Legal Department

ANDREW D. SHORE
Senior Regulatory Counsel

BellSouth Telecommunications, Inc
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(404) 335-0765

July 3, 2003

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

Re: Docket No.: 020919-TP
Complaint of AT&T Communications of the Southern States, LLC, Teleport Communications Group, Inc., and TCG South Florida for Enforcement of Interconnection Agreements with BellSouth Telecommunications, Inc.

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Post Hearing Statement of Issues and Positions and Post-Hearing Brief, 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,

Andrew D. Shore

Andrew D. Shore (cm)

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

CERTIFICATE OF SERVICE
DOCKET NO. 020919-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and First Class U.S. Mail this 3rd day of July, 2003 to the following:

Patricia Christensen
Staff Counsel
Florida Public Service
Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
pchriste@psc.state.fl.us

Loretta A. Cecil, Esq. **(+)**
Womble Carlyle Sandridge & Rice PLLC
1201 West Peachtree Street
Suite 3500
Atlanta, GA 30309
Tel. No. (404) 888-7437
Fax. No. (404) 870-4826
lcecil@wcsr.com
Represents AT&T

Virginia Tate, Esq.
AT&T Communications
1200 Peachtree Street, N.E.
Suite 8100
Atlanta, GA 30309
Tel. No. (404) 810-4196
Fax No. (404) 877-7648
vctate@att.com

Andrew D. Shore (ADA)
Andrew D. Shore

(+) Signed Protective Agreement

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re:	)	Docket No. 020919-TP
AT&T Communications of the	)	
Southern States, LLC, Teleport	)	
Telecommunications Group, Inc.,	)	
And TCG South Florida for	)	
Enforcement of Interconnection	)	
Agreements with BellSouth	)	Filed: July 3, 2003
Telecommunications, Inc.	)	

BELLSOUTH'S POST-HEARING STATEMEMT OF ISSUES AND POSITIONS AND POST-HEARING BRIEF

INTRODUCTION

In their Mississippi Interconnection Agreement, BellSouth and AT&T agreed that "Local Traffic means any telephone call that originates and terminates in the same LATA." *See* Ex. 20. In Florida (as well as the other seven states in BellSouth's region), they defined "local traffic" much differently, however. The Florida Interconnection Agreement states:

> The Parties **agree** to apply a **"LATAwide" local** concept to this Attachment 3, meaning traffic that has traditionally been treated as intraLATA toll traffic will now be treated as local for intercarrier compensation purposes, **except those calls that are originated or terminated through switched access arrangements** as established by the State Commission or FCC.

Att. 3 § 5.3.1 (emphasis added). AT&T claims, nevertheless, that the Florida definition, with its express exclusion for calls carried over switched access arrangements, means *exactly* the same thing as the definition of local traffic in the Mississippi Agreement – that *all* calls that originate and terminate in the same LATA, including those carried over switched access arrangements, are "local."

AT&T was candid about the reason that it is arguing that the Florida Agreement does not mean what it says: The parties pay each other reciprocal compensation rates for transporting and terminating what they define as "local traffic," whereas higher switched access rates apply to non-local traffic, and AT&T is "trying to reduce cost." Tr. at 130. The only witness that AT&T filed in support of its direct case, Jeff King, conceded, significantly, that the Florida definition "on its face" excludes calls carried over switched access arrangements from treatment as "local traffic." Tr. at 90. Mr. King characterized AT&T's claim that the contract means something other than what he acknowledges that it plainly says as AT&T's "own little spin." *Id.* at 131-32.

There is, however, nothing "little" about AT&T's "spin." AT&T is asking the Commission to order BellSouth to (1) refund to AT&T $7 million AT&T paid BellSouth during the first eighteen months of the parties' interconnection agreement for terminating intraLATA traffic AT&T originated and terminated over switched access arrangements purchased out of BellSouth's Florida Switched Access Tariff, plus interest at a rate of 18% per annum, and (2) begin charging AT&T reciprocal compensation rather than switched access rates for such traffic for the remainder of the three year contract term. Mr. King testified in response to a question from Commissioner Davidson that AT&T's customers would *not* benefit if the Commission granted AT&T the relief it seeks, and that the only result of a ruling in AT&T's favor would be for AT&T to increase its margins. Tr. at 108-09.

The extensive and creative "spin" put forth by AT&T as to why the Commission should ascribe a meaning to the contract that would allow AT&T to increase the profit it derives serving its current base of local customers in Florida by close to $5 million per year does not support the interpretation of the agreement that AT&T seeks. First and

foremost, AT&T's arguments contravene the express terms of the contract. The Interconnection Agreement between BellSouth and AT&T *expressly and specifically* states that intraLATA calls originated or terminated over switched access arrangements are *not* "local traffic." Second, AT&T's contention that the express exclusion from the local traffic definition for intraLATA calls carried over switched access arrangements excludes only *inter*LATA calls, in addition to being nonsensical, violates a bedrock rule of contract construction, because it renders the exclusion meaningless.

Third, if the Commission determines that the exclusion for calls carried over switched access arrangements is ambiguous and that it is, therefore, appropriate to consider extrinsic evidence regarding the meaning of the agreement, the evidence demonstrates conclusively that the parties intended at the time of contracting to exclude intraLATA calls carried over switched access arrangements from the definition of local traffic. AT&T's post-hoc explanation of the supposed purpose of the exclusion for switched access arrangements, as well as its version of the facts surrounding the parties' negotiation of the pertinent contract language, are not credible. AT&T's witnesses contradicted themselves and each other on multiple points, and AT&T's theory for the purported reason for the contractual exclusion is implausible. AT&T, to be certain, has not carried its burden of proving that BellSouth agreed to treat intraLATA calls transmitted via switched access arrangements as local traffic for purposes of inter-carrier compensation. Consequently, the Commission should deny AT&T's requests for a multi-million dollar refund from BellSouth and for lower rates than the parties' contract requires AT&T to pay BellSouth for terminating AT&T's switched access traffic.

STATEMENT OF PERTINENT FACTS

In the first interconnection agreement between BellSouth and AT&T, which became effective June 10, 1997 ("1997 Agreement"), the parties agreed that "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 AT&T is not directly interconnected." 1997 Agreement, Att. 11, at 6. *See also* Ex. 20, BCP-Ex. 6, at 1. So, for example, if an AT&T customer made an intraLATA toll call to a BellSouth customer and AT&T billed its customer toll rates, then AT&T would pay BellSouth switched access rates for terminating that call, and not reciprocal compensation rates. Tr. at 100-01. The 1997 Agreement contained a three-year term.

