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July 27, 2001

Ms. Blanca S. Bayo, Director Division of Records and Reporting Florida Public Service Commission 2540 Shumard Oak Boulevard Betty Easley Conference Center, Room 110 Tallahassee, Florida 32399-0850

HAND DELIVERY

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Re: Docket No. 000075-TP

001810-TP

Dear Ms. Bayo:

Enclosed herewith for filing in the above-referenced docket are the following documents:

- 1. Original and fifteen copies of the Posthearing Brief of TCG South Florida and Teleport Communications Group; 2. A diskette containing the brief formatted in Word Perfect 6 containing the brief.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me. Thank you for your assistance with this filing.

Sincerely,

Martin P. McDonnell Martin P. McDonnell

MPM/cs Enclosures cc: All Parties of Record

APP DAF DMP DOM STR CR EG PC AI GO EC ER

RECEIVED & FILED DOCUMENT NUMBER-DATE 09177 JUL 27 03 FPSC-BUREAU OF RECORDS FPSC-COMMISSION CLERK

**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. )

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Docket No. 001810-TP

Filed: July 27, 2001

**POSTHEARING BRIEF OF TCG SOUTH FLORIDA  
AND TELEPORT COMMUNICATIONS GROUP**

TCG South Florida and Teleport Communications Group (hereinafter referred to collectively as "TCG"), by and through undersigned counsel and pursuant to Rule 28-106.215, Florida Administrative Code, and Order No. PSC-01-0833-PCO-TP, issued March 30, 2001, hereby files its posthearing brief.

**INTRODUCTION**

TCG's complaint raises three issues: (1) Whether BellSouth Telecommunications, Inc. ("BellSouth") is required to pay TCG reciprocal compensation for TCG's termination of Internet Service Provider ("ISP")-bound traffic under the terms and conditions of the Second BellSouth/TCG Agreement at issue in this proceeding; (2) Whether BellSouth is required to pay TCG reciprocal compensation at the tandem interconnection rate of \$0.00325 per minute of use for the transport and termination of local traffic, including ISP-bound traffic, originated by BellSouth's end users; and, (3) Whether BellSouth has failed to pay TCG the full amount of intrastate switched access charges for TCG's transport and termination of intraLATA toll minutes.

On the basis of the record evidence in this proceeding, the Florida Public Service Commission ("Commission") should grant the relief requested by TCG and enforce the terms of its Interconnection Agreement with BellSouth.

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## STATEMENT OF BASIC POSITION

On July 15, 1996, TCG and BellSouth entered into an interconnection agreement (the “First BellSouth/TCG Agreement”). The First BellSouth/TCG Agreement, approved by this Commission in Order No. PSC-96-1313-FOF-TP issued October 29, 1996, was the subject of an earlier dispute between the parties over whether reciprocal compensation was due for the transport and termination of calls to ISPs. In that case, the Commission was asked to determine whether the definition of “Local Traffic” contained in the First BellSouth/TCG Agreement required BellSouth to pay TCG reciprocal compensation for the delivery of calls to ISP customers served by TCG. On September 15, 1998, the Commission issued Order No. PSC-98-1216-FOF-TP (“*TCG Order*”)<sup>1</sup> interpreting the definition of “Local Traffic” under the First BellSouth/TCG Agreement to include TCG’s transport and termination of BellSouth-originated calls to ISPs.

On June 10, 1997 AT&T and BellSouth entered into an Interconnection Agreement that was approved by the Commission on June 19, 1997, by Order No. PSC-97-0724-FOF-TP. The BellSouth/AT&T Agreement terminated on June 10, 2000. The BellSouth/AT&T Agreement contained the same definition of “Local Traffic” reflected in the First BellSouth/TCG Agreement, interpreted by the Commission in the *TCG Order* to require BellSouth to pay reciprocal compensation to TCG for termination of ISP calls. On June 14, 1999, TCG and BellSouth adopted the BellSouth/AT&T Agreement, with amendments, and the agreement was approved by this Commission pursuant to Order No. PSC-99-1877-FOF-TP issued September 21, 1999 (the “Second BellSouth/TCG Agreement”). The Second BellSouth/TCG Agreement contains the same definition

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<sup>1</sup> See 98 F.P.S.C. 9:126.

of “Local Traffic” set forth in the First BellSouth/TCG Agreement interpreted by the Commission in the *TCG Order* to require payment of reciprocal compensation for ISP-bound calls. This Commission’s decision in the *TCG Order* provides the controlling precedent for the disposition of this case. As a matter of law, the definition of Local Traffic in the Second BellSouth /TCG Agreement is not ambiguous as this Commission has previously interpreted that language in its prior order. Reciprocal compensation is due to TCG for transporting and terminating BellSouth’s purported ISP-bound traffic.

Undeterred by the clear mandate of this Commission in the *TCG Order* that reciprocal compensation is due for ISP-bound traffic pursuant to the “Local Traffic” definition in the Second BellSouth/TCG Agreement, BellSouth raises three main arguments in defense of its failure to pay. First, BellSouth asserts that ISP-bound calls are not local telephone calls and therefore are not subject to reciprocal compensation. BellSouth made this identical argument in the first TCG case and it was specifically rejected by the Commission in its *TCG Order*. The Commission has also rejected this identical argument by BellSouth in its *DeltaCom Order*<sup>2</sup> and *Global NAPS Order*<sup>3</sup> discussed further herein. Although the FCC has subsequently issued its *Order on Remand*<sup>4</sup>

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<sup>2</sup> *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*, Order No. PSC-00-1540-FOF-TP issued August 24, 2000, 00 F.P.S.C. 8:390 (“*DeltaCom*”)

<sup>3</sup> *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*, Order No. PSC-0802-FOF-TP issued April 24, 2000, 00 F.P.S.C. 4:353 (“*GlobalNAPS*”).

<sup>4</sup> *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 96-98, and 99-68, FCC Order 01-131, (released

determining that ISP-bound traffic is not subject to reciprocal compensation pursuant to 47 U.S.C. §251(b)(5), the Order on Remand is prospective in effect and the FCC explicitly stated that the Order on Remand “does not alter existing contractual obligations” and “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.”<sup>5</sup> There is no evidentiary reason in the record for the Commission to deviate from its interpretation of the definition of “Local Traffic” in the *TCG Order*. The Commission should, as it has done in the past, reject BellSouth’s argument that the definition of “Local Traffic” does not include ISP-bound calls.

Second, BellSouth argues that it was BellSouth’s publicly stated intent not to consider ISP-bound traffic as “Local Traffic” at the time AT&T and BellSouth entered into their intercarrier agreement. Again, BellSouth raised the defense that it never intended ISP-bound traffic to be subject to reciprocal compensation in the docket subject to the *TCG Order* as well as the *GlobalNAPS* and *DeltaCom Orders* discussed herein, and that position was soundly rejected by the Commission in all three Orders. Further, at the time BellSouth and TCG entered into the Second BellSouth/TCG Agreement, BellSouth had the benefit of this Commission’s *TCG Order* which clearly stated that if it is BellSouth’s intention not to include ISP-bound traffic within the definition of Local Traffic, it should clearly so state in the Agreement. In March of 1999, four months prior to the Second BellSouth/TCG Agreement, the Alabama Public Service Commission also ruled that if BellSouth

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April 27, 2001) (“*Order on Remand*”).

