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From: Fatool, Vicki [Vicki.Fatool@BellSouth.COM]
Sent: Friday, July 27, 2001 2:43 PM
To: 'filings@psc.state.fl.us'
Subject: Filing in Docket No. 001810-TP

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The attached document is from:

Vickie Fatool
for James Meza III
BellSouth Telecommunications, Inc.
150 South Monroe Street, Suite 400
Tallahassee, FL 32301

Docket No. 001810-TP - In re: Complaint of TCG South Florida and Teleport Communications Group for Enforcement of Interconnection Agreement with BellSouth Telecommunications, Inc.

Number of Pages: 30 including letter to Ms. Bayo, pleading and Certificate of Service.

Pleading entitled: Post Hearing Brief of BellSouth Telecommunications, Inc.

A paper copy will be filed with the Division of the Commission Clerk and Administrative Services today.

By filing electronically, BellSouth accepts that the official copy is the version printed by the Public Service Commission's Division for the commission clerk and Administrative Services and filed in the official docket file.

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Legal Department

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ORIGINAL

July 27, 2001

Mrs. Blanca S. Bay6
Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

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

Dear Ms. Bayó:

Enclosed is BellSouth Telecommunications, Inc.'s Post Hearing Brief, which we ask that you file in the captioned matter.

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

Sincerely,

James Meza III /rf.

James Meza III

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

CERTIFICATE OF SERVICE
Docket No. 001810-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Federal Express this 27th day of July, 2001 to the following:

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James Meza III/V.F.
James Meza III

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of TCG South Florida and Teleport Communications Group for Enforcement of Interconnection Agreement with BellSouth Telecommunications, Inc.	)	Docket No. 001810-TP
		Filed: July 27, 2001

POST HEARING BRIEF OF BELLSOUTH TELECOMMUNICATIONS, INC

BellSouth Telecommunications, Inc. ("BellSouth") submits this post-hearing brief in support of its positions on the issues set forth in the Complaint for Enforcement of Interconnection Agreement with BellSouth filed by TCG South Florida and Teleport Communications Group ("TCG"). These issues revolve around whether BellSouth breached its interconnection agreement with TCG. Considering the evidence and applicable law, the Commission should adopt BellSouth's position on each of the issues.

Statement of Basic Position

BellSouth did not breach its agreement with TCG by refusing to pay TCG reciprocal compensation for traffic bound to Internet Service Providers ("ISPs") for three primary reasons. First, ISP-bound traffic is, and always has been, interstate traffic. Second, the parties did not agree to pay reciprocal compensation for ISP-bound traffic in the agreement between TCG and BellSouth, effective July 15, 1999 to June 14, 2000. ("Second TCG Agreement"). Third, this Commission's Order in Order No. PSC-98-1216-TP ("TCG Order") has no bearing on the issues in this proceeding because it

only applies to the agreement between BellSouth and TCG that was effective from July 1996 to July 1999 ("First TCG Agreement").

Additionally, TCG is not entitled to the tandem switching rate for the termination of "Local Traffic," and BellSouth has not breached the Second TCG Agreement by failing to pay TCG switched access charges for telephone exchange service.

BellSouth's Position on the Issues

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

The Commission has jurisdiction to resolve disputes concerning the enforcement of agreements it approves pursuant to the Act. However, any interpretation and decision by this Commission must be consistent with federal law.

The Commission has jurisdiction in this matter because state commissions have the authority to hear disputes concerning the enforcement of agreements they approve pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 (the "Act"). See Iowa Util. Bd. v. FCC, 120 F. 3d 753, 804 (8th Cir. 1997). However, the Commission's interpretation of the agreement must be consistent with federal law. In the FCC's Order on Remand and Report and Order (FCC Order No. 01-l 31, released April 27 2001) ("Remand Order"), the FCC confirmed that ISP-bound traffic is interstate traffic and within the exclusive jurisdiction of the FCC. Remand Order at ¶¶ 1, 34, 36, and 44. Additionally, in the Remand Order, the FCC initiated steps to limit the

regulatory arbitrage that resulted from the payment of reciprocal compensation for ISP-bound traffic. Id. at ¶ 2. As a result, pursuant to binding authority, the only way parties to an interconnection agreement can now owe each other reciprocal compensation for the transport and termination of ISP-bound traffic is if they explicitly include such a provision in an agreement. Without it, federal law requires that any state commission interpreting an agreement find that reciprocal compensation is not owed for ISP-bound traffic.

