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August 10, 2001

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Re: **000075-TP (Generic ISP) (Phase II)**

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Brief of the Evidence, which we ask that you file in the captioned docket.

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

Sincerely,

E. Earl Edenfield, Jr.

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Enclosures

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Docket No. 000075-TP (Phase II)

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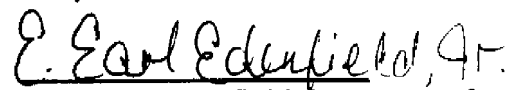
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into Appropriate)
Methods to Compensate Carriers)
for Exchange of Traffic Subject to)
Section 251 of the Telecommunications)
Act of 1996.)

Docket No.: 000075-TP (Phase II)

Filed: August 10, 2001

**BELLSOUTH TELECOMMUNICATIONS, INC.'S
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STATEMENT OF POSITION ON THE ISSUES

ISSUE 10: Pursuant to the Telecommunications Act of 1996 (Act), the FCC's rules and orders, and Florida Statutes, what is the Commission's jurisdiction to specify the rates, terms, and conditions governing compensation for transport and delivery or termination of traffic subject to section 251 of the Act? (Legal issue)

**** The Commission has jurisdiction to set rates, terms and conditions for traffic subject to §251(b)(5) of the 1996 Act. ****

DISCUSSION

Pursuant to §251(b)(5) of the 1996 Act and corresponding FCC rules, the Florida Public Service Commission ("Commission") is obligated to ensure that BellSouth has established reciprocal compensation arrangements for the transport and termination of telecommunications traffic. This obligation includes establishing rates that are compliant with §252(d)(2) of the 1996 Act.¹ The Commission has three options for establishing rates for the transport and termination of local telecommunications traffic: (1) forward-looking costs using a cost study; (2) default proxies; and (3) bill-and-keep arrangements. (*See*, FCC Rule 51.705) To date, the Commission has used forward-looking cost studies as the basis for establishing rates for the transport and termination of local traffic. However, there is nothing preventing the Commission from establishing a bill-and-keep arrangement for this traffic, so long as the Commission's findings are consistent with FCC Rule 51.713.²

¹ *See*, ¶ 1027 of the FCC's First Report and Order (CC Docket 96-98).

² The Commission inquired, at the hearing, on whether the parties were aware of any decisions post-FCC Remand Order (May 15, 2001) wherein a state commission ordered bill-and-keep for §251(b)(5) traffic. BellSouth is not aware of any such state commission decision. BellSouth can direct the Commission to the decision of the Iowa Public Service Commission discussed in Phase I of this proceeding. In that proceeding the Iowa Commission exercised its right of presumption under FCC Rules and Iowa statutes and determined that ISP and local traffic was roughly balanced and implemented a bill-and-keep regime. The Iowa Commission presumption was rebuttable to the extent a carrier could demonstrate that traffic was not roughly balanced, which according to Iowa law was a 45/55 ratio. Nothing precludes this Commission from making the same rebuttable presumption, or determining, as a matter of policy that the §251(b)(5) traffic in

Regarding terms and conditions for interconnection, the carriers' responsibilities are set forth in §251(c)(2)(D) of the 1996 Act. Basically, the Commission is to ensure that the terms and conditions under which carriers interconnect are "just, reasonable and nondiscriminatory" either through review of Interconnection Agreements or arbitrations conducted pursuant to §252 of the 1996 Act.

ISSUE 11: What types of local network architectures are currently employed by ILECs and ALECs, and what factors affect their choice of architectures? (Informational issue)

As this issue is informational only, BellSouth has no position as such. Instead, BellSouth refers the Commission to the testimony of BellSouth witness Nathaniel Tolar. (TR, at 15-21)

ISSUE 12: Pursuant to the Act and FCC's rules and orders:

- (a) Under what condition(s), if any, is an ALEC entitled to be compensated at the ILEC's tandem interconnection rate?**
- (b) Under either a one-prong or two-prong test, what is "similar functionality?"**
- (c) Under either a one-prong or two-prong test, what is "comparable geographic area?"**

** An ALEC is entitled to the tandem interconnection rate when it can demonstrate compliance with FCC Rule 51.711. "Similar Functionality" is defined in FCC Rule 51.319(c)(3), while "Comparable Geographic Area" requires demonstration of the physical location of customers actually served. **

DISCUSSION

At the time that its testimony was filed, BellSouth's position was that the determination of whether an ALEC is entitled to the tandem switching rate plus the end office switching rate is a factual one determined by a two-pronged test. Specifically, BellSouth took the position that in order for an ALEC to appropriately charge for tandem switching, the ALEC must demonstrate to

this proceeding (traffic at a 3:1 ratio or less) is roughly balanced and instituting a bill-and-keep regime.

the Commission that: 1) its switches serve a comparable geographic area to that served by BellSouth's tandem switches and 2) its switches actually perform local tandem functions. An ALEC should only be compensated for the functions that it actually provides. (TR, at 28-29)

In spite of the clear and logical basis for BellSouth's position, BellSouth must acknowledge that the FCC, in its recent Notice of Proposed Rule Making, In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, released April 27, 2001 ("NPRM"), addressed this issue in a way that supports the ALECs' position. There, at paragraph 105, the FCC said:

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 area test. Therefore, we confirm that a carrier demonstrating that its switch serves "a geographic area comparable to that served by the incumbent LEC's tandem switch" is entitled to the tandem interconnection rate to terminate local telecommunications traffic on its network.