<sup>5</sup> *Id.* at ¶ 82; See also fn. 149. Since the Second BellSouth/TCG Agreement terminated on June 10, 2000, almost a year prior to the *Order on Remand*, any contractual change in law provision would not apply.

did not intend to encompass ISP traffic within the meaning of Local Traffic, then BellSouth should take steps to specifically exclude ISP-bound traffic from the definition of Local Traffic in its intercarrier agreements.<sup>6</sup> BellSouth and TCG negotiated other terms of the adopted BellSouth/AT&T Agreement in the Second BellSouth/TCG Agreement however, there were no negotiations regarding ISP-bound traffic. (Tr. 37:18-22).<sup>7</sup> BellSouth's silence regarding ISP-bound traffic at the time of the negotiation and during the adoption of the Second BellSouth/TCG Agreement clearly indicates, in light of the *TCG Order* and the *ICG Telecom Order* issued by the Alabama Public Service Commission, that BellSouth understood that ISP-bound traffic would be included in the definition of "Local Traffic" at the time it entered into the Second BellSouth/TCG Agreement. At minimum, in light of these prior decisions, BellSouth should have, but failed to even address, negotiate or separately identify ISP-bound traffic in the Second BellSouth/TCG Agreement, an act that BellSouth subsequently determined to be prudent in negotiating a subsequent interconnection agreement with Level 3 Communications, LLC ("Level 3"). See Ex. 14.

Third, BellSouth presumptuously assumes that as a result of the FCC's *Declaratory Ruling* released in February 1999, BellSouth no longer had any obligation to negotiate the issue of whether ISP-bound traffic is subject to reciprocal compensation.<sup>8</sup> BellSouth apparently takes the position

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<sup>6</sup> *Re ICG Telecom Group Inc.*, Docket No. 26619, Alabama Public Service Commission Slip Opinion, March 4, 1999. ("*ICG Telecom*") (Ex. 11).

<sup>7</sup> All references to the transcript of the final hearing will be identified as "Tr. Page(s): Line(s)".

<sup>8</sup> *In the Matter of Implementation of the Local Competition Provision in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-bound Traffic*, CC Docket Nos. 96-98 and 99-68, FCC Order 99-38 ("*Declaratory Ruling*").

today (although it never advised TCG of this position prior to entering into the Second BellSouth/TCG Agreement) that the FCC's *Declaratory Ruling* precluded state commissions from finding that reciprocal compensation is due for ISP-bound traffic. This contention was not even raised by BellSouth witness Elizabeth Shiroishi in her prefiled direct testimony where she supposedly laid out the reasons why BellSouth should not pay reciprocal compensation for ISP-bound traffic under the Second BellSouth/TCG Agreement. The FCC *Declaratory Ruling* never stated or even implied that state commissions could no longer make such a determination. In fact, in the *Declaratory Ruling*, the FCC specifically stated that state commissions retained the authority to determine that parties have agreed to treat ISP-bound traffic as local traffic subject to the reciprocal compensation provisions of intercarrier agreements.<sup>9</sup> As further argued herein, the explicit statements by the FCC in the *Declaratory Ruling* authorizing state commissions to act in the absence of a federal rule, clearly belies BellSouth's purported reliance on that ruling as impacting its reciprocal compensation obligations for ISP-bound traffic.

In addition to entitlement to all reciprocal compensation for ISP-bound traffic, TCG is entitled to reciprocal compensation for terminating BellSouth's local traffic at the tandem interconnection rate. TCG's switches throughout Florida, more fully explained herein in Issue 4, serve geographic areas comparable to that served by BellSouth's tandem switches in accordance with the relevant FCC Rules, Orders and case law.

Finally, TCG is also entitled to be fully compensated for the transport and termination of BellSouth's intraLATA toll traffic. As discussed herein in issue 5, BellSouth has not fully

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<sup>9</sup> *Id.*, at ¶ 24, 26.

compensated TCG for the transport and termination of intraLATA toll traffic, including the tandem interconnection rate, in accordance with BellSouth's intraLATA switched access tariff filed with the Commission.

## ISSUES

### **Issue 1:        What is the Commission's jurisdiction in this matter?**

**Summary of Position:**        \*The Florida Public Service Commission has jurisdiction to enforce the terms of the Second BellSouth/TCG Agreement that BellSouth has breached.\*

The Federal Telecommunications Act of 1996 ("Act") sets forth provisions regarding the development of competitive markets in the telecommunications industry. The United States Court of Appeals for the Eighth Circuit confirmed that, pursuant to Section 252 of the Act, state commissions like this one, "are vested with the power to enforce the provisions of the agreements . . . (they) have approved." Iowa Utilities Board v. FCC, 120 F.3d 753, 804 (8<sup>th</sup> Cir. 1997). The Commission also has jurisdiction to consider and resolve this complaint pursuant to Section 364.01, Florida Statutes, and to enforce Order No. PSC-99-1877-FOF-TP which approved the Second BellSouth/TCG Agreement. Moreover, Section 16 of the Second BellSouth/TCG Agreement (Ex. 8 (RTG-1) requires the parties to petition this Commission for a resolution of any disputes that arise as to the interpretation of the agreement.

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

**Summary of Position:**        \*Yes.\*

Notwithstanding the clear and unambiguous definition of "Local Traffic" set forth in the Second BellSouth/TCG Agreement and previously interpreted by the Commission in the *TCG Order*



to require payment of reciprocal compensation for delivery of ISP-bound traffic, BellSouth has unilaterally decided to withhold approximately \$9.7 million dollars in reciprocal compensation, claiming that the traffic that TCG terminated on behalf of BellSouth's end user customers was "ISP-bound." (See Late Filed Ex. 5).

**A. *BellSouth has failed to establish that any of the calls at issue are ISP-bound calls purportedly excluded from the definition of "Local Traffic."***

Perhaps lost in the testimony and exhibits of the parties is a very simple threshold issue. BellSouth witness Elizabeth Shiroishi agreed that BellSouth owes TCG reciprocal compensation for "Local Traffic." (Tr. 157: 14-18.) BellSouth disagrees that it owes reciprocal compensation for ISP-bound calls. *Id.* Yet, BellSouth failed to produce one iota of competent, substantial and reliable evidence demonstrating which calls in the invoices sent by TCG to BellSouth actually terminated at ISPs and, therefore, were ISP calls that BellSouth *argues (but did not prove)* should be excluded from the contractual definition of "Local Traffic." To this date, BellSouth has not satisfactorily demonstrated, through competent and substantial evidence, that the calls reflected in TCG's invoices to BellSouth that were excluded from payment as ISP calls were in fact calls transported and terminated by TCG to ISPs. BellSouth's failure to present such evidence - - a product of its failure to establish a separate tracking mechanism for ISP-bound calls in the Second BellSouth/TCG Agreement - - renders all local calls transported and terminated by TCG, including calls to ISPs, invoiced as local calls by TCG to BellSouth, as "Local Traffic" subject to reciprocal compensation.