Indeed, there is a serious question as to whether the Commission has jurisdiction to order anything other than that reciprocal compensation is not owed for ISP-bound traffic. See Remand Order at ¶ 82 ("Because we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, however, state commissions will no longer have authority to address this issue.")." Simply put, to find that BellSouth owes TCG reciprocal compensation for ISP-bound traffic would require the Commission to violate federal law and the FCC's

[1] This jurisdictional question is further complicated for opt in agreements because the Remand Order prohibits carriers from opting into an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic. Remand Order at ¶ 82. The FCC held that Section 252(i) applies "only to agreements arbitrated or approved by state commissions pursuant to section 252; it has no application in the context of an intercarrier compensation regime set by this Commission pursuant to section 201." Id.

expressed goal to limit the regulatory arbitrage that has resulted from the payment of reciprocal compensation for ISP-bound traffic.

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

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

""No. Under the terms of the Second TCG Agreement, the parties were only required to pay reciprocal compensation for local traffic, which does not include ISP-bound traffic.**

This dispute primarily revolves around whether TCG and BellSouth intended to pay each other reciprocal compensation for the transport and termination of ISP-bound traffic under the terms of a Second TCG Agreement which was effective from July 15, 1999 to June 14, 2000. TCG and BellSouth previously entered into the First TCG Agreement in July 1996, which expired on July 14, 1999. During the term of the First

TCG agreement, the Commission issued the TCG Order, wherein it interpreted the First TCG Agreement to require BellSouth to pay TCG reciprocal compensation for ISP-bound traffic under the terms of that specific agreement. At the expiration of the First TCG Agreement, TCG opted into an Interconnection Agreement between AT&T and BellSouth ("AT&T/BellSouth Agreement), which became the Second TCG Agreement. AT&T and BellSouth executed that agreement on June IO, 1997. The definition of "Local Traffic" in both the First TCG Agreement and the Second TCG Agreement are substantially the same.

TCG argues that reciprocal compensation is due under the Second TCG Agreement primarily because the Commission previously interpreted the First TCG Agreement, to require BellSouth to pay TCG reciprocal compensation for ISP-bound traffic. TCG's entire argument in this proceeding is based on the fact that the First TCG Agreement and Second TCG Agreement contain the same definition of "Local Traffic." However, as will be established below, reciprocal compensation is not due for ISP-bound traffic under the terms of the Second TCG Agreement.

A. The FCC's Declaratory Ruling established that BP-bound traffic was not interstate traffic and thus not subject to reciprocal compensation.

As a general rule, when the terms and provisions of a contract are unambiguous and complete, parol evidence is not admissible to define or explain the contract. NCP Lake Power, Inc. v. Florida Power Corp., 781 So. 2d 531, 536 (Fla. 5th DCA 2001). Additionally, it is well settled that the "laws in force at the time of the making of a contract enter into and form a part of the contract as if they were expressly incorporated into it." Florida Beverage Corp. v. Division of Alcoholic Beverages and Tobacco, Dept. of Business Reg., 503 So. 2d 396, 398 (Fla. DCA 1987). Indeed, in interpreting the First TCG Agreement, the Commission looked at the law in effect at the time of execution to ascertain the parties' intent. (Tr. 59).

In the case at hand, the terms of the Second TCG Agreement are clear and unambiguous – reciprocal compensation is only due for "Local Traffic." "Local Traffic" is defined in the Second TCG Agreement as "any telephone call that originates and terminates in the same LATA . . . ." (Tr. 156). Accordingly, as agreed to by TCG witness Guepe, reciprocal compensation is only due under the agreement when traffic originates and terminates in the same LATA.

Q. Okay. Would you agree with me that under this definition and other provisions of the agreement, the second TCG agreement, reciprocal compensation is only due for local traffic.

A. Yes, I would agree. . .

Q. Would you agree with me that in order for a call to be considered local traffic under the definition in the second agreement, the call must originate and terminate in the same LATA.