Thus, in order to develop a meaningful test, the Commission needs to develop specific criteria to determine when an ALEC has demonstrated "Similar Functionality" or "Comparable Geographic Area".

"Similar Functionality" is as defined in FCC Rule 51.319(c)(3) as: (1) Trunk-connect facilities, which include, but are not limited to, the connection between trunk termination at a cross connect panel and switch trunk card; (2) the basic switch trunk function of connecting trunks to trunks; and (3) the functions that are centralized in tandem switches (as distinguished from separate end office switches), including but not limited, to call recording, the routing of calls to operator services, and signaling conversion features. To satisfy the "Similar Functionality" test, an ALEC must demonstrate that its switches are providing a tandem function to transport local calls. (TR, at 31-32) As stated in the FCC's definition, to provide transport

utilizing tandem switching, an ALEC's switch must connect trunks terminated in one end office switch to trunks terminated in another end office switch. In other words, a tandem switch, as defined by the FCC, provides an intermediate switching function.

When BellSouth routes a call from an ALEC through a BellSouth tandem, BellSouth completes the call by first switching the call at the tandem, transporting the call to the appropriate local end office and finally switching the call to the intended recipient of the call. (TR, at 28) BellSouth then charges the originating ALEC reciprocal compensation based on the appropriate tandem switching rate, transport rate and local switching rate, since all of these parts of BellSouth's network were used in transporting and terminating the call. (TR, at 29)

On the other hand, when BellSouth hands off one of its calls to an ALEC, the ALEC carries the call back to its end office switch, where the call is switched once and then placed on the appropriate loop to reach the intended recipient of the call. That is, because of the ALEC's network design, the call is only switched once and there are no interoffice transport facilities involved.

Nevertheless, and in spite of the fact that only one switch is involved, the ALECs want BellSouth to pay reciprocal compensation to them for calls placed from BellSouth's local subscribers to their local subscribers at a rate equal to the total of the tandem switching rate and the end office switching rate for every such call the ALECs handle. (TR, at 75-76) For obvious reasons, BellSouth objects to this result.

Turning to the issue of "Comparable Geographic Area", the ALECs' position is based on the language of a portion of FCC Rule 47 C.F.R. §51.711(a)(3), which provides "[w]here 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 an

incumbent LEC is the incumbent LEC's tandem interconnection rate." The issue to be resolved is how an ALEC demonstrates that it serves a comparable geographic area.

FCC Rule 51.711 is clear that an ALEC must demonstrate to the Commission that the ALEC's switches actually serve a comparable geographic area to the area served by the ILEC's tandem switches. The ALECs, however, simply argue that the test is satisfied if the ALECs demonstrate that their switches are *capable* of serving a comparable geographic area. (*Id.*) The ALEC's position is contrary to the test imposed by the FCC, and by this Commission, that the ALEC switch actually has to "actually serve" the area, not just be capable of serving the area, in order to qualify for the tandem switching rate. Adoption of a "capable of serving" standard would render the FCC Rule meaningless, in that every switch is capable of serving virtually any point within the continental United States.

The last opportunity that the Commission had to consider this issue was in the §252 Arbitration proceeding between BellSouth and Intermedia Communications, Inc. ("Intermedia").³ In ruling that the appropriate standard is "actually serving" comparable geographic areas and concluding that Intermedia did not satisfy the standard, the Commission found:

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.

³ Final Order on Arbitration, *In re: Petition of BellSouth Telecommunications, Inc. for Section 252(b) arbitration of Interconnection Agreement with Intermedia Communications, Inc.*, Docket No. 991854-TP, Order No. PSC-00-1519-FOF-TP, dated August 22, 2000 ("BellSouth/Intermedia Arbitration Order").

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.

BellSouth/Intermedia Arbitration Order, at 14.

BellSouth submits that the Commission should continue to apply the “actually serves” standard in this proceeding. In determining whether an ALEC switch is actually serving a comparable geographic area to that of the ILEC’s tandem switch, the Commission should consider the following factors: (1) whether the ALEC’s switch currently serves every exchange served by one of the ILEC’s switches; (2) evidence of percentage of population served in a given LATA served by an ILEC’s switch (3) evidence as to the location of the ALEC’s customers within the area served; (4) whether the ALEC has customers in every wire center territory within an area served by an ILEC’s tandem switch; (5) whether the ALEC’s customers are concentrated in a small area, or whether its customers are widely scattered over a large area.. (Hearing Exhibit 13)

ISSUE 13: How should a "local calling area" be defined, for purposes of determining the applicability of reciprocal compensation?