In 1999, BellSouth and AT&T began negotiating on a region-wide basis the terms of second interconnection agreements in all BellSouth states. Ex. 9 (Transcript from North Carolina proceeding),[1] Vol. 1 at 165. The parties were not able to agree on all terms of the second agreements, however, and AT&T filed arbitration petitions pursuant to the Telecommunications Act of 1996 in eight of the nine states where BellSouth operates as an incumbent local exchange carrier. The parties agreed that they did not want to arbitrate in Mississippi, and they reached a negotiated agreement on all terms for the interconnection agreement governing their relationship in that State. Tr. at 282; *see also* Ex. 9 (NC Tr. Vol. 2 at 87). The parties thus ended up with one set

[1] The parties agreed that the depositions of AT&T witnesses King, Peacock, and Stevens, and the deposition of BellSouth witness Shiroishi taken in North Carolina Utilities Commission Docket No. P-55, Sub 1376, which is an identical proceeding AT&T filed before the North Carolina Commission, should be admitted into evidence in this proceeding, as should the transcript from the North Carolina proceeding. *See* Order No. PSC-03-0570-PHO-TP, issued May 5, 2003, at 21. The Commission entered the above-referenced deposition and hearing transcripts into the record in this case as Exhibits 5-9, respectively.

of negotiated language in Mississippi and another set of language for the other eight states. Ex. 6 (Peacock Depo.) at 23-24.

One of the issues upon which the parties initially did not agree was the definition of local traffic. With its petition for arbitration filed in Florida on June 16, 2000, AT&T submitted proposed contract language that stated that the parties would bill each other reciprocal compensation for "all local and intraLATA toll traffic originated by one party and terminated to the other party." Tr. at 121-22; Ex. 17. In its response to AT&T's arbitration petition, BellSouth stated that the version of the proposed interconnection agreement "filed by AT&T with its petition contains misstatements of the parties' agreement." Tr. at 122-23; Ex. 18. In the proposed Agreement BellSouth filed as an attachment to its response, BellSouth made clear that it disagreed with AT&T's proposed LATA wide local traffic definition, and it proposed that "local traffic" be defined as "any telephone call that originates and terminates in the same LATA and is billed by the originating Party as a local call." *See* Ex. 18; Tr. at 122-24. Notwithstanding the parties' differing positions on this issue, AT&T did not ask the Commission to arbitrate the definition of local traffic. Tr. at 126. This Commission conducted an arbitration of the disputed issues in February 2001, and issued its arbitration decision in June 2001.

In March 2001, BellSouth and AT&T executed their fully negotiated Mississippi interconnection agreement. It defines "local traffic" broadly as "any telephone call that originates and terminates in the same LATA." Att. 3, § 6.1.1. There is no exclusion for calls carried over switched access arrangements (or any other types of intraLATA calls).

The parties thereafter set out finalizing their other agreements, for which the various state commissions, including this one, had begun issuing arbitration decisions with respect to the disputed issues raised by the parties. Billy Peacock was the person at AT&T responsible for the negotiations generally and he described himself as A&T's "lead negotiator." Tr. at 179. Mr. Peacock acknowledged that he did not, however, have substantive experience in all of the areas addressed in the BellSouth-AT&T Interconnection Agreement. Tr. at 179-80. He therefore brought internal AT&T subject matter experts in to negotiate certain issues directly with BellSouth. Tr. at 120. Up through execution of the Mississippi Agreement, Mr. Greg Follensbee was AT&T's local interconnection expert and the person at AT&T who negotiated local interconnection issues with BellSouth. Tr. at 120. He left AT&T in the Spring of 2001, and AT&T did not replace him with another local interconnection expert. Tr. at 120-21. Instead, Billy Peacock assumed responsibility for negotiating the technical local interconnection issues. Beth Shiroishi was BellSouth's local interconnection expert at the times relevant to this case and she negotiated the definition of local traffic and other local interconnection issues with AT&T on behalf of BellSouth.

On May 22, 2001, BellSouth proposed to Mr. Peacock for inclusion in the AT&T Agreements (excluding Mississippi) a LATAwide definition of local traffic, but with an express exclusion for calls carried over switched access arrangements, like BellSouth had in interconnection agreements with other ALECs. Tr. at 180-83; Exs. 21, 22. Specifically, BellSouth proposed that the parties define local traffic as "any telephone call that originates and terminates in the same LATA except for those calls that are originated or terminated through switched access arrangements as established by the ruling regulatory body." The parties discussed this proposal in meetings in June and

July 2001, and specifically discussed the fact that the language excluded from the definition of "local traffic" intraLATA calls that originated or terminated through switched access arrangements. Tr. at 243-44; 259-60. AT&T requested that the phrase "as established by the ruling regulatory body" be revised to read "as established by the State Commission or FCC" given the fact that those are the specific regulatory bodies that establish or approve tariffs pursuant to which parties purchase switched access arrangements, and BellSouth agreed to that minor modification. Ex. 9 (NC Tr. Vol. 1 at 212; Vol. 3. at 37).

The parties reached an agreement on the contract language at issue here on July 19, 2001. *See* Ex. 23. BellSouth and AT&T thereafter executed the Florida interconnection agreement and it became effective October 26, 2001 ("Interconnection Agreement" or "Second Agreement"). AT&T filed its complaint initiating this proceeding on August 26, 2002.

STATEMENT OF ISSUES AND BELLSOUTH'S POSITIONS

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

*** Pursuant to 47 U.S.C. § 252(c)(1), the Commission has jurisdiction to interpret and enforce the terms of an interconnection agreement filed with and approved by the Commission. The claims set forth in AT&T's complaint arise under such an agreement. ***

Issue 1A: Do the terms of the Second Interconnection Agreement as defined in AT&T's complaint apply retroactively from the expiration date of the First Interconnection Agreement as defined in AT&T's complaint, June 11, 2000, forward?

*** Yes. See Commission Order No. PSC-03-0528-FOF-TP (April 21, 2003). ***

Issue 1B: If the answer to Issue 1(a) is "yes," is AT&T entitled to apply the reciprocal compensation rates and terms of the Second Interconnection Agreement only from July 1, 2001, forward?

*** Yes. The Parties agree and have stipulated accordingly. ***

Issue 2: Does the term "Local Traffic" as used in the Second Interconnection Agreement identified in AT&T's complaint include all "LATAwide" calls, including all calls originated or terminated through switched access arrangements as established by the state commission or FCC?