A. Yes. . .

****

Q. In order for recip comp to be paid, the call has to originate and terminate in the same LATA, is that correct?

A. That is the language of the definition of local traffic.

(Tr. 72-73).

At the time of the execution of the Second TCG Agreement, June 15, 1999, the FCC's February 26, 1999 Declaratory Ruling was in effect. (Tr. 174); see In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, 14 FCC Rcd 3689, (FCC Feb. 26, 1999) ("Declaratory Ruling"). As a result, under Florida law, the Declaratory Ruling entered into and formed part of the Second TCG Agreement. Florida Beverage Corp., 503 So. 2d at 398. This FCC ruling established that ISP-bound traffic did not terminate at the ISP and that such traffic was interstate in nature. Declaratory Ruling at ¶ 12; see also, FCC Remand Order at ¶ 1.

Therefore, as a matter of federal law, reciprocal compensation is not due for ISP-bound traffic under the Second TCG Agreement because at the time of the execution of that Agreement, the FCC had determined that such traffic was interstate in nature. Consequently, ISP-bound traffic could not constitute "Local Traffic" because it did not "originate[] and terminate1 in the same LATA."

B. AT&T and BellSouth both intended not to pay reciprocal compensation for ISP-bound traffic.

Assuming arquendo that the Second TCG Agreement is ambiguous, parol evidence establishes that the original parties to the Agreement, AT&T and BellSouth, did not intend to pay reciprocal compensation for ISP-bound traffic. This Commission has previously determined that, in interpreting opt in agreements, the relevant inquiry is the intent of the original parties to the Agreement and not the parties adopting the agreement. Order No. PSC-OO-0802-FOF-TP, Apr. 24, 2000 at 7 ("Global NAPS Order"). In that Order, the Commission reasoned that to hold otherwise would allow original and adopting parties to an agreement to "receive differing interpretations of the same Agreement, which is not consistent with the purpose of Section 252(i) of the Act." Id.

As stated above, BellSouth and AT&T entered into the AT&T/BellSouth Agreement on June IO, 1997. (Tr. 128). The only credible evidence establishing

AT&T's intent immediately prior to the execution of the AT&T/BellSouth Agreement proved that AT&T, like BellSouth, believed that ISP-bound traffic was interstate in nature and therefore not subject to reciprocal compensation.

As stated by BellSouth witness Shiroishi, AT&T filed comments with the FCC on March 30, 1997. In these comments, AT&T stated that ". . . calls made to an ESP do not terminate at the ESP's POP as they would if the ESP were truly a business user. Like an IXC's POP, the ESPs node or POP merely collects traffic for interstate transmission." (Tr. 155). AT&T also recommended in its comments that the appropriate compensation mechanism for ISP-bound traffic should be cost-based access rates that ESPs or ISPs would pay to the ILEC. (Tr. 155). AT&T did not mention or even suggest in these comments that reciprocal compensation should be paid by an ILEC to an ALEC serving an ISP. Id.

In contrast, the only evidence TCG presented to establish AT&T's intent prior to the execution of the AT&T/BellSouth Agreement was the testimony of TCG witness Guepe.[2] The Commission should give little credence to Mr. Guepe's testimony because it is not based on first hand knowledge or on any specific information. As he admitted in response to a question from Commissioner Deason, Mr. Guepe (1) did not

[2] TCG introduced at the hearing reply comments AT&T filed with the FCC on July 31, 1997, wherein AT&T apparently supported the payment of reciprocal compensation for ISP-bound traffic. (Tr. 169-70).

participate in the negotiations between AT&T in BellSouth in 1997; and (2) based his opinion on "looking at the associated documentation" and the belief that "no one seems to be able to come up with anything saying that [reciprocal compensation for ISP-bound traffic] was a disputed issue." (Tr. 100). Further, Mr. Guepe's ability to testify on AT&T's intent is suspect because Mr. Guepe admitted that he was testifying solely on behalf of TCG and not AT&T in this proceeding. (Tr. 52).

Buttressing the finding that neither AT&T nor BellSouth intended to pay reciprocal compensation for ISP-bound traffic is the fact that, as admitted by witness Guepe, AT&T has not brought a complaint against BellSouth for the payment of reciprocal compensation for ISP-bound traffic under the AT&T/BellSouth Agreement. (Tr. 74). Indeed, AT&T has not attempted to intervene in this proceeding despite the fact that TCG is now owned by AT&T and that TCG's witnesses are AT&T employees. (Tr. 52, 155).