** For reciprocal compensation purposes, carriers should be able to define their own local calling areas. **

DISCUSSION

For purposes of determining the applicability of reciprocal compensation, a “local calling area” should be defined through mutual agreement between the parties and pursuant to the terms and conditions contained in the parties’ negotiated interconnection agreement. The Commission should simply allow each party to establish their own local calling area for reciprocal compensation purposes. (TR, at 35) However, the originating carrier’s “local calling area”

should be used to determine whether reciprocal compensation, toll or access is due for any particular call.

- ISSUE 14:**
- (a) **What are the responsibilities of an originating local carrier to transport its traffic to another local carrier?**
 - (b) **For each responsibility identified in part (a), what form of compensation, if any, should apply?**

** The FCC determined that each originating carrier has the right to designate its POI on the ILEC's network. Thus, if an ALEC wants BellSouth to bring BellSouth's originating traffic to a point designated by the ALEC, then that ALEC should pay for those additional facilities. **

DISCUSSION

It would be ironic if a law designed to promote a market-driven economy in local telephony service were instead interpreted to prohibit the consideration of cost when making decisions and thereby subsidize and reward inefficient behavior by market participants. *U.S. West Communications, Inc. v. Jennings*, 46 F.Supp.2d 1004, 1021 (D. Ariz. 1999).

This issue concerns calls that originate in one BellSouth local calling area and are intended to be terminated in that same local calling area, but that have to be routed out of that local calling area because of the ALEC's network design. BellSouth believes the ALEC should be responsible for the costs BellSouth incurs in hauling these calls outside the local calling area in which they originate to a Point of Interconnection the ALEC has designated in a distant local calling area. (TR, at 36-37). The ALECs, on the other hand, believe that BellSouth should be responsible for these costs. (TR, at 528)

To illustrate the nature of the issue, assume that a particular LATA is shaped like a rectangle and that within the LATA are the Jacksonville and Lake City local calling areas. The Lake City local calling area is on the left side of the LATA, and the Jacksonville local calling area is on the right side of the LATA. Assume further that an ALEC establishes a single Point of

Interconnection in the LATA, and that the single Point of Interconnection is located in the Jacksonville local calling area. (TR, at 39-40)

Consider what must happen in order for a BellSouth end-user in the Lake City local calling area to call an ALEC end-user who is also located in the Lake City local calling area. That call must be hauled outside of the Lake City local calling area to the ALEC Point of Interconnection in the Jacksonville local calling area. The ALEC will then turn around and haul the call all the way back to the Lake City local calling area (where it originated), and terminate it to its end user. (*Id.*)

Clearly, when a BellSouth end user in the Lake City local calling area tries to call a BellSouth end user in the Jacksonville local calling area, BellSouth will not deliver that call unless the end user placing the call pays toll charges. The ALECs, however, are unwilling to compensate BellSouth for hauling the call described above from the Lake City local calling area to the Jacksonville local calling area. (TR, at 513-514) Instead, the ALECs contend that BellSouth should bear the costs of hauling the call from the BellSouth end user in the Lake City local calling area all the way across the LATA to the Jacksonville local calling area, just so the ALEC can turn around and haul the call right back to the same local calling area in which it originated. (*Id.*) The question this Commission must decide, therefore, is when an ALEC deliberately, and for its own purposes, chooses to have a single Point of Interconnection in a LATA as discussed above, who should pay for the consequences of that decision.

A. Two federal courts have rejected the arguments the ALECs present in support of their position on this issue, and one of those courts has expressly stated that a state commission may require an ALEC to compensate an incumbent for costs resulting from an inefficient interconnection.

The ALECs contend that they do not have to consider any economic impacts to BellSouth in determining where to locate their single Point of Interconnection in the LATA. (*Id.*) The

ALECs' argument is similar to an argument the FCC raised before a federal court in Oregon. In *US West v. AT&T Communications*, 31 F.Supp.2d 839, 852 (D. Or. 1998), reversed in part, vacated in part *sub nom.*, *US West v. AT&T*, 224 F.3d 1049 (9th Cir. 2000),⁴ the Court acknowledged the FCC's argument that the Act only requires a CLEC to establish one Point of Interconnection. *Id.* At 852. The Court then expressly rejected the FCC's argument, stating that “[i]n the end, the FCC's interpretation of the statute collapses under the weight of its own contradictions.” *Id.* at 852 (emphasis added). The Court explained that with regard to Section 251(c), the concept of “[t]echnical feasibility answers the question of whether a CLEC may interconnect at a given point, but it does not answer the question of how many points of interconnection a CLEC must have.” *Id.* (emphasis in original). The Court, therefore, concluded that a state Commission may order a CLEC to establish more than one Point of Interconnection. *Id.*