*** No. The Second Interconnection Agreement expressly excludes from the definition of "local traffic" intraLATA calls originated or terminated through switched access arrangements. Even if the Commission determines that the contract is ambiguous, the answer is the same, because the evidence proves that the parties intended to exclude such calls. ***

Issue 3: Under the terms of the Second Interconnection Agreement, do reciprocal compensation rates and terms apply to calls originated or terminated through switched access arrangements as established by the state commission or FCC?

*** No. Switched access rates apply to non-local calls, and the Second Interconnection Agreement expressly excludes from the definition of local traffic calls carried over switched access arrangements. BellSouth's Florida Switched Access Tariff sets forth the rates and terms pursuant to which AT&T purchases switched access arrangements from BellSouth to carry the traffic at issue. ***

Issue 4: If the answer to Issue 3 is "yes," has BellSouth breached the Second Interconnection Agreement?

*** N/A ***

Issue 5: If the answer to Issue 4 is "yes," what remedies are appropriate?

*** N/A ***

LEGAL ARGUMENT

I. THE INTERCONNECTION AGREEMENT PLAINLY AND UNAMBIGUOUSLY EXCLUDES INTRALATA CALLS CARRIED OVER SWITCHED ACCESS ARRANGEMENTS FROM THE DEFINITION OF "LOCAL TRAFFIC."

"Where the language of the contract is plain, unambiguous, and capable of only one reasonable interpretation, construction of the contract is not permitted, and the language of the contract is given effect." *Strozzo v. Sea Island Bank*, 521 S.E.2d 392, 396 (Ga. App. 1999) (citation omitted).[2] "To be ambiguous, a word or phrase must be of uncertain meaning and fairly understood in multiple ways." *Resolution Trust Corp. v. Artley*, 24 F.3d 1363, 1366 (11th Cir. 1994)(citations omitted). The test is what a reasonable person would understand the contract term to mean. *See Artley*, 24 F.3d at 1366. "Words generally bear their usual and common signification; . . . words used in a particular trade or business will be construed, generally, to be used in reference to this particular meaning." Ga. Code Ann. § 13-2-2(2).

The Interconnection Agreement unambiguously says that all intraLATA calls will be treated as local and, therefore, subject to reciprocal compensation rates rather than switched access rates, *except* those intraLATA calls that are carried over switched access arrangements. It states:

> The Parties **agree** to apply a **"LATAwide" local** concept to this Attachment 3, meaning traffic that has traditionally been treated as intraLATA toll traffic will now be treated as local for intercarrier compensation purposes, **except those calls that are originated or terminated through switched access arrangements** as established by the State Commission or FCC.

---

[2] The parties agreed that the contract would be construed and enforced in accordance with Georgia law. Interconnection Agreement § 24.6.1.

Att. 3 § 5.3.1 (emphasis added). Notably, **AT&T agrees that this provision unambiguously excludes calls carried over switched access arrangements from treatment as "local traffic."** Its contract interpretation witness, Mr. King, admitted in response to a question from Commissioner Deason that the exclusion "on its face" means exactly what it plainly says. Tr. at 90-91. AT&T has manufactured this dispute by contending that the subject of the except clause -- "calls that are originated or terminated through switched access arrangements as established by the State Commission or FCC" -- means something different than the commonly understood meaning of the phrase, which is consistent with how *both* parties understood the phrase at the time of contracting. The Commission should not allow AT&T to create an ambiguity with its double-speak.

A. "Switched access arrangements" are facilities offered via access tariffs, and AT&T admits that it knew that at the time it executed the Interconnection Agreement.

1. It is undisputed that switched access arrangements are facilities purchased out of a switched access tariff. The term "switched access arrangements" is not defined in nor found at any place in the Interconnection Agreement other than in section 5.3.1.1 of Attachment 3. Tr. at 104. It did not need to be defined. It is commonly understood in the telecommunications industry that "switched access arrangements" are facilities the terms and rates for which are set forth in tariffs subject to the jurisdiction and approval of state commissions and the FCC. Tr. at 105-06. BellSouth's Florida Switched Access Tariff describes in detail the various types of "switched access service arrangements" (e.g., Feature Group A, B, C, D, etc.) offered via the tariff. AT&T's Mr. King testified that the switched access *service* arrangements described in BellSouth's Florida Switched Access Tariff are what he understood

switched access arrangements were when he first saw BellSouth's proposed contract language that expressly excludes calls carried over switched access arrangements from the definition of "local traffic." Tr. at 113.

The only *reasonable* interpretation of the term "switched access arrangements as established by this Commission" is that it refers to those facilities that AT&T purchases pursuant to BellSouth's commission-approved Switched Access Tariff. That is exactly what AT&T understood the term to mean at the time it executed the Interconnection Agreement. Both AT&T's contract negotiator, Mr. Peacock, and the person at AT&T with responsibility for inter-carrier compensation, Mr. King, testified that they knew at the time BellSouth proposed the above language and before the parties agreed to include the language in the Interconnection Agreement that a "switched access arrangement" is a facility "purchased out of the switched access tariff." Ex. 9 (NC Tr. Vol. 1 at 84, 213-14); *see also* Tr. at 105. It is, therefore, not surprising that AT&T never asked BellSouth what was meant by the term "switched access arrangements" nor had any internal discussions regarding the meaning of the term. Ex. 9 (NC Tr. Vol. 1 at 212-13). The fact that both parties ascribed the one commonly understood meaning to the term is convincing proof that the term "switched access arrangements" is *not* ambiguous. It undoubtedly refers to facilities purchased out of Commission approved Switched Access Tariffs.

Mr. King and AT&T's issue is that reading the agreement "on its face" means that AT&T will have higher costs if it *chooses* to terminate intraLATA calls over switched access arrangements. Tr. at 91-92. While that may be true, it is irrelevant. Both parties are bound to the unambiguous terms of a contract, even if one of them decides after-the-fact that the terms are not desirable. Although AT&T left negotiation of the

provision to Billy Peacock rather than to an expert in local interconnection issues, AT&T is a sophisticated party and is legally bound to the unambiguous terms of the contract. BellSouth's Ms. Shiroishi testified that other ALECs, including MCI, have separate networks to transport their local and non-local traffic. Tr. at 297. The Interconnection Agreement provides a mechanism for AT&T to convert its switched access arrangements to local interconnection facilities, and AT&T can do so and eliminate this issue entirely. Tr. at 246-47. AT&T has chosen instead to litigate in an effort to avoid any expense so that it can maximize its margins. That does not justify the Commission ignoring the plain words of the contract that even AT&T admits means "on its face" exactly what they say.