As a result, in order for the Commission to find that BellSouth is required to pay reciprocal compensation to TCG under the Second TCG Agreement, the Commission would have to (1) ignore the only credible evidence in this proceeding; and (2) find that the original parties to the agreement, AT&T and BellSouth, had a different intent than

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However, AT&T filed these reply comments approximately six weeks after AT&T and BellSouth executed the AT&T/BellSouth Agreement. (Tr. 171).

the adopting parties, BellSouth and TCG. Such a result is nonsensical and contrary to the Commission's Global NAPS Order.

C. **The actions of the parties establish that reciprocal compensation is not due for BP-bound traffic.**

Even if the Commission refused to follow its decision in the Global NAPS Order, the actions of both TCG and BellSouth establish that the parties did not intend to pay reciprocal compensation for ISP-bound traffic. The Commission has previously determined that, in determining parties' intent to a contract, it is appropriate to consider the circumstances that existed at the time the companies entered into the agreement as well as the subsequent acts of the parties. Global NAPS Order at 6.

In the case at hand, on September 8, 1999, BellSouth sent TCG a letter confirming that, because TCG opted into the AT&T/BellSouth Agreement, BellSouth was no longer obligated to pay TCG for the transport and termination of ISP-bound traffic. See Exh. 2; (Tr. 76). Additionally, at the time TCG opted into the AT&T/BellSouth Agreement, BellSouth had in place a separate tracking mechanism for segregating ISP-bound traffic from ALECs' bill to BellSouth and from BellSouth's bills to ALECs. (Tr. 177-78). As noted by Commissioner Jaber, the FCC has recognized that one factor that state commission should consider in interpreting agreements regarding

the treatment of ISP-bound traffic is whether ILECs meter ISP-bound traffic or separate it from local traffic for the purposes of billing. (Tr. 98).

The fact that BellSouth did not attempt to negotiate this issue prior to TCG opting into the AT&T/BellSouth Agreement does not require the Commission reach a different conclusion. BellSouth's reasons for not attempting to negotiate the ISP-bound traffic issue were threefold. First, because it was an opt in agreement, BellSouth was required under the Act to allow TCG to adopt the AT&T/BellSouth Agreement, which included the same definition of "Local Traffic." (Tr. 71). Second, prior to the execution of the Second TCG Agreement, the FCC issued its Declaratory Ruling, which confirmed BellSouth's belief that ISP-bound traffic did not terminate at the ISP and was interstate in nature. (Tr. 173). Accordingly, the "law of the land" at the time of the execution of the Second TCG Agreement made it "very clear to BellSouth" that, under the terms of that agreement, reciprocal compensation was not due for ISP-bound traffic. Id.

Third, BellSouth did not contemplate that the issue would surface again with the Second TCG Agreement because (1) TCG was opting into the AT&T/BellSouth Agreement; (2) AT&T had never stated to BellSouth that it had a problem with BellSouth not paying reciprocal compensation for ISP-bound traffic; and (3) BellSouth

was negotiating with AT&T and not TCG because AT&T had acquired TCG by July 1999. (Tr. 52, 175).

Thus, to the extent the Commission considers extrinsic evidence to determine TCG's and BellSouth's intent, such extrinsic evidence establishes that the parties did not intend to pay each other reciprocal compensation for ISP-bound traffic.

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?

** Order No. PSC-98-1216-FOF-TP has no effect whatsoever on the interpretation and application of the Second TCG Agreement because that Order interpreted only the First TCG Agreement, which is not at issue in this docket.**

A. The First TCG Agreement has expired.

The TCG Order has no effect on the interpretation of the Second TCG Agreement because that Order only interpreted the First TCG Agreement. As admitted by TCG witness Guepe, the First TCG Agreement expired on July 14, 1999 and has been superseded by the Second TCG Agreement. (Tr. 55). Witness Guepe also admitted that (1) the parties were not operating under the First TCG Agreement during the time period at issue in this proceeding; and (2) the TCG Order did not interpret the

intent of BellSouth and AT&T regarding their agreement, which in turn became the Second TCG Agreement. (Tr. 55, 69).