The reciprocal compensation provision in the Second BellSouth/TCG Agreement in Attachment 6, Section 5.1, Mutual Compensation, expressly provides that it is the billing carrier who determines whether traffic is local or intraLATA toll:

the parties shall bill each other reciprocal compensation in accordance with the standards set forth in this agreement 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 traffic. 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. (emphasis added).

Nonetheless, BellSouth has unilaterally withheld reciprocal compensation payments to TCG for traffic billed as local traffic by TCG based upon a process whereby BellSouth "estimates" how many of its local calls are ISP-bound. BellSouth's "estimation" process significantly reduced BellSouth's reciprocal compensation payments to TCG under the Second BellSouth/TCG Agreement. Ms. Shiroishi, in response to a question from Commissioner Jaber, testified that

"for what ALECs bill to us, we have a verification process whereby when -- let's just use easy numbers. If an ALEC were to submit one hundred minutes to BellSouth, we have a data base and a methodology that we go through to say of those one hundred minutes how many do we *think* are ISP." (emphasis added) See Tr. 177:4-17.

Based on BellSouth's failure to demonstrate by competent, substantial and reliable evidence that any of the calls for which they have withheld reciprocal compensation were in fact ISP-bound calls, TCG is entitled to reciprocal compensation for all Local Traffic invoiced by TCG to BellSouth and at issue in this proceeding.

**B. *BellSouth's publicly stated position that it opposes reciprocal compensation for ISP-bound traffic is irrelevant and does not undermine the controlling precedent of the TCG Order.***

In the instant case, BellSouth defends its position of unilaterally deciding to withhold payment for ISP-bound traffic by stating that it had made its position opposing the payment of reciprocal compensation for ISP-bound traffic publicly known prior to the time TCG adopted the BellSouth/AT&T Agreement. That same defense was raised by BellSouth in the *Global NAPS* proceeding and rejected by the Commission. In *Global NAPS*, BellSouth maintained that it made its position on ISP traffic publicly known prior to the adoption by *Global NAPS* of a Commission approved agreement between ITC Deltacom and BellSouth. The Commission rejected that defense in *Global NAPS* noting that BellSouth had never modified the ITC DeltaCom/BellSouth Agreement adopted by GlobalNAPS to reflect BellSouth's position. The same is true in this case. The intercarrier agreement between AT&T and BellSouth incorporated in the Second BellSouth/TCG Agreement does not reflect any language or modification addressing reciprocal compensation for termination of traffic to ISPs. See Ex 8 (RTG-2). Additionally, there is no language modifying the definition of "Local Traffic" in the Second BellSouth/TCG Agreement, even though the parties renegotiated other terms from the BellSouth/AT&T Agreement, including completely deleting Section 16 of the general terms and conditions of the AT&T Agreement and replacing it with new and different language, and deleting Part IV, Section 37 of the general terms and conditions of the BellSouth/AT&T Agreement and replacing it with different language. *Id.* Contrary to BellSouth's claims, the record in the instant case reflects that BellSouth notified AT&T and TCG that it would not pay reciprocal compensation for ISP-bound traffic on September 8, 1999, two months *after* the Second BellSouth/TCG Agreement became effective. (T. 76:2-11).

On September 5, 1989, the Commission issued Order No. 21815 wherein the Commission concurred with the testimony of a BellSouth witness and found that end user access to information

service providers, which include Internet Service Providers, is by local service.<sup>10</sup> In the *TCG Order*, the Commission reiterated its holding in the *Information Services Order* that ISP-bound traffic should be treated as local, stating:

In this case, witness Hendrix claimed that Order No. 21815 was only an interim order that has now been overruled. He could not identify any commission order establishing a different policy; nor could he specify the FCC Order that supposedly overrules the Florida Commission order. Further, and most importantly, BellSouth admitted that this definition (that calls to Enhanced Services Provides should be treated as local exchange services) had not been changed at the time it entered into its Agreements.

It is clear that the treatment of ISP-bound traffic was an issue long before the parties agreement was executed. We found, in Order No. 21815, as discussed above, that such traffic *should be treated as local*. Both [WorldCom] and BellSouth clearly were aware of this decision, and we presume that they considered it when they entered into their Agreement.<sup>11</sup>

At the time BellSouth and TCG entered into the Second BellSouth/TCG Agreement, BellSouth was well aware of this Commission's prior decisions ruling in the *Information Services Order* and the *TCG Order*. BellSouth's "publicly stated position" that it opposed the payment of reciprocal compensation for ISP-bound traffic (i.e., BellSouth's disagreement with a Commission decision) does not alter the controlling legal effect of this Commission's prior decisions holding that reciprocal compensation is due for ISP-bound traffic.

Further support for TCG's assertion that reciprocal compensation is due to TCG for the transport and termination of BellSouth's ISP-bound traffic is found in the Commission's contract enforcement decision in *Global NAPS* where the Commission framed the controlling issue as one

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<sup>10</sup> *Investigation into the Statewide Offering of Access to the Local Network for the Purpose of Providing Information Services*, Docket No. 880423-TP ("*Information Services Order*").

<sup>11</sup> *TCG Order*, 98 F.P.S.C. at 9:137.

of contract interpretation. In rejecting BellSouth's "publicly stated position" argument, the Commission held:

[W]e find it particularly noteworthy that there is nothing in the Agreement that specifically addresses traffic bound for ISPs, nor is there any mechanism in the Agreement to account for such traffic, as explained by GNAPs. Thus, nothing in the Agreement indicates that this traffic was to be treated differently than local traffic. In addition, while BellSouth may have already made its position on traffic to ISPs publicly-known by the time GNAPs adopted the DeltaCom Agreement, BellSouth never modified the Agreement adopted by GNAPs to reflect its position, as noted by GNAPs' witness Rooney, even though BellSouth's witness Shiroishi indicated that BellSouth had developed such an amendment.<sup>12</sup>

Given that the Commission had already determined that the plain meaning of the same definition of "Local Traffic" required reciprocal compensation for the termination of ISP-bound traffic in the *TCG Order*, and that the Second BellSouth/TCG Agreement does not specifically segregate or address ISP-bound traffic, BellSouth's "public position" opposing payment for ISP-bound traffic is irrelevant.

This Commission has previously interpreted the controlling language in the Second Agreement — the definition of "Local Traffic" — after a formal evidentiary hearing between these same two parties. In the instant case, as in *Global NAPS* and *DeltaCom*, the Agreement does not segregate ISP-bound traffic nor is ISP-bound traffic addressed anywhere else in the Agreement. As a matter of law, this Commission's decision in the *TCG Order* reflects the governing and controlling law at the time the parties entered into the Second BellSouth/TCG Agreement.<sup>13</sup> The Commission's

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<sup>12</sup> *Global NAPS*, 00 F.P.S.C. at 4:358.

<sup>13</sup> See, e.g., *TCG Order*, 98 F.P.S.C. at 9:137 (Commission determined that parties were aware that the Commission had previously determined that ISP traffic should be treated as local in the *Information Services Order* at the time the parties entered into the agreement at issue); see also, *Northbrooke Property and Casualty Insure. Co. v. RNG Crane Service, Inc.*, 765 So.2d 836, 839

decision in the *TCG Order* renders the definition of Local Traffic under the Second BellSouth/TCG Agreement clear and unambiguous; BellSouth is obligated to pay reciprocal compensation to TCG for ISP-bound traffic.