2. A switched access arrangement does not cease being a switched access arrangement because AT&T chooses to send calls from a customer to whom AT&T provides local exchange service over the switched access arrangement. There is no dispute that AT&T purchases switched access arrangements from BellSouth pursuant to Bellsouth's Florida Switched Access Service Tariff or that AT&T uses those switched access arrangements to terminate intraLATA calls to BellSouth. Tr. at 112. It is the intraLATA calls carried over those switched access arrangements that are the subject of this dispute. *Id.*

AT&T's Mr. King, testified at the hearing that, notwithstanding the plain language exempting from the local traffic definition calls carried over switched access arrangements, the type of facility over which a call travels is not relevant in determining whether the call is "local" for inter-carrier compensation purposes. Tr. at 87, 89. AT&T claims that if it provides local exchange service to a customer, than by virtue of AT&T's "local relationship with the end user," any call the customer makes that terminates in the

LATA, including those that AT&T terminates over a switched access arrangement it purchased out of BellSouth's Florida Switched Access Tariff, is "local traffic" under the Interconnection Agreement. Tr. at 89.

That interpretation is, again, inconsistent with the plain words of the contract, which says that an intraLATA call is "local" for inter-carrier compensation purposes *except* when it is originated or terminated over a switched access arrangement. In fact, Mr. King admitted that the Interconnection Agreement does not say that "switched access arrangements" is limited by how AT&T bills its customer for traffic that AT&T chooses to terminate over switched access arrangements. Tr. at 132-33.

The fact that the parties use factors to report the percentage of "local" traffic traversing certain facilities does not magically turn a switched access arrangement into something different, as Mr. King claimed, *see* Tr. at 86-87, 98, nor does it alter the fact that the parties' contractual definition relies upon the type of facilities used as the critical factor in determining whether an intraLATA call is "local traffic." AT&T's argument that the use of factors to report the jurisdictional nature of traffic somehow changes the parties' definition of "local traffic" is wrong. Mr. King admitted that on cross-examination, when he acknowledged that the percentage local usage factor is based on how "local traffic" is defined in the Interconnection Agreement. Tr. at 111. Ms. Shiroishi stated it succinctly: "[T]he use of a factor doesn't change what's local. . . . It implements what's local." Tr. at 306-07. Thus, the Agreement requires the parties to develop that percentage local usage factor by using the definition of "local traffic" and reporting as "local" the percentage of traffic which meets the contractual definition of "local traffic." Tr. at 303-05. The factor is reported quarterly based on a statewide traffic study. Tr. at 306-07. The fact that AT&T refuses to accept the definition of "local traffic"

that it admits is clear "on its face" and attempted instead to use a factor based on whether it had a "local relationship" with a customer does not change the analysis – the definition of "local traffic" controls.

B. The phrase "switched access arrangements" is not synonymous with or limited by the term "Switched Access Traffic" as the latter term is defined elsewhere in the Interconnection Agreement.

AT&T contends that "calls that are originated or terminated through switched access arrangements" in section 5.3.1 of Attachment 3 of the Interconnection Agreement "clearly means" "Switched Access Traffic" as that term is defined in section 5.3.3 of Attachment 3. AT&T's claim that the Interconnection Agreement is unambiguous in that regard fails for several reasons. First, the contract clause that contains the definition of "local traffic," section 5.3.1.1 of Attachment 3, does not use the defined term "Switched Access Traffic." Tr. at 104. Second, the Interconnection Agreement states that "certain terms have been defined in the body of the Agreement to encompass meanings that may differ from, or be in addition to, the normal connotation of the defined word. . . . A defined word intended to convey its special meaning is capitalized when used." Tr. at 103-04; Ex. 11 (JAK-1, at 7). The term "switched access arrangements" is *not* capitalized. Tr. at 104. Consequently, it must be interpreted as it is normally understood, and not to be synonymous with a different, specially defined term. Third, the definition of "local traffic" in section 5.3.1.1 speaks solely in terms of *intra*LATA traffic, whereas the definition of "Switched Access Traffic" in section 5.3.3 speaks solely in terms of *inter*LATA traffic. AT&T's claim that the contract says that all intraLATA traffic is local except for a certain category of traffic, but that certain category does not include *any* intraLATA traffic, is not reasonable.

C. Section 5.3.3 is "interrelated" to section 5.3.1.1 to ensure that an ALEC which seeks to adopt section 5.3.3, which addresses VOIP

calls, also must adopt the definition of local traffic, because otherwise there may be an inconsistency between the definition of local traffic in the adopting ALEC's interconnection agreement and the VOIP provision it adopts from the AT&T agreement.

1. Section 5.3.3, including the definition of "Switched Access Traffic" contained therein, was included in the Interconnection Agreement solely for the purpose of addressing inter-carrier compensation for VOIP transmissions. AT&T claims that the definition of "Switched Access Traffic" in section 5.3.3 governs what constitutes a "switched access arrangement" pursuant to section 5.3.1.1 because the last sentence of section 5.3.3 states that section "is interrelated to section 5.3.1.1."[3] AT&T is wrong. The two contract provisions deal with two different issues. Section 5.3.3 addresses the treatment of voice-over-internet protocol ("VOIP") transmissions and it was included in the Interconnection Agreement solely to deal with the treatment of VOIP transmissions. Tr. at 367-68. As Ms. Shiroishi explained, "there is no reason other than the voice over IP or transport protocol method issue that you would need a switched access traffic definition in a local interconnection agreement." Tr. at 370. The Commission need not take Ms. Shiroishi's word for it, however. It need only examine the numerous interconnection agreements that it has approved, including the 1997 BellSouth-AT&T Agreement to see for itself that interconnection agreements that do not address the treatment of VOIP transmissions do not contain definitions of "Switched Access Traffic." That is because, as AT&T's Mr. King testified, if traffic is not specifically defined as "local traffic," it is transported and terminated at switched access rates that are set forth in switched access tariffs rather than local reciprocal compensation rates that are set forth in parties' interconnection agreements. Tr. at 62, 99-100.

---

[3] AT&T's testimony on this point, like on many others, is, in fact, inconsistent. See Section IV.C.2. below.