B. Subsequent FCC decisions have rendered the First TCG Order inapplicable.

In addition, while the Commission did its best to decide the TCG Order without the benefit of FCC guidance, much of the Commission's analysis and reasoning in that Order was subsequently determined to be incorrect by the FCC. For instance, in the TCG Order, the Commission stated that the "FCC has not yet decided whether ISP traffic is subject to reciprocal compensation." TCG Order at 8. As admitted by TCG witness Guepe, the FCC's Declaratory Ruling disposed of this issue as it determined that reciprocal compensation was not due for ISP-bound traffic. (Tr. 61-63); Declaratory Ruling at n.87.

Similarly, in the TCG Order, the Commission rejected BellSouth's argument that an ISP-bound call terminates at the ISP. See Tr. 64; TCG Order at 10. Again, as admitted by TCG witness Guepe, the FCC subsequently determined in its Declaratory Ruling that ISP-bound calls do not terminate at the ISP. Declaratory Ruling at ¶ 12. Likewise, the Commission stated in the TCG Order that the FCC has described Internet calls as calls with "two severable parts," which is known as the two-call theory. TCG Order at 12. As with the other above examples, Mr. Guepe agreed that the FCC

rejected the two-call theory in its Declaratory Ruling. (Tr. 65). Further, in the TCG Order, one of the primary reasons why the Commission found that the parties' intended to pay reciprocal compensation for ISP-bound traffic was its belief that BellSouth's refusal to pay reciprocal compensation would have an "adverse effect . . . on competition." TCG Order at 20. However, the FCC, in its Remand Order, determined just the opposite, finding that the payment of reciprocal compensation for ISP-bound traffic undermines competition. (Tr. 68); Remand Order at ¶ 71.

In addition, the TCG Order and other similar decisions, all of which were executed prior to the Declaratory, have no bearing on this specific case. n those decisions, the Commission, in finding that the parties intended to pay reciprocal compensation for ISP-bound traffic, focused on the fact that, in those agreements, there was no express intent to exclude ISP-bound traffic from the definition of "Local Traffic."

Namely, the Commission stated that there was nothing in those agreements that specifically addressed ISP-bound traffic nor any mechanism to account for such traffic. *See* TCG Order at 21; Global NAPS Order at 7; In re: Request for Arbitration Concerning Complaint of ITC DeltaCom Communications, Inc. Against BellSouth Telecommunications, Inc. for Breach of Interconnection Terms and Request for Immediate Relief, Docket No. 991946-TP, Order No. PSC-OO-1540-FOF-TP (Aug. 24,

2000) ("DeltaCom Order"). Thus, under the standard articulated in these decisions, the Commission found that BP-bound traffic was subject to reciprocal compensation unless the agreement explicitly stated otherwise.

That standard or analysis must now change in light of the FCC's Remand Order. As stated above, under that Order, the FCC confirmed that ISP-bound traffic is not subject to the reciprocal compensation provisions of Section 251(b)(5) and that it is predominately interstate access traffic under Section 251(g). Remand Order at ¶¶ 1, 34, 36, and 44. Accordingly, unlike the Commission's analysis in the past, the only way parties to an interconnection agreement can now owe each other reciprocal compensation for the transport and termination of ISP-bound traffic is if they explicitly include such a provision in the agreement. Simply put, to follow the analysis set forth in the Global NAPS Order, DeltaCom Order, and TCG Order would require this Commission to violate federal law. For this additional reason, the TCG Order has no effect on the Commission's decision regarding the Second TCG Agreement.

C. **Collateral Estoppel does not apply.**

Collateral estoppel, or estoppel by judgment, is a judicial doctrine which prevents identical parties from relitigating issues that have been previously decided between them. Mobil Oil Corp. v. Shelvin, 354 So. 2d 372 (Fla. 1997). The essential elements

of collateral estoppel are that "the parties and issues be identical and that the particular matter be fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction." Weiss v. Courshon, 768 So. 2d 2, 4 (Fla. 3rd DCA 2000).