Subsequently, the United States District Court for the District of Arizona also concluded that a state Commission may order a CLEC to establish more than one Point of Interconnection. *See US West v. Jennings*, 46 F.Supp.2d 1004, 1021 (D. Az. 1999). In that case, the Court reviewed the Arizona Commission's decisions on the Point of Interconnection issue in ten consolidated arbitration proceedings. The Arizona Commission acknowledged that in at least one of those ten proceedings, it had considered “only whether interconnection was physically possible at the requested location.” *Id.* at 1021. The Arizona Commission “ignored other factors such as the cost to [the incumbent] of establishing only a single point of interconnection, because

⁴ US West appealed several aspects of the Oregon Public Utility Commission's decisions in arbitration proceedings between US West and AT&T, MCI, and Sprint to the federal district court. *Id.* at 843. The FCC participated in the proceeding before the district court as *amicus curiae*. *Id.* After the district court rendered the decision discussed in this brief, some of the parties appealed that decision to the United States Court of Appeals for the Ninth Circuit. The district court's decision on the point of interconnection issue discussed in this brief, however, was not raised on appeal, thus it was not disturbed by the Ninth Circuit's decision.

the [Commission] assumed it could not consider those factors.” *Id.* The Court, however, ruled that

In determining whether a CLEC should establish more than one point of interconnection in Arizona, the [Arizona Commission] may properly consider relevant factors, including whether a CLEC is purposely structuring its point(s) of interconnection to maximize the cost to the ILEC or to otherwise gain an unfair competitive advantage. The purpose of the Act is to promote competition, not to favor one class of competitors at the expense of another.

Id.

Significantly, the Arizona court further ruled that, “[a]s an alternative, the [Arizona Commission] may require a CLEC to compensate [the incumbent] for costs resulting from an inefficient interconnection.” *Id.* The Court concluded its discussion of this issue by noting that “[i]t would be ironic if a law designed to promote a market-driven economy in local telephone service were instead interpreted to prohibit the consideration of cost when making decisions and thereby subsidize and reward inefficient behavior by market participants.” *Id.* at 1022.

The ALECs do not dispute the fact that if BellSouth has to transport a call to a Point of Interconnection located in a different local calling area, the costs would be higher than they would if BellSouth transported the call to a Point of Interconnection located within the local calling area in which it originated. (TR, at 669-671) To the contrary, the ALECs acknowledge the higher cost, but write it off as “immeasurably small” and therefore not worth the Commission’s time and effort to assess. (TR, at 670) This argument, however, is self-defeating for the ALECs. If the amount to be assessed in additional transport costs are “immeasurably small”, then requiring the ALECs to reimburse BellSouth for this cost should not be a burden on the ALECs. Regardless, the ALECs are unwilling to compensate BellSouth for these additional costs they have caused BellSouth to incur. Instead, the ALECs want BellSouth, and BellSouth

alone, to bear those costs and thereby subsidize the ALECs' operations. As the federal court in Arizona ruled, the Act neither requires nor permits such a result.

B. Under the logic of the FCC's *TSR Wireless* Order, an incumbent only is required to deliver its originating traffic, without charge, to a Point of Interconnection that is located within the local calling area in which the traffic originated.

After these two federal court decisions were released, the FCC released an Order addressing the Point of Interconnection issue. See Memorandum Opinion and Order, *In the Matter Of TSR Wireless, LLC. v. US West*, File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18 (June 21, 2000). In *TSR Wireless*, a CMRS provider took the position that an incumbent was required to deliver its originating traffic to the CMRS provider's Point of Interconnection without charge. As the FCC noted, two FCC rules bear on this position. The first is 47 CFR §51.702(b), which provides that "a LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network." The second is 47 CFR §51.701(b)(2), which defines "local telecommunications traffic" to which reciprocal compensation obligations apply as "telecommunications traffic between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area"⁵

In the *TSR Wireless* Order, the FCC read these two rules together to determine the extent of an incumbent's obligation to deliver its originating traffic to a CMRS provider without charge. Specifically, the FCC ruled that:

Section 51.703(b), when read in conjunction with Section 51.701(b)(2), requires LECs to deliver, without charge, traffic to CMRS providers anywhere within the MTA in which the call originated

⁵ As explained below, a Major Trading Area (MTA) is the CMRS equivalent of a local calling area in a wireline environment.

TSR Wireless Order at ¶31 (emphasis added). An incumbent, therefore, is required to deliver its originating traffic, without charge, to a CMRS provider's Point of Interconnection located within the same MTA in which the traffic originates. Absolutely nothing in the *TSR Wireless* Order suggests that an incumbent is required to deliver its originating traffic, without charge, to a Point of Interconnection located in an MTA other than the MTA in which the traffic originated.

The logic of the *TSR Wireless* decision applies with equal force to traffic between two LECs. The definition of "local telecommunications traffic" for LEC-to-LEC calls is traffic "that originates and terminates within a local service area established by the state commission." See 47 CFR §51.701(b)(1). Applying the logic of the FCC's decision in the *TSR* Order to the LEC-to-LEC traffic that is at issue in this proceeding, therefore, leads to the inescapable conclusion that BellSouth must deliver its originating traffic, without charge, to an ALEC Point of Interconnection that is located anywhere within the local calling area in which the traffic originated. BellSouth, however, is not required to deliver traffic that originates in one local calling area to a Point of Interconnection an ALEC has designated in another local calling area without charge to the ALEC.

C. Adopting BellSouth's proposal would not force Sprint to build facilities to every BellSouth local calling area, but instead it would require Sprint to be financially responsible for the facilities necessary to carry calls from distant local calling areas to a Point of Interconnection designated by Sprint.

Adopting BellSouth's proposal would not force an ALEC to build facilities to every BellSouth local calling area. (TR, at 78) BellSouth acknowledges that an ALEC can establish a physical Point of Interconnection with BellSouth at any technically feasible point, and if it chooses to have only a single such point in a LATA, that is the ALEC's choice. (TR, at 47-48) The ALEC can, however, lease facilities from BellSouth or any other entity to collect traffic

from local calling areas outside of the local calling area in which its Point of Interconnection is found. (*Id.*) Nothing in BellSouth's proposed solution to this issue would require an ALEC to build another (or the first) foot of cable devoted to local service in Florida beyond that required to establish a single Point of Interconnection in the LATAs the ALECs choose to serve.

Finally, BellSouth is not challenging an ALEC's ability to designate a single Point of Interconnection for its originating traffic in each LATA. Nor is BellSouth challenging an ALEC's ability to design its network as it sees fit. (*Id.*) BellSouth is, however, challenging an ALEC's ability to avoid the costs that result from its own network design decisions by requiring BellSouth and its customers to bear those costs. BellSouth, therefore, requests the Commission to conclude that while an ALEC can have a single Point of Interconnection in a LATA if it chooses, it remains responsible to pay for the facilities necessary to carry calls originated by BellSouth customers in distant local calling areas to that single Point of Interconnection. That is the fair and equitable result and is consistent with the Commission's ruling in the BellSouth/Sprint Arbitration, wherein the Commission determined:

First, there are additional costs directly associated with BellSouth completing a local call to a Sprint end-user when Sprint's POI is located outside of the local calling area. BellSouth witness Ruscilli identifies additional transport mileage that is involved when BellSouth completes a local call to a Sprint end-user when Sprint's POI is located outside of BellSouth's local calling area.

* * *

For rating purposes, BellSouth may require Sprint to pay TELRIC rates for Interoffice Dedicated Transport airline mileage between the Vertical and Horizontal (V&H) coordinates of Sprint's VPOI and Sprint's POI.

Sprint/BellSouth Arbitration, Docket 000828-TP, Order No. PSC-01-1095-FOF-TP, at 58, 63.

The evidence presented in this proceeding is identical to that presented in the BellSouth/Sprint Arbitration. Thus, the Commission should require the ALECs to pay

Interoffice Dedicated Transport rates when BellSouth is required to haul local traffic out of the local calling area.

- ISSUE 15:**
- (a) Under what conditions, if any, may carriers assign telephone numbers to end users physically located outside the rate center in which the telephone is homed?**
 - (b) Should the intercarrier compensation mechanism for calls to these telephone numbers be based upon the physical location of the customer, the rate center to which the telephone number is homed, or some other criterion?**

**** Carriers should assign NPA/NXXs outside the rate centers to which they are homed only if the carrier can identify the physical endpoint of the call so that the appropriate compensation can be determined by the other carriers involved in the completion of the call. ****

DISCUSSION

Reciprocal compensation obligations apply only to “local telecommunications traffic,” which is defined as traffic that “originates and terminates within a local service area established by the state commission.” (*See* 47 CFR § 51.701) If a BellSouth customer in Lake City calls an ALEC customer in Jacksonville, the call originates in one local calling area and terminates in a different local calling area. The call, therefore, is not a local call, and BellSouth does not owe the ALEC reciprocal compensation for the call. Instead, the call is a toll call, and BellSouth is entitled to collect originating access charges for the call. (TR, at 51-52) The ALECs do not dispute that this is a traditional toll call. (TR, at 839)

The ALECs seek to alter these results by merely assigning a telephone number associated with the Lake City local calling area to the same ALEC customer that is physically located in Jacksonville. The ALECs argue that when they assign such a number to its customer, the ALEC is entitled to reciprocal compensation when the BellSouth customer in Lake City dials that

number to call the ALEC customer that is physically located in Jacksonville. (TR, at 836) As Level 3's witness Gates acknowledges, regardless of the telephone number the BellSouth customer dials, the call *still* originates in Lake City and it *still* terminates in Jacksonville. (TR, at 841, 848). The call, therefore, is not a local call, and BellSouth is not required to pay reciprocal compensation for the call. Instead, the call is a toll call for which BellSouth is entitled to receive originating access charges.