The reason that the provision in the Interconnection Agreements addressing how VOIP calls will be treated for inter-carrier compensation purposes needed to include a definition of "Switched Access Traffic" is that VOIP calls, including those that cross LATA boundaries, generally are not routed over switched access arrangements like other interLATA calls. Tr. at 335. The issue BellSouth and AT&T faced when negotiating how to deal with VOIP calls was whether they should, nevertheless, be subject to switched access rates. Tr. at 335-36. BellSouth's position was that the Interconnection Agreement should specify that VOIP traffic is non-local traffic and subject to switched access rates. Ex. 20 (BCP-4). AT&T argued that VOIP transmissions should be subject to lower local reciprocal compensation rates. The parties compromised and agreed that VOIP calls that originate and terminate in different LATAs would not be compensated as local calls, and that they would abide by any subsequent FCC decisions regarding the jurisdictional nature and appropriate compensation for VOIP calls. Tr. at 129, 160-62, 338.

2. The word "interrelated" is a term of art under section 252(i) of the 1996 Act. *BellSouth* added the "interrelated" language to section 5.3.3. Tr. at 190. It is undisputed that BellSouth placed that language in the contract so that an ALEC seeking to adopt that provision from the AT&T-BellSouth Interconnection Agreement addressing VOIP calls would also have to adopt the definition of "local traffic" set forth in section 5.3.1.1. Tr. at 252-53, 261, 337.

Section 252(i) of the 1996 Act allows an ALEC to adopt terms from another ALEC's interconnection agreement. 47 U.S.C. § 252(i). The FCC, in implementing this statute, ruled that when an ALEC seeks to adopt, or "pick and choose," a term from another ALEC's agreement, that the ILEC may insist that the ALEC also adopt all terms

"legitimately related" to that term. Tr. at 114. BellSouth, accordingly, routinely places language in its interconnection agreements which states than when an ALEC exercises its right to adopt pursuant to section 252(i) of the 1996 Act terms from another ALEC's agreement, the ALEC also will adopt any terms "that are legitimately related to" the term the ALEC seeks to adopt. *See, e.g.*, Ex. 15. In some instances, Bellsouth uses the word "interrelated" in lieu of "legitimately related" in this section of its interconnection agreements. *See, e.g.*, Ex. 16. There is no dispute that in this context "interrelated" and "legitimately related" mean exactly the same thing.

3. An ALEC which adopts the provision in the Interconnection Agreement addressing VOIP transmissions must also adopt the definition of "local traffic" from the Agreement in order to avoid a potential inconsistency between the treatment of "local traffic" and VOIP traffic. Ms. Shiroishi explained why the reference to local traffic in the VOIP clause needed to match the definition of "local traffic" in the agreement and why BellSouth therefore added the statement stating that section 5.3.3 is "interrelated" to section 5.3.1.1 to ensure that the "local traffic" definition would be adopted along with the VOIP clause:

> When you are dealing with whether or not these voice over IP transmissions are going to be considered switched access traffic or not, you have to take into account whether you've determined that you're going to have a basic local calling area determine your compensation for local or a larger area. And in this case with AT&T, we've agreed to an even larger area which is anything in the LATA except for switched access arrangements or calls that are originated or terminated over switched access arrangements. So the potential problem that BellSouth could have if someone came and tried to adopt this definition of voice over IP without taking the local traffic definition that goes with it is that I might have here treatment for voice over IP transmissions within the LATA, but let's say that their inter-connection agreement deemed local anything in the local calling area. Now I've got a gap about what I do when the transmission originates and terminates outside the local calling area but within the LATA because I have a local traffic definition that's smaller than what I've

> determined I'm going to do on VOIP. So this interrelated sentence was put in only to address the fact that if you're going to take this VOIP language . . . that they would also have to relate back and take the definition of local traffic so that you didn't have that gap that was determined earlier.

Tr. at 336-37. She also explained why this inconsistency would not occur if an ALEC agreed to BellSouth's position on VOIP traffic and why an interrelationship with the local traffic definition is necessary only in those cases like this one where BellSouth compromised from its position on the jurisdictional nature of VOIP transmissions. Tr. at 338-39.

D. Under AT&T's theory, the same "local traffic" definition would have a different meaning for an ALEC that adopted that definition.

Although section 5.3.3 states that it is interrelated to section 5.3.1.1, section 5.3.1.1 does not state that it is interrelated to section 5.3.3. Thus, another ALEC could adopt the definition of "local traffic" and corresponding exclusion for calls carried over switched access arrangements in the BellSouth-AT&T Interconnection Agreement without also having to adopt the provision addressing the treatment of VOIP calls.[4] In that case, according to AT&T's theory, the exact definition of local traffic would mean one thing in the AT&T agreement and another thing in the adopting ALEC's agreement, because the second ALEC would have not have the language in its contract addressing VOIP transmissions that AT&T contends limits the commonly understood meaning of "switched access arrangements." That absurd result is the byproduct of AT&T's linguistic machinations, and has nothing to do with the parties' agreement on how to treat calls traversing switched access arrangements. The Commission should not adopt a theory that leads to such an absurd result.

---

[4] This is not an unlikely scenario, because some ALECs do not originate VOIP transmissions.

Finally, the fact that one provision in an interconnection agreement is related to another provision in the agreement does not mean that a term specifically defined in one section has the same meaning as a different term used in another section. Yet that is the precise leap AT&T is asking this Commission to make. Indeed, AT&T claims that a term defined in one place in the contract *unambiguously* means the same thing as a different term appearing elsewhere in the contract. The Interconnection Agreement, to be certain, does not unambiguously state that "Switched Access Traffic" limits the commonly understood meaning of "switched access arrangements." Quite to the contrary, the Interconnection Agreement is clear that defined terms have their specially defined meaning only when the *same term* is used and capitalized, and that intraLATA calls that traverse switched access arrangements are non-local and are subject to switched access rates, not local reciprocal compensation rates.

II. AT&T'S INTERPREATION OF THE AGREEMENT VIOLATES THE FUNDAMENTAL PRINCIPLE OF CONTRACT CONSTRUCTION THAT ALL TERMS OF A CONTRACT ARE TO BE GIVEN MEANING.

"'Under the rules governing the construction of contracts all provisions contained therein are presumed to be inserted with a purpose, and are to be given some meaning. A contract, unless its terms necessarily require it, will not be so construed as to render useless and meaningless a particular provision in the contract.'" *Harper v. Phoenix Ins. Co. of Hartford*, 126 S.E.2d 916, 918 (Ga. App. 1962) (citation omitted). "[T]hat construction will be favored which gives meaning and effect to all the terms of the contract over that which nullifies and renders meaningless a part of the language therein contained." *Sugarman v. Shaginaw*, 260 S.E.2d 731, 733 (Ga. App. 1979) (citations omitted); *see also Gray v. Cousins*, 245 S.E.2d 58, 60 (Ga. App. 1978)

(holding that construction that renders contract language meaningless is not to be adopted).

AT&T's interpretation of the Interconnection Agreement as requiring the parties to treat *all* intraLATA calls, including those carried over switched access arrangements, as "local traffic" violates this fundamental principle of contract construction, because it renders the entire "except" clause within the local traffic definition meaningless. AT&T's Mr. King testified that the express exclusion from the definition of local traffic for calls carried over switched access arrangements applies to exclude only *inter*LATA calls from the definition of local traffic. Tr. at 92-93. As an initial matter, that interpretation, as Mr. King begrudgingly acknowledged on cross-examination, is preposterous:

> Q. So under your interpretation this definition would read, "The parties agree to apply a LATAwide local concept to this Attachment 3, meaning the traffic that has traditionally been treated as intraLATA toll traffic will now be treated as local for intercarrier compensation purposes, except interLATA traffic." That's your interpretation; correct?
>
> A. Technically, that is somewhat – I mean, that's true. . . .

Tr. at 92-93. Moreover, as Mr. King also testified, no interLATA calls would be included within the definition of "local traffic" if the "except" clause was absent from the parties' local traffic definition. See Tr. at 95. Thus, under AT&T's interpretation, the exclusion language is useless and meaningless because it is not needed to exclude interLATA calls from the definition of local traffic. Consequently, the Commission should reject AT&T's interpretation of the Interconnection Agreement.

III. AT&T'S CLAIM THAT THE EXCEPTION FOR CALLS CARRIED OVER SWITCHED ACCESS ARRANGEMENTS EXCLUDES ONLY *INTER*LATA CALLS FROM THE DEFINITION OF LOCAL TRAFFIC IS INCONSISTENT WITH THE TESTIMONY OF AT&T'S CONTRACT NEGOTIATOR THAT THE EXCLUSION APPLIES TO *ALL* ACCESS CALLS.

In addition to the fact that AT&T's interpretation of the Interconnection Agreement violates a primary rule of contract construction and makes no sense, Mr. King's claim that the contract language stating that calls carried over switched access arrangements are exempted from the definition of local traffic excludes only *inter*LATA calls is inconsistent with the testimony of AT&T's contract negotiator, Mr. Peacock. Mr. Peacock testified that the purpose of the "except" clause in section 5.3.1.1 was to exclude "access services" from the definition of "local traffic." Ex. 9 (NC Tr. Vol. 2 at 4-5); Ex. 6 (Peacock Depo.) at 37-38. He explained that by "access services," he meant "any Feature Group A, B, C, and *any* other *access services* that would be *defined by* the FCC or the *State Commission*." Ex. 9 (NC Tr. Vol. 2 at 5) (emphasis added); *see also* Ex. 6 (Peacock Depo.) at 68. Mr. Peacock further testified that switched access services, as well as the rates for those services, are set forth in tariffs filed with both the FCC and with state commissions. Ex. 6 (Peacock Depo.) at 59-60. The FCC has jurisdiction over interstate access services, and this Commission establishes rates pursuant to tariffs it approves for intrastate and intraLATA access services. Thus, according to Mr. Peacock, when he negotiated the Interconnection Agreement on behalf of AT&T, he understood that the language in section 5.3.1.1 to exempt intraLATA switched access calls from the definition of local traffic. Mr. King's claim that the contract language excludes only interLATA calls from the definition of local traffic is, even according to the testimony of AT&T's lead contract negotiator, bogus.

AT&T now claims that Mr. Peacock's specific description of calls excluded from the contract's definition of local traffic as including *any* access service defined by the FCC or by the state commission refers only to interstate access traffic. AT&T's claim is without merit. In addition to contradicting the plain words of the Agreement "as established by the State Commission or FCC," it is inconsistent with Mr. Peacock's sworn testimony. He testified repeatedly that access services defined by the state commission, as well as those defined by the FCC, were the subjects of the exclusion. State Commissions do not have jurisdiction over, nor do they define, interstate access services. State Commissions, through the tariffs they approve, establish only intrastate access services and rates. AT&T's argument also is inconsistent with Mr. King's testimony. Although Mr. King's interpretation of the exclusion is that it applies to exclude only interLATA calls, that category includes intrastate calls.

IV. IF THE COMMISSION DETERMINES THAT THE DEFINITION OF LOCAL TRAFFIC IN THE INTERCONNECTION AGREEMENT IS AMBIGUOUS, THE EXTRINSIC EVIDENCE DEMONSTRATES CONCLUSIVELY THAT THE PARTIES INTENDED AT THE TIME OF CONTRACTING TO EXCLUDE INTRALATA CALLS CARRIED OVER SWITCHED ACCESS ARRANGEMENTS FROM THE DEFINITION OF "LOCAL TRAFFIC."

A. The Commission cannot determine that the Agreement is ambiguous simply because AT&T conjured up an argument as to why the exclusion does not actually mean what it says.

"A contract is ambiguous when it is *reasonably* susceptible to more than one interpretation." *Stewart v. KHD Deutz of America*, 698 F.2d 698, 702 (11th Cir. 1993) (citing Georgia case law) (emphasis added). Extrinsic evidence is not admissible to establish ambiguity; "any ambiguities must be created by the language of the contract itself." *Id.* (citations omitted). Accordingly, AT&T's assertion that the exclusion from the definition of local traffic of calls originated or terminated over switched access arrangements means something different than what the Agreement says is not sufficient

for the Commission to conclude that the Agreement is ambiguous. In order to find that the Interconnection Agreement is ambiguous, the Commission must first conclude that AT&T's interpretation of the agreement -- which requires that the Commission determine that a term specifically defined in one section of the contract means the same thing as a different, commonly understood term used in a separate provision -- is *reasonable*. BellSouth explained in section I. above why construing the Interconnection Agreement in that manner is not reasonable and that the Agreement unambiguously excludes from the definition of local traffic "calls that are originated or terminated through switched access arrangements." Indeed, AT&T admitted that the Agreement was clear in that regard "on its face." If the Commission determines, nevertheless, that the exclusion is *reasonably* susceptible to the interpretation AT&T advocates, the Commission must look to the extrinsic evidence to explain the ambiguity. *Id.*[5] The extrinsic evidence demonstrates conclusively that the parties intended at the time of contracting to exclude intraLATA calls carried over switched access arrangements from their definition of "local traffic."