Collateral estoppel does not apply to the instant matter for several reasons. First, the issues are not the same. While it is true that the Commission previously ordered BellSouth to pay TCG reciprocal compensation pursuant to the terms of the First TCG Agreement, however, as established above, the facts, issues, and law surrounding that decision are different than TCG's current claim for reciprocal compensation. For instance, the First TCG Agreement was a negotiated agreement while the Second TCG Agreement was an opt in agreement. This fact changes the dynamics of the case because, under the Global NAPS Order, the intent of the original parties to the Second TCG Agreement, AT&T and BellSouth, is only relevant to the Commission's analysis. As a result, in the TCG Order, the issue the Commission focused on was whether **TCG** and BellSouth intended to pay reciprocal compensation for ISP-bound traffic. In this proceeding, the Commission must focus on whether **AT&T** and BellSouth intended to pay reciprocal compensation for ISP-bound traffic.

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

Third, collateral estoppel does not apply because, as established above, the Declaratory Ruling and the Remand Order changed the law on which the TCG Order was based. A change or development in the controlling legal principles may prevent the application of collateral estoppel even though an issue has been litigated and decided. North Georgia Elec. Membership Corp. v. City of Calhoun, Georgia, 989 F.2d 429, 433 (11th Cir. 1993) (citing Commissioner v. Sunnen, 333 U.S. 591, 599, 69 S.Ct. 715, 720, 92 L.Ed. 898 (1948)). The basis for this rule is that "modifications in 'controlling legal principles,' could render a previous determination inconsistent with prevailing doctrine." Montana v. United States, 440 U.S. 147, 161, 99 S.Ct. 970, 977, 59 L.Ed.2d 210 (1979) (quoting Sunnen, 333 U.S. at 599).

This is exactly the case here. The TCG Order was issued prior to the Declaratory Ruling and the Remand Order, both of which definitively established that

ISP-bound traffic was interstate in nature and not subject to reciprocal compensation. Clearly, the TCG Order is inconsistent with these controlling legal principles because it required the payment of reciprocal compensation for ISP-bound traffic. Accordingly, assuming arquendo that the TCG Order is final, collateral estoppel does not apply. To hold otherwise would violate federal law.

For these reasons, it would be improper to apply the Commission's holding in the TCG Order to the case at hand.

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 customer and transported and terminated by TCG to ISPs?

***For the reasons previously stated, BellSouth did not breach the Second TCG Agreement by failing to pay reciprocal compensation for the calls originated by BellSouth's end-user and transported and terminated by TCG.**

For the reasons stated above, BellSouth did not breach the Second TCG Agreement by failing to pay TCG reciprocal compensation for ISP-bound traffic. BellSouth has paid TCG for the transport and termination of "Local Traffic," which does not include ISP-bound traffic.

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

If the Commission finds that BellSouth has breached the Second TCG Agreement by failing to pay reciprocal compensation for ISP-bound traffic, the rate of compensation under the Agreement that BellSouth should pay TCG is the "Direct End Office Interconnection" rate of $.002 per minute of use.

If the Commission determines that BellSouth breached the Second TCG Agreement by failing to pay reciprocal compensation for ISP-bound traffic, the rate of compensation that BellSouth should pay TCG is the end office rate of $.002 per MOU. TCG is not entitled to the tandem rate because TCG's switches do not serve a comparable geographic area to the area served by BellSouth's switches.

The FCC appears to have put to rest the running question of whether an ALEC must prove both functionality and geographic comparability to be entitled to the tandem switching rate. On April 7, 2001, the FCC stated in its Notice of Proposed Rule Making ("NPRM") in Docket No. 01-92 that "section 51.71 l(a)(3) of the Commission's rules requires that the geographic area test be met before carriers are entitled to the tandem interconnection rate for local call termination." NPRM at ¶ 105. Nevertheless, TCG cannot satisfy this test.

The evidence **in this record (or lack thereof)** on **the question of whether TCG's** switches serve a comparable geographic area is similar to the record evidence confronted by the federal district court in MCI Telecommunications Corp. v. Illinois Bell Telephone Company d/b/a Ameritech Illinois, Inc., 1999 U.S. Dist. LEXIS 11418, *19

(N.D. Ill, June 22, 1999). In that case, MCI argued that it should be compensated at the tandem rate for its switch in Bensonville, Illinois. The Illinois Commerce Commission ("ICC") rejected MCI's argument, finding that MCI had failed to provide sufficient evidence to support a conclusion that it was entitled to the tandem interconnection rate.

In affirming the ICC on the tandem switching issue, the federal district court found that MCI's "intentions for its switch" were "irrelevant." According to the court, MCI was required to identify the location of its customers and the geographical area "actually serviced by MCI's switch," which MCI had utterly failed to do. Id. at *22-23 n.10. The district court reasoned that:

> The "Chicago area" is large, yet MCI offered no evidence as to the location of its customers within the Chicago area. Indeed, an MCI witness said that he "doubted" whether MCI had customers in every "wire center territory" within the Chicago service area. MCI's customers might have been concentrated in an area smaller than that served by an Ameritech tandem switch or MCI's customers might have been widely scattered over a large area, which raises the question whether provision of service to two different customers constitutes service to the entire geographical area between the customers. These are questions that MCI could have addressed, but did not. . . . In short, *MCI* offered *nothing but bare, unsupported conclusions that its switch currently served an area comparable to Ameritech tandem switch or was capable of serving such an area in the future.* The ICC's determination that "MCI has not provided sufficient evidence to support a conclusion that it is entitled to the tandem interconnection rate" was not arbitrary and capricious.

Id. at *22-23 (emphasis added).

The district court's reasoning applies equally here. As noted by TCG witness Guepe, the only evidence that TCG submitted to establish that it was entitled to the tandem rate were maps showing the location of TCG's switches and the areas that they potentially could serve, which included areas outside of BellSouth's terriority. (Tr. 84). TCG provided no evidence of the number of rate centers in BellSouth's territory that TCG serves through its switches or the location of these rate centers. (Tr. 80). Further, TCG witness Guepe did not know how many customers TCG's switches served in BellSouth's territory or even where TCG's customers are located. (Tr. 81, 85-86).

> Q. Do you know whether or not those customers -- and let's say, for example, in the Jackson[ville] LATA, whether those customers are clustered together or dispersed over that geographic area?
>
> A. I personally don't know, no.
>
> **********
>
> Q. Can you tell us how many customers TCG was serving in, for example, the Jacksonville LATA?
>
> A. I don't know that. . .

(Tr. 85, 86).

Clearly, TCG failed to produce the location of its customers in Florida, a fact which would be essential for the Commission to determine the geographic area TCG's Florida switches actually serve customers in BellSouth's terriority and whether that area is comparable to the area served by BellSouth's tandem switch. Lack of evidence on this key point alone should doom TCG's request that the Commission grant it the tandem switching rate.

The evidence presented (or not presented, as the case may be) is almost identical to that presented by Intermedia in the Intermedia/BellSouth arbitration, wherein the Commission determined that Intermedia was not entitled to the tandem switching rate element. Order No. PSC-00-1519-FOF-TP at 14. As noted by the Commission in its Order:

> These maps indicate that Intermedia has established local calling areas that are comparable to those of BellSouth. We have difficulty, however, assessing from these maps whether Intermedia's switch actually serves these areas. We find BellSouth's argument more compelling, as witness Varner contends:
>
> > Intermedia claims that its switches are capable of serving areas comparable to BellSouth's tandems. **However, that** finding is insufficient. Any modern switch is capable of doing this. The issue is does it actually serve customers in an area that is comparable. And I submit that Intermedia's switches do not.
>
> We find the evidence of record insufficient to determine if the second, geographic criterion is met. We are unable to reasonably determine if

> Intermedia is actually serving the areas they have designated as local calling areas. As such, we are unable to determine that Intermedia should be compensated at the tandem rate based on geographic coverage.

Id.

The Commission reached similar conclusions in the BellSouth/ICG arbitration (Docket No. 990691-TP) and the recent AT&T/BellSouth arbitration (Docket No. 000731-TP). For instance, in the ICG arbitration, the Commission determined that the evidence in the record did not support "ICG's claim that its network serv[ed] a geographic area comparable to the area served by BellSouth's tandem switch." Order No. PSC-00-0128-FOF-TP at 11. Similarly, in the AT&T arbitration, AT&T, like its subsidiary TCG in this proceeding, only presented maps allegedly establishing the areas where AT&T's switches were capable of serving as evidence that it was entitled to the tandem rate. Order No. PSC-Ol-1402-FOF-TP at 79. The Commission, however, rejected AT&T's claim and found that it was not entitled to the tandem rate.

> While AT&T's maps show the geographic areas AT&T is willing to serve, they do not provide enough information to enable us to make a reasonable determination as to whether AT&T's switches do in fact serve customers in those areas.

Id. at 80.

The Commission should reach the same conclusion here. TCG has presented the same insufficient evidence as did AT&T – maps only depicting the area where

TCG's switches are capable of serving. TCG failed to prove how many customers it was serving in BellSouth's terriority or even where these customers are located. Because TCG's switches apparently serve areas outside of BellSouth's terriority, it is possible that all of TCG's customers reside in areas where BellSouth does not provide service. Surely, TCG would not be entitled to the tandem rate under that scenario.

To illustrate the importance of providing the customer locations, assume TCG's Florida customers are all located in a single office complex located next door to a TCG switch in Miami. Under no set of circumstances could TCG seriously argue that in such a case its switch serves a comparable geographic area to BellSouth's switch. See Decision 99-09-069, In re: Petition of Pacific Bell for Arbitration of an Interconnection Agreement with MFS/WorldCom, Application 99-03-047, 1999 Cal. PUC LEXIS 652, *21-*24 (Sept. 16, 1999) (finding "unpersuasive" MFS' showing that its switch served a comparable geographic area when many of MFS' ISP customers were actually collocated with MFS' switch). Absent such evidence, which TCG admitted it did not produce, TCG has clearly failed to satisfy its burden of proof on this issue. Thus, the Commission should follow its precedent regarding this issue and conclude that TCG is not entitled to the tandem switching rate.

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?

BellSouth has not breached the Second TCG Agreement by failing to pay switched access charges because BellSouth has paid all switched access charges owed.

BellSouth has not breached the Second TCG Agreement by failing to pay switched access charges because BellSouth has paid all switched access charges owed. (Tr. 140). TCG claims that it is entitled to a rate of $.02733 per MOU. (Tr. 15). BellSouth counters that the appropriate rate for switch access charges is $02643. (Tr. 153). TCG claims that the rate it bills BellSouth for switched access, $.02733 per MOU, is based on the rate elements in BellSouth's intrastate switched access tariff. (Tr. 152). The switched access usage elements, however, in BellSouth's intrastate switched access tariff are elemental in nature. Id.

In this proceeding, TCG failed to present any evidence in its prefiled testimony or on the bills submitted to BellSouth to establish what rate elements TCG was combining to receive the rate of $02733. (Tr. 153). In paying TCG's bills, BellSouth has calculated the rate for intraLATA usage using the elements BellSouth knows TCG is providing (i.e. Carrier Common Line, Local Switching, and interconnection) and the rates from the tariff in effect at the time of the contract. Id. At the hearing, TCG witness Guepe, for the first time, appeared to explain that TCG's rate of $02733 included a rate for tandem or transport and termination, which BellSouth's rate did not include. (Tr. 86).

However, TCG has provided no evidence that it is providing these additional elements and thus should be entitled to their corresponding rates.

Indeed, the only evidence whatsoever presented as to this issue was by Mr. Guepe who submitted no testimony on this issue and who admitted that he could not testify to the exact methodology that "billing" uses to calculate TCG's rate. (Tr. 86). Accordingly, because TCG has failed to satisfy its burden of proof that TCG is entitled to the rate of $.02733, BellSouth has not breached the Second TCG Agreement.

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

The appropriate rate for switch access charges should be $.02643 per MOU.

For the reasons stated above, BellSouth has not breached the Second TCG Agreement for failing to pay an incorrect rate for switched access charges. If the Commission, however, does find a breach, the rate for switched access charges is the rate that BellSouth is currently paying, $.02643 per MOU. This rate is based on the elements that TCG is currently providing – Common Carrier Line Rate, Local Switching, and Interconnection – and the rates from the tariff in effect at the time of the Second TCG Agreement. (Tr. 153). As explained in detail above, TCG has failed to present any evidence or establish that it is entitled to any other rate.

Respectfully submitted this 27th day of July, 2001.

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