- C. ***The “intent” of the parties at the time of the Agreement, if relevant, establishes that ISP-bound traffic was never intended to be excluded from the reciprocal compensation obligations of the Second BellSouth/TCG Agreement.***

It is a fundamental tenet of contract law that if the words used in a written contract are clear and unambiguous, extrinsic evidence as to the meaning of the language, including a party’s intent is irrelevant.<sup>14</sup> As stated above, the Commission has previously interpreted the definition of “Local Traffic” in the Second BellSouth/TCG Agreement. Therefore the Commission should rely on the plain meaning of the definition of “Local Traffic” as previously interpreted and relied upon by TCG (Tr. 87: 9-15) and determine that such language includes ISP-bound traffic; without regard to any extrinsic evidence, including a party’s subjective purported intent to define “Local Traffic” differently than the Commission. However, if the Commission determines that the intent of the parties is relevant, the record in the instant case establishes that ISP-bound traffic was never intended to be excluded from the reciprocal compensation obligations of the Second BellSouth/TCG Agreement.

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(Fla. 4<sup>th</sup> DCA 2000); *Florida Beverage Corp. v. Division of Alcoholic Beverages and Tobacco*, 503 So.2d 396, 398 (Fla. 1<sup>st</sup> DCA 1987).

<sup>14</sup> See *McCarty v. Dade Division of American Hospital Supply*, 360 So. 2d 436 (3<sup>rd</sup> DCA 1978).

1. *The BellSouth/AT&T Agreement*

BellSouth asserts that reciprocal compensation is not due for ISP-bound traffic pursuant to the definition of “Local Traffic” in the Second BellSouth/TCG Agreement on the theory that it was the intent of BellSouth and AT&T that reciprocal compensation not include ISP-bound traffic at the time BellSouth entered into its interconnection agreement with AT&T. BellSouth has presented no testimony or documentary materials from any competent witness to actually establish that its intent in negotiating with AT&T (or TCG for that matter) was to avoid compensation for the termination of ISP-bound traffic. The only evidence introduced by BellSouth was the testimony of Ms. Shiroishi, who never testified that she had anything personally to do with the negotiations between AT&T and BellSouth or with the negotiation between BellSouth and TCG.

BellSouth witness Elizabeth Shiroishi testified that at the time AT&T and BellSouth entered into their interconnection agreement, it was the position of AT&T that ISP-bound traffic was interstate and therefore not subject to reciprocal compensation. In drawing that conclusion, Ms. Shiroishi cited the Commission to comments that AT&T filed before the FCC in 1999 in a docket entitled *In the Matter of Request by the Association for Local Telecommunications for Clarification of the Commission’s Rules Regarding Reciprocal Compensation for Information Service Provider Traffic*. See Exhibit 10 (ERAS-1). In those comments, AT&T urged the FCC, as a matter of public policy, to repeal the access charge exemption for ISP-bound traffic in the future. The comments did not even address the issue of whether ISP-bound traffic is subject to reciprocal compensation and AT&T never stated that reciprocal compensation is not due for ISP-bound traffic.

More importantly, AT&T clearly stated its position that reciprocal compensation is due for ISP-bound traffic in Reply Comments filed with the FCC in July of 1997.<sup>15</sup> Therein, AT&T specifically stated:

For purposes of cost recovery . . . the applicability of reciprocal compensation arrangements to interstate ISP traffic makes sense.<sup>16</sup>

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It is thus a legitimate exercise of the Commission's (the FCC's) authority to govern the terms of cost recovery for interstate access services provided to ISPs by requiring that LECs be compensated for transport and termination of traffic to ISP switches in accordance with their existing reciprocal compensation arrangements.<sup>17</sup>

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Clarification that the Commission's (FCC's) rules governing the treatment of Internet traffic is eligible for reciprocal compensation will put to rest, once and for all, the blatant attempts of the ILECs to competitively disadvantage emerging competitors and their potential customers.<sup>18</sup>

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<sup>15</sup> *In the Matter of Requests by the Association for Local Telecommunications ("ALTS") for Clarification of the Commission's Rules Regarding Reciprocal Compensation For Information Service Provider Traffic*. CCB-CPD 97-30. Reply comments of AT&T Corp. filed with the FCC on July 31, 1997. (Exhibit 13).

<sup>16</sup> *Id.*, at 2.

<sup>17</sup> *Id.*, at 3. (emphasis supplied). This passage references, for example, the BellSouth/AT&T Agreement and the existing reciprocal compensation arrangements for ISP-bound traffic thereunder which were in effect prior to the filing of the Reply Comments.

<sup>18</sup> *Id.*, at 5.



. . . AT&T respectfully requests that the Commission (FCC) declare that ILECs are eligible for reciprocal compensation for the transport and termination of traffic to their ISP subscribers.<sup>19</sup>

AT&T's Reply Comments filed with the FCC in the above docket clearly establish AT&T's intent that reciprocal compensation is applicable to ISP-bound traffic. AT&T filed those comments with the FCC in July of 1997, approximately two years before TCG adopted the BellSouth/AT&T Agreement. BellSouth witness Shiroishi confirmed that BellSouth was aware of AT&T's intent as reflected in the above Reply Comments prior to TCG's adoption of the BellSouth/AT&T Agreement. *See Tr. 172:19-23.*

To further enlighten the Commission that AT&T's position, like TCG's, is that reciprocal compensation is (and always has been) due for ISP-bound traffic, TCG witness Richard Guepe testified that:

- (1) AT&T intended to be compensated by ISP-bound traffic (Tr. 91: 4-19);
- (2) AT&T always billed BellSouth for terminating ISP-bound traffic (Tr. 101: 17-23)
- (3) AT&T does not segregate or separately identify ISP-bound traffic (Tr. 101:17-23);
- (4) the language comprising the definition of "Local Traffic" in the BellSouth/AT&T

Agreement would have been negotiated at around the same time BellSouth negotiated the definition of "Local Traffic" in the First BellSouth/TCG Agreement and similar definitions of "Local Traffic" that did not specifically include ISP-bound traffic (with WorldCom Technologies, Inc., Intermedia Communications, Inc. and MCI Metro Access Transmission Services, Inc.) that were interpreted to include ISP-bound traffic in the *TCG Order* (Tr. 89:6-17); and,

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<sup>19</sup> *Id.*, at 6.

(5) AT&T and TCG would not have had different interpretations of the definition of “Local Traffic” interpreted to include ISP-bound traffic in the *TCG Order*. (Tr. 91:14-19).

Moreover, BellSouth was aware or should have been aware of the prevailing law in Florida reflected in the *Information Services Order* at the time of the BellSouth/AT&T Agreement.