B. BellSouth's Ms. Shiroishi testified truthfully and credibly about the parties' contract negotiations; AT&T's witnesses did not.

In her opening statement, AT&T's lawyer told the Commissioners that, "because BellSouth has opted to try this case based on what the parties say the contract means rather than what the contract actually says, you are going to have to decide who is telling the truth regarding what happened during the negotiations that led to the signing of this agreement." Tr. at 18-19. Counsel's statement was only one-third correct. First,

[5] AT&T alleged in its motion to strike BellSouth's extrinsic evidence that the parol evidence rule bars testimony regarding the parties' discussion about the contract term at issue because the Interconnection Agreement contains a merger clause. As the Commission recognized when it denied AT&T's motion, AT&T is wrong. The parol evidence rule "prohibits the consideration of evidence of a prior or contemporaneous oral agreement to *alter, vary or change* the *unambiguous* terms of a written contract." *First Data POS v. Willis*, 546 S.E.2d 781, 795 (Ga. 2001).

BellSouth has stated consistently in its Answer, pre-filed testimony, responses to AT&T's motions to strike testimony, pre-hearing statement, hearing opening statement, witness testimony, and in this brief, that the contract *unambiguously* states that any call that originates or terminates over a switched access arrangement is not "local traffic." Because even AT&T's chief witness admits that the contract provision at issue "on its face" means what it plainly says, it is AT&T, not BellSouth, that would prefer that the Commission focus on AT&T's "little spin" of what AT&T would like the definition of "local traffic" in the parties' Interconnection Agreement to mean, rather than on what the contract plainly says. Second, if the Commission agrees that the definition of "local traffic" in the Interconnection Agreement is unambiguous, then it need not make any determination about whose version of the negotiations is credible.

Counsel was correct, however, with respect to her final point. If the Commission determines that the "local traffic" definition is ambiguous (which it is not), then the Commission will indeed "have to decide who is telling the truth." That is not even a close call. Ms. Shiroishi's testimony, which is discussed in detail below, was unwavering that she discussed the plain meaning of the exclusion for calls that are originated or terminated over switched access arrangements with AT&T before the parties agreed to that contract language and that AT&T's post-hoc explanation of the purpose for and meaning of the language is both not true and illogical.[6] The story put forth by AT&T's witnesses, by contrast, is full of gaping holes and inconsistencies. As set forth in detail below, AT&T's story, to be certain, is not believable.

---

[6] AT&T devoted a substantial amount of its cross-examination time at the hearing to questioning Ms. Shiroishi in painstaking detail about her education and employment history, which is not in dispute and which "cross-examination" was already in the record by virtue of admitting the same testimony from the North Carolina case into the record in this proceeding. AT&T did not in any way impugn Ms. Shiroishi's testimony or her credibility generally.

C. BellSouth told AT&T and AT&T understood before AT&T agreed to the language that intraLATA calls carried over switched access arrangements were excluded from the definition of "local traffic."

Ms. Shiroishi testified that BellSouth proposed the LATA wide local traffic definition with its exception for calls carried over switched access arrangements specifically to exclude from the definition of local traffic calls carried over switched access arrangements purchased out of a party's switched access tariff. Tr. at 242-44, 259-60. Both Mr. Peacock and Mr. King acknowledged that they knew at the time BellSouth proposed the above language that a "switched access arrangement" is a facility "purchased out of the switched access tariff." Ex 9 (NC Tr. Vol. 1 at 84, 213-14). Moreover, after BellSouth sent the proposed contract language to AT&T, the parties specifically discussed that the language meant that intraLATA calls carried over switched access arrangements would not be treated as local traffic. *Id.* at 36-38. Mr. Peacock does not dispute this important fact. He testified that Ms. Shiroishi told him that the "except" clause in section 5.3.1.1 was intended to exclude from the definition of local traffic calls placed using any "access services" purchased out of state or federal tariffs. *Id.* at 4-5; Ex. 6 (Peacock Depo.) at 36-38, 59-60, 68. The intraLATA calls that are the subject of this case are terminated over switched access arrangements that AT&T purchases out of BellSouth's Florida Switched Access Service Tariff. They are, therefore, within the class of calls that Mr. Peacock acknowledged Ms. Shiroishi told him would be excluded from the definition of local traffic.

"The intention of the parties may differ among themselves. In such case, the meaning placed on the contract by one party and known to be thus understood by the other party at the time shall be held as the true meaning." Ga. Code Ann. § 13-2-4. Thus, even if AT&T's claim that it would not have purposefully intended to exclude calls

carried over switched access arrangements from the definition of local traffic is believable, which, for the reasons set forth below it is not, that the language excludes intraLATA calls carried over switched access arrangements is still the true meaning of the contract, because BellSouth told AT&T the meaning BellSouth placed on the contract and AT&T did not object.

D. AT&T's explanation for the "switched access arrangements" exception is implausible, and the testimony of its witnesses is not credible.

1. AT&T's story does not even pass the "red face" test. AT&T's Mr. King did not participate in any of the Interconnection Agreement negotiations with BellSouth, nor did he discuss the exclusion language for "switched access arrangements" with BellSouth before the parties executed the Interconnection Agreement. Tr. at 119-20. He admitted that his testimony about BellSouth's alleged intent regarding the language was based solely upon what Mr. Peacock told him. Tr. at 120. According to Mr. King, Mr. Peacock told him that BellSouth wanted the exclusion language in order to protect BellSouth in the event that a State Commission or the FCC determined that (1) ISP traffic[7] was interstate in nature, and/or (2) the FCC determined VOIP transmissions constituted interLATA traffic. Tr. at 65, 127.

AT&T's explanation of BellSouth's supposed intent is implausible. Mr. King admitted that he knew that BellSouth's position was and always has been that VOIP calls should be treated as interLATA. Tr. Vol. 1 at 127-28. He also acknowledged on cross-examination that he knew before BellSouth proposed the language at issue in May 2001, and the parties agreed upon it in late July 2001, that the FCC concluded in

[7] ISP traffic comprises calls to an information service provider or Internet service provider ("ISP") that are dialed by using a local dialing pattern (7 or 10 digits) by a calling party in one LATA to an ISP server or modem in the same LATA.

its April 2001 ISP Order on Remand that ISP traffic is not subject to the reciprocal compensation requirements of the 1996 Act. Tr. at 128. Mr. King did not, and AT&T cannot explain why BellSouth would need protection from an FCC ruling on VOIP calls that was consistent with BellSouth's long-held position that such calls should be treated as interLATA, or from a ruling on ISP traffic given that the FCC had finally decided that issue before BellSouth even proposed the definition of local traffic with its exclusion for calls carried over switched access arrangements. Mr. King also acknowledged that Mr. Peacock never gave him a reason why BellSouth would need protection from such rulings when he supposedly told Mr. King about BellSouth's purported intent. Ex. 9 (NC Tr. Vol. 1 at 88-90). The reason is simple – It would not need such "protection."

Mr. King's explanation of BellSouth's supposed intent is even more implausible given that the parties specifically addressed in the Interconnection Agreement how they would handle both ISP traffic and VOIP transmissions. The parties "agree[d] to implement the FCC's Order on Remand and Report and Order in CC Docket No. 96-98 and 99-68 released April 27, 2001 ("ISP Order on Remand")" and "to amend [their] agreement . . . to incorporate language reflecting the FCC's ISP Order on Remand." In the amendment to the Interconnection Agreement, the parties, in accordance with the ISP Order on Remand, agreed that "ISP-bound Traffic is not Local Traffic . . . subject to reciprocal compensation, but instead is information access traffic subject to the FCC's jurisdiction," and set forth a mechanism to compensate each other for such traffic that is dependent of the ratio of terminating to originating such traffic. Ex. 11 (JAK Ex. 1, at 18). With respect to VOIP traffic, the parties expressly acknowledged that they were unable to agree on how to treat VOIP transmissions that cross local calling area

boundaries and that they would agree to abide by any FCC decisions regarding the nature of such traffic and the compensation payable. *Id.* at 21.

Mr. King conceded that the Interconnection Agreement specifically addresses the treatment of both ISP traffic and VOIP transmissions. Tr. at 129. Notably, however, neither Mr. King nor anyone else on behalf of AT&T has ever offered a coherent explanation of how a general exclusion for calls carried over switched access arrangements was intended to address two specific types of traffic that are each addressed in detail in the Agreement. That is because none exists. [8] As Ms. Shiroishi testified, AT&T's story is not true and does not make sense in any event:

> I understand what AT&T has done in trying to tie the ISP and the VOIP to make that be what this exclusion says. That's not what this exclusion means. That's not what BellSouth ever said this exclusion means. And I can say that with a great deal of passion because when I read AT&T's testimony, . . . it took me about eight times of reading that testimony before I understood that argument because that's not what this means. This language says that it excludes calls that are originated over switched access arrangements. . . . If we needed to exclude ISP traffic, we would have done that. If we needed to exclude voice over IP, we would have done that. We would have said that. We wouldn't have said switched access arrangements as established by the FCC or state commission because, quite frankly, that doesn't even protect me. I mean, number one, ISP traffic had been determined that it wasn't subject to reciprocal compensation. Number two, voice over IP transmissions are interLATA so I don't need protection from that. And the other thing, . . . ISP-bound traffic isn't . . . 99.9 percent of the time isn't going to be originated or terminated through a switched access arrangement. . . . And voice over IP is the same way. So it's not even – the language doesn't even accomplish that. . . . I guess, again, it's convenient that those things for AT&T were being negotiated at the same time, and thus this theory can be drawn, but that's not [what the language means].

---

[8] AT&T argued in its brief in the identical North Carolina case that because the FCC determined in its ISP Order on Remand that ISP traffic was "predominately interstate in nature," "BellSouth needed further 'protection' in the event the FCC subsequently determined that calls to ISPs constituted interLATA traffic." AT&T Brief, at 44. AT&T is dead wrong. The FCC determined in its ISP Order on Remand that no ISP traffic is subject to reciprocal compensation (including the very small percentage that might terminate to a website located in the same local calling area in which it originated). The FCC concluded that service provided to deliver traffic to an ISP constitutes "information access" and that compensation for the service is, therefore, not subject to the reciprocal compensation requirements of section 251(b)(5). *See* Order on Remand and Report and Order, CC Docket Nos. 96-98 and 99-68 (rel. April 27, 2001).

Tr. at 328-30.

In addition, the first time he testified under oath about this issue, Mr. Peacock testified unequivocally, consistent with Ms. Shiroishi's testimony, that the local traffic definition and its express exclusion were *not* tied to the issues of how the parties would compensate each other for transporting and terminating ISP traffic and VOIP transmissions:

> Q. Now, is it your testimony that that sentence we talked about [the one setting forth the local traffic definition and exclusion for calls transmitted over switched access arrangements] was part of the parties' resolution of the ISP traffic issue?
>
> A. No, not the resolution of the ISP issue. But the language was negotiated at about the same time that we were finalizing the language that we would use as a place holder language for ISP, to implement the ISP order.
>
> ***
>
> Q. Is it your testimony that the sentence we're looking at in 5 – I think I've been saying 5.1.1.1. I mean to be saying 5.3.1.1. . . . Is it your testimony that that sentence was put in as part of the parties' resolution of the voice over internet issue?
>
> A. The language was – let me go back and say no. . . .

Ex. 6 (Peacock Depo.) at 26-28.

The fact that the local traffic definition was not tied to the parties' agreement on how to handle either ISP traffic or VOIP transmissions is confirmed by the May 22, 2001, redlined version of the Interconnection Agreement in which BellSouth first proposed a LATAwide definition of local traffic with an exception for intraLATA calls carried over switched access arrangements for Florida. Tr. at 182-83; Ex. 22. There is no mention in that document that the parties would agree to treat ISP traffic in accordance with the FCC's ISP Order on Remand, and there is no reference to VOIP calls. Ex. 9 (NC Tr. Vol. 1 at 137-38). There is likewise nothing in the parties' July 11,

2001, redlined version of the contract that says the parties would handle ISP traffic in accordance with the FCC's ISP Order on Remand. *Id.* at 141-42. The matrices AT&T prepared to use as a hearing exhibit show that the language addressing VOIP transmissions and ISP traffic first appeared in versions of the Interconnection Agreement dated July 11 and July 17, 2001, respectively, well after BellSouth first proposed the local traffic definition with its plain exclusion for calls carried over switched access arrangements. Tr. at 185-87.

Notwithstanding the fact that the both the documentary evidence and Ms. Shiroishi's testimony are consistent with Mr. Peacock's sworn deposition testimony, Mr. Peacock changed his story completely at the North Carolina hearing, where he testified under oath in stark contrast to his prior testimony as follows:

> