whether TCG is entitled to include the tandem interconnection rate in its claim for reciprocal compensation under the Second BellSouth/TCG Agreement. TCG asserts that currently the Commission will be addressing this issue in its generic investigation in Docket No. 000075-TP, by establishing general rules and criteria for when an ALEC can recover the tandem rate. Therefore, TCG contends that the outcome of Docket 000075-TP may play a significant role in determining how the tandem rate issue is resolved in the instant case. Therefore, TCG states that the prospect of settlement should increase once the "rules of the road" for the tandem rate have been established, if the parties are reasonable. TCG states that the Commission is scheduled to make a determination in Phase II of Docket 000075-TP, which includes the tandem rate issue, at the September 4, 2001, Agenda Conference. TCG requests that the hearing on Issues 4(b), 5(a) and 5(b) commence no later than 30 days after September 4, 2001. TCG states that this will give the parties 30 days to negotiate the issue of the tandem rate amount in the event that the Motion for Partial Summary Final Order is granted.

As noted above, at the Prehearing Conference, BellSouth stated that it objected to a continuance of the hearing date. BellSouth stated that even if the Motion for Partial Summary Final Order was granted, there would still be a hearing on the remaining issues. BellSouth indicated that it would not feel comfortable agreeing to a continuance just to allow TCG's Motion for Partial Summary Final Order to be heard. BellSouth also stated that TCG had a lot of time to bring the Motion for Partial Summary Final Order. BellSouth also stated that TCG has outstanding discovery and in TCG's Motion to Compel, TCG indicated that they were going to depose witnesses.

Further, BellSouth stated that it does not believe that the hearing should wait until the generic docket is resolved. BellSouth asserts that "kicking" the rate issues to the generic docket will not promote judicial economy. BellSouth states that while it may be true that AT&T [TCG] will know its position on what rates it could charge, that is on a going-forward basis. BellSouth contends that this is an agreement and it requires certain rates which are the subject of this contract dispute. Thus, BellSouth maintains that the hearing needs to go forward and the rate issue

should not be "kicked" to the generic docket or delayed until the generic docket is resolved.

Analysis

If the Commission approves staff's recommendation on Issue 1, staff believes that there is good cause to continue the hearing date. Staff agrees with TCG that it would be more efficient to wait until the tandem rate issue is resolved in the generic proceeding. Although staff is aware that the resolution in the generic proceeding would be implemented on a going-forward basis, staff believes that the decision would include an analysis of the tandem rate issue which would apply in this instance. Staff believes that the generic proceeding would be a far better forum to address the application of the tandem rate than an individual complaint docket.

Moreover, if TCG believes that waiting for the generic proceeding would increase the chances of settlement and they are willing to forego a possible earlier payment of settlement, then staff supports the continuance. Staff agrees with BellSouth that a hearing may still be necessary, even if the Motion for Partial Summary Final Order is granted. However, staff believes that once the interpretation of when the tandem rate should apply to local traffic is established, settlement may be a realistic goal for the parties.

Should the Commission deny staff on Issue 1, staff still believes that there is good cause to grant a continuance of the hearing date for the reason stated above. Staff notes that the tandem rate issue will be addressed in Phase II of the generic proceeding which is scheduled for the October 16, 2001, Agenda Conference. However, staff does not believe bifurcation is appropriate, nor would it promote judicial economy.

Based on the foregoing, staff recommends denying, in part, and granting, in part, TCG's Motion to Bifurcate and Supplemental Motion for Continuance. Staff recommends denying bifurcation of the issues to separate hearing dates, and granting a continuance of the hearing date to after the October 16, 2001, Agenda Conference, at the first available date on the Commission's calendar.

DOCKET NO. 001810-TP

DATE: JUNE 8, 2001

ISSUE 3: Should this docket be closed

RECOMMENDATION: No. This docket should remain open pending resolution of TCG's complaint.

STAFF ANALYSIS: This docket should remain open pending the resolution of TCG's complaint.