In *Global NAPS*, the Commission noted the importance of consistency in its interpretation of interconnection agreements that are subsequently adopted by other carriers:

Although we need not look beyond the plain language in the agreement in this instance, we note that we do not believe that the intent of the parties at the time of the adoption is the relevant intent when interpreting an agreement adopted pursuant to Section 252(i) of the Act. Rather, we believe the intent of the original parties is the determining factor when the agreement language is not clear. Otherwise, original and adopting parties to an agreement could receive differing interpretation of the same agreement, which is not consistent with the purpose of Section 252(i) of the Act.<sup>20</sup>

In this case, the Commission need not reach the issue of the intent of AT&T and BellSouth in connection with the BellSouth/AT&T Agreement to maintain consistency with the *Global NAPS* decision. Contrary to the facts in *Global NAPS*, the Second BellSouth/TCG Agreement was not a pure and sole opt-in of the BellSouth/AT&T Agreement. In the instant case, TCG relied on the Commission’s interpretation of the definition of “Local Traffic” in the *TCG Order* incorporated in the BellSouth/AT&T Agreement and there were additional negotiated provisions which did not address ISP-bound traffic. However, to the extent the Commission deems the intent of AT&T and BellSouth to include ISP-bound traffic in the definition of “Local Traffic” to be relevant, it is abundantly clear based on the evidence in this record it was the intent of both BellSouth and AT&T

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<sup>20</sup> *Global NAPS*, 00 F.P.S.C. at 4:359.

not to exclude ISP-bound traffic from the definition of “Local Traffic” in the BellSouth/AT&T Agreement.

## 2. *The Second BellSouth/TCG Agreement*

BellSouth’s assertion that it never intended ISP-bound traffic to be subject to reciprocal compensation is the same argument that was raised by BellSouth and rejected by this Commission in the *TCG Order*, *Global NAPS*, and *DeltaCom*. If, in fact, BellSouth intended to exclude ISP-bound traffic from the definition of Local Traffic, it should have done so at the time TCG and BellSouth adopted and partially renegotiated the BellSouth/AT&T Agreement. This Commission held in the *TCG Order* in support of its ruling that reciprocal compensation was due for ISP-bound traffic, that “no exceptions have been made to the definition of Local Traffic to exclude ISP traffic.”<sup>21</sup> Surely, the *TCG Order* placed BellSouth on notice that if it intended to exclude ISP-bound traffic from the definition of Local Traffic in its interconnection agreement with TCG, it should have done so at the time the parties entered into the Second BellSouth/TCG Agreement. Further, on March 4, 1999, approximately four months before TCG adopted and partially renegotiated the BellSouth/AT&T Agreement, the Alabama Public Service Commission also put BellSouth on notice that ISP-bound traffic was to be treated as local traffic unless specifically excluded from the definition of local traffic in the intercarrier agreement. In *ICG Telecom*, the Alabama Public Service Commission held BellSouth responsible for reciprocal compensation for ISP-bound traffic and stated:

Also persuasive is the evidence of record demonstrating BellSouth’s awareness of the 1989 decision of the Florida Public Service Commission wherein the Florida

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<sup>21</sup> *TCG Order*, 98 F.P.S.C. at 9:142.

Commission held that calls to ISPs should be viewed as jurisdictionally intrastate local exchange calls. BellSouth's knowledge of the Florida Information Services Order is particularly enlightening given the fact that BellSouth generally negotiates interconnection agreements on a region-wide basis. The existence of that decision strongly suggests that BellSouth was fully aware of the prevailing local treatment afforded ISP traffic by industry usage and custom long before the interconnection agreements under review were negotiated and executed. *If there was indeed no intention to encompass ISP traffic within the meaning of Local Traffic as BellSouth claims, it is reasonable to assume that BellSouth would have taken steps to specifically exclude ISP traffic from the definition of Local Traffic in light of the Florida Information Services Order.* (emphasis added).<sup>22</sup>

In light of the *TCG Order* and *ICG Telecom*, the absence of any language in the Second BellSouth/TCG Agreement excluding ISP-bound traffic from the definition of Local Traffic clearly illustrates that BellSouth never intended to (or, at minimum, failed to take prudent steps to) exclude ISP-bound traffic from Local Traffic.<sup>23</sup>

Moreover, consistent with the factors articulated by the FCC in the *Declaratory Ruling*<sup>24</sup> (trumpeted by BellSouth) and emphasized by Commissioner Jaber (Tr. 97: 12-99:12) as relevant in determining whether two carriers intended to treat ISP-bound traffic as local traffic subject to

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<sup>22</sup> *ICG Telecom*, at 17 (Exhibit 11).

<sup>23</sup> Jerry Hendrix, a BellSouth employee, was the authorized representative for BellSouth during the negotiations by TCG and BellSouth of the BellSouth/AT&T Agreement. In fact, Mr. Hendrix, as BellSouth's authorized representative, signed the provisions that were renegotiated by TCG and BellSouth to the BellSouth/AT&T Agreement. Mr. Hendrix was also a witness for BellSouth before this Commission in Docket No. 971478-TP, wherein this Commission issued the *TCG Order*, and was a witness for BellSouth before the Alabama Public Service Commission in *ICG Telecom* discussed herein. Despite Mr. Hendrix's familiarity with the negotiations between TCG and BellSouth during the adoption of the BellSouth/AT&T Agreement and his familiarity with the *TCG Order* and *ICG Telecom* decision, BellSouth chose not to call him as a witness in the instant proceeding.

<sup>24</sup> *Declaratory Ruling*, at ¶ 24.

reciprocal compensation (and applied by the Commission in the *TCG Order*<sup>25</sup> and in decisions which followed the *Declaratory Ruling*<sup>26</sup>), BellSouth witness Elizabeth Shiroishi confirmed that during the periods encompassed by both the BellSouth/AT&T and the Second BellSouth/TCG Agreements:

- (1) BellSouth's end user customers generally call a seven digit local number to dial up ISPs (*See Tr. 158: 23-159:5*);
- (2) Service provided by BellSouth to its ISPs falls under BellSouth's intrastate local exchange tariffs (*See Tr. 158:10-12*);
- (3) Calls to ISPs within BellSouth's local calling area are rated and billed just like any other local call (*See Tr. 158:15-19*);
- (4) BellSouth charges its ISP customers local business line rates (*See Tr. 158:4-6*).
- (5) BellSouth includes calls to ISPs in its local telephone rates (*See Tr. 158:23-159:5*);  
and
- (6) BellSouth made no effort to memorialize a separate tracking, identification or compensation mechanism for ISP-bound traffic in the Second BellSouth/TCG Agreement (*See Tr. 179: 4-7; 183:16-184:2*).

Moreover, TCG does not segregate ISP-bound traffic from other local traffic for the purpose of billing reciprocal compensation (*See Tr. 41:3-5*).

In short, utilizing factors and criteria previously deemed relevant by the FCC and applied by this Commission, the evidence clearly shows that BellSouth treated the ISP-bound calls at issue

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<sup>25</sup> *TCG Order*, 98 F.P.S.C. 9:138-140.

<sup>26</sup> *See, e.g., Global NAPS*, 00 F.P.S.C. 4:358; *DeltaCom*, 00 F.P.S.C. 8:398.

during the periods of the BellSouth/AT&T and Second BellSouth/TCG Agreements as local calls in every respect.

Finally, it is important to note that in May 1997, the FCC issued its *Access Charge Reform Order*.<sup>27</sup> In the *Access Charge Reform Order*, the FCC expressly reaffirmed that ISPs were exempt from access charges. In fact, BellSouth continues to take advantage of the access charge exemption by ensuring that its customers can, when feasible, access the Internet by means of a local call. Because of the access charge exemption, if ISP-bound traffic is not treated as local for purposes of reciprocal compensation, there is no provision in the Second BellSouth/TCG Agreement that would permit TCG (or would permit any ALEC who opted into this intercarrier agreement) to be paid for millions of minutes of switching services that it provides to BellSouth to route calls from BellSouth end users to ISPs served by TCG. It is inconceivable that TCG or any other ALEC would have intended to enter into an agreement that subjected it to the prospect of performing this work for free.

**3. *BellSouth's reliance on the FCC's Declaratory Ruling as authority for withholding reciprocal compensation for ISP-bound traffic is misplaced.***

BellSouth witness Shiroishi testified that BellSouth is not obligated to pay reciprocal compensation to TCG for the transport and termination of BellSouth's ISP-bound traffic under the Second BellSouth/TCG Agreement because of the *Declaratory Ruling* released by the FCC on February 26, 1999. It is apparently also BellSouth's position that BellSouth had no obligation to discuss or negotiate ISP-bound traffic after the *Declaratory Ruling* despite the clear statements to the contrary by this Commission in the *TCG Order* and the Alabama Public Service Commission

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<sup>27</sup> *Access Charge Reform*, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982 (1997) ("*Access Charge Reform Order*"), aff'd sub nom. *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8<sup>th</sup> Cir. 1998).

in *ICG Telecom*. BellSouth's purported reliance on the *Declaratory Ruling* is dubious for a number of reasons.

First, the *Declaratory Ruling* was not final as it was immediately appealed and BellSouth was aware that an appeal was pending at the time TCG and BellSouth entered into the Second BellSouth/TCG Agreement. See Tr. 186:3-21. The strained rationale of the FCC in the *Declaratory Ruling* ultimately came to light as the *Declaratory Ruling* was reversed by the D.C. Circuit Court of Appeals for, among other reasons, "want of reasoned decisionmaking."<sup>28</sup>

Second, as emphasized by Commissioners Deason's and Jaber's questions to BellSouth witness Shiroishi, BellSouth was well aware at the time of the *Declaratory Ruling* that FCC orders, including FCC orders concerning reciprocal compensation for ISP-bound traffic, have generally and consistently been subject to differing interpretations and that at the time of the Second BellSouth/TCG Agreement, litigation between BellSouth and various ALECs over the issue of reciprocal compensation for ISP-bound traffic remained widespread throughout BellSouth's nine-state region. (Tr. 173:22-174:2; 179:8-13). BellSouth witness Elizabeth Shiroishi did not deny that BellSouth could have raised the issue of reciprocal compensation for ISP-bound traffic "as an item of clarification given that there were other amendments that were made to this opt-in agreement." (Tr. 174:18-24). Indeed, when asked by Staff counsel if it would have been prudent for BellSouth to address the issue of reciprocal compensation for ISP-bound traffic as part of the modifications to the adopted BellSouth/AT&T Agreement in light of the contentious history of the issues and the millions of dollars at stake, Ms. Shiroishi could only say:

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<sup>28</sup> See *Bell Atlantic v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

“At the time BellSouth looked at the situation and didn’t feel it was necessary.”<sup>29</sup>

Contrary to its actions in the instant case, BellSouth subsequently found it prudent to negotiate a separate intercarrier compensation mechanism for ISP-bound traffic with Level 3 pursuant to an agreement that was filed with the Commission on May 2, 2001. (Ex. 14; Tr. 180: 23-182: 15).

Third, even a cursory reading of the FCC’s *Declaratory Ruling* establishes that BellSouth’s reliance on that Order to posit that reciprocal compensation is no longer due for ISP-bound traffic is profoundly misplaced. In the *Declaratory Ruling*, the FCC repeatedly stated that state commissions may conclude that reciprocal compensation is appropriate for termination of ISP-bound traffic in the absence of a contrary federal rule. In a companion order to the *Order on Remand*, the FCC issued a Notice of Proposed Rulemaking to initiate the process of promulgating a federal rule to govern ISP-bound traffic.<sup>30</sup> The absurdity of BellSouth’s argument that the *Declaratory Ruling* precluded state commissions from holding that reciprocal compensation is due for ISP-bound traffic is illustrated in the following paragraphs from the Order:

[i]n the absence of any contrary Commission rule, parties entering into interconnection agreements may reasonably have agreed for the purposes of determining whether reciprocal compensation should apply to ISP-bound traffic, that such traffic should be treated in the same manner as local traffic. When construing the parties’ agreements to determine whether the parties so agreed, state commissions have the opportunity to consider all the relevant facts, including the negotiation of the agreements and the context of this Commission’s longstanding policy of treating this traffic as local, and the conduct of the parties pursuant to those agreements....Nothing in this *Declaratory Ruling*, therefore, should be construed to question any determination a state commission has made, *or may make in the future*

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<sup>29</sup> Tr. 186: 13-21.

<sup>30</sup> *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, FCC Order 01-132 (released April 27, 2001).



that parties have agreed to treat ISP-bound traffic as local traffic under existing interconnecting agreements. (emphasis added).<sup>31</sup>

Clearly, the *Declaratory Ruling* did not preclude state commissions from determining that reciprocal compensation is due for ISP-bound traffic. In fact, in the order, the FCC explicitly stated that until the completion of an FCC rule, state commissions are authorized to determine that reciprocal compensation is due and owing for termination of ISP-bound traffic.<sup>32</sup> The preservation of state commission jurisdiction to address disputes regarding reciprocal compensation for ISP-bound traffic with respect to interconnection agreements in effect prior to the June 14, 2001 effective date of the *Order on Remand* was clearly and explicitly stated in the *Order on Remand* at paragraph 82.

Fourth, BellSouth's reliance on the *Declaratory Ruling* was particularly misplaced in light of the fact that the FCC specifically reserved state commission jurisdiction to arbitrate the issue of reciprocal compensation for ISP-bound traffic - - an option that was clearly available to TCG - - and emphasized:

(that) our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied *in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic.*

\* \* \*

*A state commission's decision to impose reciprocal compensation obligations in an arbitration proceeding - - or a subsequent state commission decision that those obligations encompass ISP-bound*

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<sup>31</sup> *Declaratory Ruling*, at ¶ 24.

<sup>32</sup> *Declaratory Ruling*, at ¶ 26.

*traffic - - does not conflict with any Commission rule regarding ISP-bound traffic. (footnote omitted).*<sup>33</sup>

At the time TCG opted into the BellSouth/AT&T Agreement, it clearly had the authority to do so pursuant to 47 USC § 252(i) which states:

**i) Availability to other telecommunications carriers.**

A local exchange carrier can make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier *upon the same terms and conditions* as those provided in the agreement. (emphasis added).