Level 3's witness Gates acknowledged that it is technically possible for an ALEC to assign an NXX code that has been assigned to a Lake City rate center to an ALEC customer physically located in New York. (TR, at 858-859) It is important, therefore, that the Commission consider the fact that adopting the ALEC's position could result in calls from Lake City to New York being treated as local calls for inter-carrier compensation purposes. In fact, Level 3 witness Gates suggests that such a call from Lake City to New York would be a local call (TR, at 863) and ostensibly within the jurisdiction of the Commission, not the FCC. This ludicrous proposition is precisely why the Commission should not allow compensation to be determined by the NPA/NXX assigned, but instead should follow the long-standing practice of determining compensation based on the physical endpoints of the call. Otherwise, carriers can "game the system" by creating reciprocal compensation obligations and avoiding toll payments simply through the process of assigning telephone numbers.

In fact, this Commission has previously considered this very issue in the BellSouth/Intermedia Arbitration. Insisting on the proper rating of calls and recognizing the potential for abuse inherent in assignment of NPA/NXXs, the Commission ruled:

If Intermedia intends to assign numbers outside of the areas with which they are traditionally associated, Intermedia must provide information to other carriers that will enable them to properly rate calls to those numbers. We find no evidence in the record indicating that this can be accomplished.

Based on the foregoing, we find it appropriate that the parties be allowed to establish their own local calling areas. Nevertheless, the parties shall be required to assign numbers within the areas to which they are traditionally associated, until such time when information necessary for the proper rating of calls to numbers assigned outside of those areas can be provided.

BellSouth/Intermedia Arbitration Order, at 43.

The ALECs have not demonstrated, nor have they even attempted to demonstrate, that they have developed a method for rating calls appropriately. Thus, BellSouth contends that the Commission should affirm its policy of not allowing the assignment of NPA/NXXs outside the rate center to which they are assigned. Further, the Commission should determine, to the extent it has not already done so, that the compensation due for a particular call will be determined on the physical endpoints of the call, not the NPA/NXXs assigned.

A. Other State Commissions have Ruled that Calls to “Virtual NXX” Numbers are not Local Calls if they Originate in One Local Calling Area and Terminate in a Different Local Calling Area.

On January 16, 2001, the Public Service Commission of South Carolina issued an Order concluding that “reciprocal compensation is not due to calls placed to ‘virtual NXX’ numbers as the calls do not terminate within the same local calling area in which the calls originated.” *See Order on Arbitration, In Re Petition of Adelpia Business Solutions of South Carolina, Inc. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc., Order No. 2001-045, Docket No. 2000-516-C (January 16, 2001) at 7.* The South Carolina Commission further concluded that “originating access charges are to be allowed for this traffic,” reasoning that the

imposition of originating access charges for this traffic does not, as alleged by Level 3, create an economic barrier to any other providers providing service to ISPs and give BellSouth a significant competitive advantage. As discussed above, BellSouth is not obligated to carry this traffic at no cost. BellSouth is entitled to compensation for carrying this traffic.

Id. at 13.

The Illinois Commerce Commission reached a similar conclusion in an arbitration proceeding involving Level 3. The Illinois Commission concluded that if a call would not be local but for the assignment of a “Virtual NXX” number to the called party, no reciprocal compensation is owed. Arbitration Decision, *Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois*, Docket No. 00-0332 (August 30, 2000), at 10 (copy attached as Exhibit 4). The Illinois Commission explained that:

The FCC’s regulations require reciprocal compensation only for the transport and termination of “local telecommunications traffic,” which is defined as traffic “that originates and terminates within a local service area established by the state commission.” 47 C.F.R. 51.701 (a)-(b)(1). FX traffic does not originate and terminate in the same local rate center and therefore, *as a matter of law, cannot be subject to reciprocal compensation*. Whether designated as “virtual NXX,” which Level 3 uses, or as “FX,” which [Ameritech Illinois] prefers, *this service works a fiction*. It allows a caller to believe that he is making a local call and to be billed accordingly when, in reality, such call is traveling to a distant point that, absent this device, would make the call a toll call. The virtual NXX or FX call is local only from the caller’s perspective and not from any other standpoint. *There is no reasonable basis to suggest that calls under this fiction can or should be considered local for purposes of imposing reciprocal compensation*.

* * *

On the basis of the record, the agreement should make clear that if [a Virtual] NXX or FX call would not be local but for this designation, no reciprocal compensation attaches.

Arbitration Decision at 9-10 (emphasis added).

BellSouth’s position on the Virtual NXX issue is consistent not only with prior decisions of this Commission, but consistent with decisions of other state Commissions that have considered the issue. *See also, e.g., Order, In re: Investigation into Use of Central Office Codes (NXXs) by New England Fiber Communications, LLC d/b/a/ Brooks Fiber*, Docket No. 98-758 (Me. P.U.C. June 30, 2000), at p. 12 (finding that a “Virtual NXX” service constitutes “an

interexchange service, not a local exchange service.”); Arbitration Award, *In re: The Federal Telecommunications Act of 1996*, Docket No. 21982 (Tx. Public Utility Comm’n July 14, 2000), at 17 (finding that when calls to “Virtual NXX” numbers do not terminate within a mandatory local calling area, they are not subject to reciprocal compensation). Recently, the Tennessee Regulatory Authority (“TRA”) verbally announced its decision in the BellSouth-Intermedia arbitration, ruling, in part, that Virtual NXX-type traffic should be treated as toll traffic for inter-carrier compensation purposes and that access charges, rather than reciprocal compensation, apply to such traffic. (See, *In re Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Intermedia Communications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket 99-00948.) Similarly, the Georgia Public Service Commission determined that assignment of NPA/NXXs was contingent upon the carrier providing information to the other carriers to allow the identification of local and toll traffic and provide for the proper routing and billing for the call. (See, *In re Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Intermedia Communications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket 11644-U.)

The ALECs’ suggestion that their “Virtual NXX” offering is similar to BellSouth’s FX offering does not alter the inescapable conclusion that reciprocal compensation is not owed on calls to Virtual NXX numbers. (TR, at 748) Even assuming the ALECs suggestion was true,⁶ the fact remains that when a BellSouth customer in Lake City dials a “Virtual NXX” telephone number to reach an ALEC customer in Jacksonville or in New York, that call simply does not

⁶ As BellSouth witness Ruscilli noted, a BellSouth FX customer pays appropriate charges to cover BellSouth’s costs of delivering a call placed to that customer’s FX number from one local calling area to another local calling area. (TR, at 90) Thus while BellSouth does not collect toll charges from the subscriber who calls an FX number, BellSouth does collect these charges from the FX subscriber. (*Id.*)

originate and terminate in the same local calling area. The ALECs, therefore, are not entitled to reciprocal compensation for such a call. Instead, such a call is a long distance call, and it should be treated as such.

The ALECs argue that BellSouth has collected reciprocal compensation from ALECs who deliver traffic to BellSouth's FX customers, insisting that this is inconsistent with BellSouth's position in this proceeding. (TR, at 784) The ALECs' argument is unfounded, since BellSouth has implementing a process to ensure that no reciprocal compensation is charged for *any* calls to BellSouth's FX customers. (TR, at 89-90)

C. BellSouth Should be Allowed to Collect Originating Access Charges on Calls to "Virtual NXX" Numbers that Originate in One Local Calling Area and Terminate in a Different Local Calling Area, Just as it is Allowed to Collect Originating Access Charges on Other Toll Calls.

As noted above, when a BellSouth customer in Lake City dials a "Virtual NXX" number to reach an ALEC customer in Jacksonville, the call originates in Lake City and terminates in Jacksonville. The call, therefore, is a long distance call, and BellSouth is entitled to collect originating access charges from the ALEC as compensation for the service BellSouth has performed for the ALEC – the service of originating a long distance call. (TR, at 96-97)

The ALECs suggest that under BellSouth's proposal, they would receive no compensation for terminating a call to a virtual NXX customer. (TR, at 784-785) This contention is simply wrong. A BellSouth FX customer pays appropriate charges to cover BellSouth's costs of delivering a call placed to that customer's FX number from one local calling area to another local calling area. (TR, at 91) Thus, while BellSouth does not collect toll charges from the subscriber who calls an FX number, BellSouth does collect these charges from the FX subscriber. (TR, at 90) Likewise, the ALEC is entitled to be compensated for providing its Virtual NXX service in the same manner in which BellSouth is compensated for providing its

FX service – by charging its Virtual NXX customers for the service that is being provided. (TR, at 91)

The ALECs, of course, are free to choose to provide their valuable Virtual NXX offering to their customers without charge. The ALECs, however, cannot subsidize a free offering by requiring BellSouth to pay reciprocal compensation on calls that are not local calls or by refusing to pay BellSouth for originating long distance calls for the ALECs. In the words of the South Carolina Commission:

there are costs associated with “virtual NXX” calls. And the issue before this Commission is who should bear the burden of those costs. By its decision, the Commission has stated that [the CLEC], as the provider of the service, is responsible for those costs to BellSouth. But [the CLEC] is not ultimately responsible for those costs. [the CLEC] may in turn charge its customers for those costs. Then, the customers, who require the service and who are the beneficiaries of the service, would be the ones who pay the costs of the service. The Commission’s decision appropriately places the costs for this service on the carrier whose provision of the service causes the cost. That carrier may in turn recover the costs from its customer who benefits from the service. However, in providing services to its customers, [the CLEC] should not be permitted to foist the costs of the services that it provides to its customers onto BellSouth.

Order on Arbitration, In Re Petition of Adelpia Business Solutions of South Carolina, Inc. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc., Order No. 2001-045, Docket No. 2000-516-C (January 16, 2001) at 10. BellSouth, therefore, is entitled to collect access charges when it originates a call from a BellSouth customer to an ALEC Virtual NXX customer.

- ISSUE 16:**
- (a) **What is the definition of Internet Protocol (IP) telephony?**
 - (b) **What carrier-to-carrier compensation mechanism, if any should apply to IP telephony?**

** IP telephony is merely a medium used to complete a telephone call. An IP telephony call should be treated no differently than a traditional circuit switched call for purposes of determining the type of compensation due (*i.e.*, reciprocal compensation, toll, or access). **

DISCUSSION

This issue concerns the appropriate treatment of phone-to-phone Internet Protocol (“IP”) Telephony. IP Telephony is, in very simple and basic terms, a mode or method of completing a telephone call. The word “Internet” in Internet Protocol telephony refers to the name of the protocol; it does not mean that the service necessarily uses the World Wide Web. Internet protocol, or any other protocol, is an agreed upon set of technical operating specifications for managing and interconnecting networks. The Internet protocol is the language that gateways use to talk to each other. It has nothing to do with the transmission medium (wire, fiber, microwave, etc.) that carries the data packets between gateways, but rather concerns gateways, or switches, that are found on either end of that medium. (TR, at 68-69).

The last opportunity that the Commission had to consider this issue was in the BellSouth/Intermedia Arbitration. In considering the issue of the classification of phone-to-phone IP Telephony traffic (the specific issue under consideration in this docket), the Commission ruled that:

The witness argued that because the FCC has not made a determination on the regulatory classification of phone-to-phone IP Telephony, any suggestion that phone-to-phone IP Telephony is a telecommunications service is premature. We disagree, because as BST’s testimony indicates, phone-to-phone IP Telephony is technology neutral. A call provisioned using phone-to-phone IP Telephony but not transmitted over the internet, to which switched access charges would otherwise apply if a different signaling and transmission protocol were employed, is nevertheless a switched access call. *Except for, perhaps, calls routed over the internet, the underlying technology used to complete a call should be irrelevant to whether or not switched access charges apply.* Therefore, like any other telecommunications services, it would be included in the definition of switched access traffic. Therefore, we find that switched access traffic shall be defined in accordance with BellSouth’s existing access tariff and include phone-to-phone internet protocol telephony.

BellSouth/Intermedia Arbitration Order, at 56-57. (Emphasis added)

In lieu of offering evidence to rebut BellSouth's evidence, some of the parties have entered into a stipulation requesting that the Commission take no action on this issue, but instead wait for the FCC to offer its opinion on how the issue should be handled. As noted in the excerpt from the BellSouth/Intermedia Arbitration Order, the Commission has previously rejected this approach. The ALECs have not offered any evidence, and cannot, of a change in the law, facts or circumstances since the Commission last ruled on this issue.

Thus, BellSouth respectfully requests that the Commission confirm its prior ruling that the type of network used to transport a call is irrelevant to the charges that apply, whether reciprocal compensation, toll or switched access. Further, the jurisdiction of a call will be determined by its endpoints, irrespective of the protocol used in the transmission.

ISSUE 17: Should the Commission establish compensation mechanism governing the transport and delivery or termination of traffic subject to Section 251 of the Act to be used in the absence of the parties reaching an agreement or negotiating a compensating mechanism? Is so, what should be the mechanism?

**** Yes. The parties should first be allowed to try and reach agreement through the negotiation process. If negotiations are unsuccessful, then the Commission-ordered rates, terms and conditions will apply by default. ****

DISCUSSION

There does not appear to be disagreement among the parties on this issue. Both the 1996 Act and FCC Rules require the Commission to ensure that the ILECs have established reciprocal compensation arrangements for the transport and termination of §251(b)(5) telecommunications traffic. At the same time, §252 of the 1996 Act obligates carriers to negotiate in good faith to reach agreement on issues such as interconnection. BellSouth submits that the parties should first be allowed to try and resolve interconnection and pricing issues such as these through voluntary negotiations. If those negotiations are unsuccessful, then the rates, terms and

conditions established in this docket should be incorporated into the interconnection agreement.

(TR, at 72-73)

ISSUE 18: How should the policies established in this docket be implemented?

****** The policies established by the Commission in this docket should be implemented prospectively in accordance with change of law provisions in existing interconnection agreements and as a default mechanism in new interconnection agreements. ******

DISCUSSION

This is another issue for which there appears to be no disagreement. The policies and rates established in this proceeding should take effect after the Commission issues an effective order and would be implemented in one of two ways. For existing interconnection agreements, the parties should invoke the change of law provisions to incorporate the Commission's Order. For new interconnection agreements, the Commission's Order should be applied as a default mechanism as explained in Issue 17 above. (TR, at 99)

CONCLUSION

The Commission's goal in this generic proceeding is to resolve each issue consistent with the requirements of the Act and federal law, including the regulations prescribed by the Federal Communications Commission ("FCC"). The Commission should adopt BellSouth's positions on the issues in dispute. BellSouth's positions on these issues are reasonable and consistent with the 1996 Act and federal law.

Respectfully submitted this 10th day of August 2001.

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