There is nothing in the *Declaratory Ruling* which precluded TCG from opting into the existing BellSouth/AT&T Agreement and entitling TCG to the “same terms and conditions” as those provided in the BellSouth/AT&T Agreement. Had the FCC intended to preclude ALECs from opting into existing carrier agreements whose terms included ISP-bound traffic within the definition of “Local Traffic” and therefore subject to reciprocal compensation, the FCC could have done so. In fact, in the *Order on Remand*, that is precisely what the FCC did. In Paragraph 82 of the *Order on Remand*, the FCC specifically stated that as of the date that the *Order on Remand* was published in the Federal Register (May 15, 2001), parties cannot opt into existing intercarrier agreements that call for reciprocal compensation for ISP-bound traffic. The FCC also reiterated its position that it would not disturb whatever decisions state commissions have made regarding the applicability of reciprocal compensation for ISP-bound traffic prior to the *Order on Remand*. There is no similar

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<sup>33</sup> *Declaratory Ruling*, at ¶ 25, 26 (emphasis supplied).

explicit language in the *Declaratory Ruling* precluding carriers from opting into existing intercarrier agreements that include ISP-bound traffic within the definition of Local Traffic.<sup>34</sup>

**Issue 3:        What is the effect, if any, of Order No. PSC-98-1216-FOF-TP, issued December 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?**

**Summary of Position:**        \*The *TCG Order* clearly mandates that the definition of “Local Traffic” in the Second BellSouth/TCG Agreement includes ISP-bound traffic and therefore BellSouth is required to pay reciprocal compensation to TCG for transporting and terminating BellSouth’s ISP-bound traffic.\*

BellSouth and TCG crafted a contractual definition of “Local Traffic” in the First BellSouth/TCG Agreement and agreed upon the exact same language in the Second BellSouth/TCG Agreement. The parties expressly delineated what is and what is not “Local Traffic” in order to eliminate uncertainty over what type of traffic might be encompassed by the definition. If BellSouth had intended at the time of the Second BellSouth/TCG Agreement to exclude calls terminated to ISP customers of TCG from the definition of “Local Traffic,” it could have, and should have, sought to modify the contractual definitions. BellSouth did not.

In the First BellSouth/TCG Agreement, “Local Traffic” was defined as follows:

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<sup>34</sup> BellSouth offered no evidence at the final hearing in support of its affirmative defenses to TCG’s Complaint. To the extent BellSouth continues to assert its affirmative defenses to TCG’s Complaint, TCG adopts and incorporates by references its arguments set forth on pp.11-13 of its Motion for Summary Final Order filed May 25, 2001 which conclusively establishes that BellSouth’s affirmative defense are without merit.

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.

On September 15, 1998, the Commission issued the *TCG Order* interpreting the definition of "Local Traffic" under the First BellSouth/TCG Agreement to include TCG's transport and termination of BellSouth originated calls to ISPs. In interpreting the above "Local Traffic" provisions, the Commission held:

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 off by BellSouth to TCG for termination with telephone exchange service and users that are Internet Service Providers or Enhanced Service Providers under the terms of TCG and BellSouth Florida Partial Interconnection Agreement. Traffic that is terminated on a local dialed basis to Internet Service Providers or 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.<sup>35</sup>

The definition of "Local Traffic" in the Second BellSouth/TCG Agreement that is the subject of this proceeding is *exactly the same* as the definition of "Local Traffic" in the First BellSouth/TCG Agreement. Attachment 11 to the Second 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.<sup>36</sup>

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<sup>35</sup> *TCG Order*, 98 F.P.S.C. 9:142.

<sup>36</sup> Exhibit 8 (RTG-1, at Attachment 11).

BellSouth's refusal to pay reciprocal compensation for local ISP traffic originated by its end users constitutes a material breach of the terms of the Second Agreement as previously interpreted by the Commission in the *TCG Order*. Section 5.1 of Attachment 6 of the Second BellSouth/TCG Agreement requires BellSouth and TCG to pay reciprocal compensation to each other for all Local Traffic that originates on one company's network and terminates on the other's network in accordance with the rates set forth in part IB Table I of the Second BellSouth/TCG Agreement.

TCG, like other ALECs and ILECs regulated by the Commission, engages in business decisions to either negotiate or opt-in to intercarrier agreements based on the law at the time the agreements are entered into. *See* Tr. 87:1-15. At the time TCG entered into the Second BellSouth/TCG Agreement, this Commission had interpreted the "Local Traffic" language in the Agreement in the *TCG Order*. Based upon that ruling, TCG opted into the BellSouth/AT&T Agreement (Tr. 91:10-13; 109: 23-110: 3). Since the time the Commission ruled in the *TCG Order* that this very definition of "Local Traffic" includes reciprocal compensation for ISP-bound traffic, nothing has transpired to change the Commission's ruling. The parties are the same, the relevant facts are the same, the law preserving this Commission's authority to interpret the instant Agreement to require payment of reciprocal compensation for ISP-bound traffic remains intact, and the relevant portions of the Second BellSouth/TCG Agreement are the same. Accordingly, the *TCG Order* provides the controlling precedent for the disposition of this contract dispute. For the Commission to rule differently today than it did in the *TCG Order* would create the regulatory uncertainty and potential discriminatory treatment of ALECs that the Act was specifically designed to avoid.

**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?**

**Summary of Position:** \*Yes, for the reasons previously discussed in this Posthearing Brief.\*

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

**Summary of Position:** \*The tandem interconnection rate of \$0.00325 is the rate that should apply for reciprocal compensation.\*

BellSouth has breached the Second BellSouth/TCG Agreement by failing to pay TCG reciprocal compensation for transport and termination of calls originated by BellSouth's end user customers and transported and terminated by TCG to ISPs.

Pursuant to the terms of the Second BellSouth/TCG Agreement, TCG is entitled to reciprocal compensation at the tandem interconnection rate of \$.00325 for the termination of all BellSouth's local traffic, including ISP-bound traffic.

Section 51.711(a)(3) of the Federal Communications Commission's rules governs a LEC's entitlement to the tandem interconnection rate for the transport and termination of local traffic.

Section 51.711(a)(3) reads as follows:

Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than and incumbent LEC is the incumbent LEC's tandem interconnection rate.

On April 27, 2001, the FCC released the Notice of Proposed Rulemaking (FCC Order 01-132) in CC Docket No. 01-92. In Paragraph 105 of the Notice of Proposed Rulemaking, the FCC stated:

In addition, Section 51.711(a)(3) of the Commission's rules requires only that the comparable geographic area test be met before carriers are entitled to the tandem interconnection rate for local call termination. Although there has been some confusion stemming from additional language in the text of the *Local Competition Order* regarding functional equivalency, Section 51.711(a)(3) is clear in requiring only a geographic test. Therefore, we confirm that if a carrier demonstrating that its switch serves "a geographic area comparable to that served by the incumbent LECs tandem switch" it is entitled to the tandem interconnection rate to terminate local telecommunications traffic on its network.

On July 3, 2001 the Ninth Circuit Court of Appeals also affirmed that an ALEC is entitled to collect the tandem switching rate if it can satisfy the "comparable geographic area" test.<sup>37</sup> In so doing, the court articulated the rationale for excluding a "functional equivalency" test as part of FCC Rule 51.711(a)(3). The court's analysis focused on the premise that the goals of local competition would not be served by discouraging ALECs from implementing efficient network architecture designs through the use of traditional and restrictive interpretations of FCC Rule 51.711(a)(3) based on the ILECs' network functionality. The court, in addressing AT&T's argument that it was entitled to the tandem interconnection rate because its switches serve a geographic area comparable to U.S. West's tandem switches, stated:

AT&T's ability to hand off (i.e., deliver) its traffic to U.S. West in a financially efficient way does not justify imposing the end-office rate (rather than the tandem rate) on U.S. West's traffic terminating on AT&T's network. AT&T's ability to efficiently interconnect with U.S. West affects the costs that U.S. West incurs; it does

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<sup>37</sup> *U.S. West Communications, Inc. v. Washington Utilities and Transportation Commission, et. al*, CV-97005686-BJR, No. 98-36013, 2001 WL 740573 (9<sup>th</sup> Cir., July 3, 2001).

not affect the costs AT&T incurs terminating U.S. West's traffic and should not affect AT&T's recovery under Section 252(d)(2)(A). AT&T should be paid according to the costs it incurs, not according to the costs it avoids imposing on U.S. West. Penalizing AT&T for its efficiently configured network architecture defeats the letter of Section 252(d)(2)(A) and the spirit of the Act by eliminating any incentive to make economically efficient interconnection decisions. Therefore, according to the statute, the arbitrator's analysis of switches' functions and his determination that AT&T's MSC<sup>38</sup> can deliver its traffic in a financially efficient way are not relevant to whether AT&T is entitled to the tandem rate for the traffic it terminates.<sup>39</sup>

The Ninth Circuit ultimately held:

[u]nder the FCC's regulations, AT&T is entitled to the tandem rate because its MSCs serve a comparable geographic area to U.S. West's tandem switches.<sup>40</sup>

To clearly demonstrate TCG's compliance with the FCC requirement that TCG's switches serve a comparable geographic area to that of BellSouth's tandem switches and therefore the tandem interconnection rate is applicable, TCG has submitted into the record in this proceeding Exhibit 9 (RTG-4), maps that establish TCG's switches and their ability to serve areas comparable to BellSouth's tandem switches. Further, all of TCG's customers can be accessed through a single point of interconnection with BellSouth in BellSouth's territory for each LATA. *See* Tr. 113:24-114:2. TCG is able to connect virtually any customer in a LATA to the TCG switch serving that LATA either through (1) TCG's own facilities built to the customer premises, (2) UNE loops provisioned through collocation in BellSouth end offices, or (3) using dedicated high-capacity facilities (in special access services or combinations of UNEs purchased from BellSouth). *See* Tr.

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<sup>38</sup> An "MSC" is a Mobile Switching Center.

<sup>39</sup> *U.S. West* at 4.

<sup>40</sup> *Id.*, at 5.



44:9-29. It remains TCG's intent to continue providing service throughout BellSouth's service area through its network switches *See* Tr. 49:15-20.

As demonstrated by the maps included in Exhibit 9 (RTG-4) and the testimony of Mr. Guepe, TCG operates five switches in Florida: Jacksonville, Orlando, Tampa and two in the Miami/Fort Lauderdale area. *See* Tr. 77:23-78:1. All of TCG's switches in Florida provide local service, including local service throughout the BellSouth territory. *See* Tr. 78:2-4; 110: 16-22; Exhibit 9 (RTG-4). TCG's switches have the capability of covering at least as large an area and in some cases perhaps larger than BellSouth's tandem switches because there are areas within some LATAs that BellSouth does not serve (service is provided by independent companies) and TCG actually is providing service and intends to continue to provide service throughout those areas. *See* Tr. 84:2-11. During the term of the Second BellSouth/TCG Agreement, TCG was actually serving and intending to continue to serve customers who originate and terminate traffic throughout the entire geographic areas that the switches cover. *See* Tr. 85:4-10.

In sum, the customers of TCG and BellSouth are interconnected and accessed through a single point of interconnection between TCG and BellSouth in each LATA in BellSouth's territory. (Tr. 113:24-114:2). While BellSouth seemed to suggest that TCG must demonstrate that it is serving some threshold benchmark number of customers to qualify for the tandem interconnection rate, such a test would undermine the FCC's intent in establishing a symmetrical reciprocal compensation mechanism and would undermine the ability of ALECs to build networks and customer bases to achieve the true intent of local service competition. (Tr. 111: 2-11). The undisputed facts and evidence establish that TCG's switches currently promote comprehensive local service in geographic areas comparable to those served by BellSouth's tandem switches, and that TCG intends to continue

expansion of service throughout BellSouth's service territory. Based on this evidence, the Commission should determine that TCG meets the criteria for payment of the tandem interconnection rate as articulated by FCC Rule 51.711(a)(3) and recently clarified by the FCC in the Notice of Proposed Rulemaking, and require BellSouth to pay TCG the undisputed amount of \$9,772,424.42 due for all local traffic, including ISP-bound calls, at the tandem interconnection rate. (See Late Filed Exhibit 5).

**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?**

**Summary of Position:** \*Yes.\*

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

**Summary of Position:** \*TCG is entitled to \$.02733 per minute-of-use for terminating switched access charges for intraLATA tolled traffic. BellSouth remits payments at the lower rate of \$.02643, in violation of BellSouth's Commission-approved tariff.\*

BellSouth witness Elizabeth Shiroishi testified that BellSouth has calculated the rate for intraLATA usage by adding the following rate elements included within BellSouth's intrastate access services tariff:

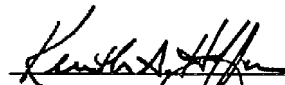
Carrier, line rate: \$ .01767 per minute of use ("mou")  
Local switching rate: \$ .00876 per mou  
Interconnection rate: \$ 0.00  
For a total rate of: \$ .02643 per mou for terminating switched access charges for intraLATA toll traffic. See Tr. 153:1-14.

In her testimony, Ms. Shiroishi fails to mention that BellSouth's Florida intrastate access services tariff also has rates for the transportation of traffic originated on BellSouth's network (\$.00004 per mou), facilities termination charges for the termination of traffic originated on BellSouth's network (\$.00036 per mou) and access tandem switching charges ( \$.00050 per mou). See Exhibit 10 (ERAS-4). TCG is clearly entitled to be compensated for the transportation and termination of BellSouth's traffic at the rates listed in BellSouth's tariff, as these costs are incurred by TCG in its transport and termination of traffic originated on BellSouth's network. Additionally, TCG is entitled to be compensated at the tandem switching rate.

### CONCLUSION

Based on the record evidence in this proceeding and the arguments raised in this posthearing brief, TCG respectfully requests the Commission grant the relief requested by TCG and enforce the terms of its Interconnection Agreement with BellSouth.

Respectfully submitted,

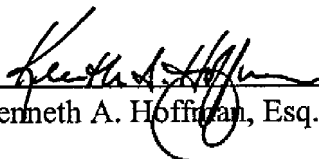
  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing was furnished by hand delivery this 27<sup>th</sup> day of July, 2001 to the following:

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AT&T/Posthearingbrief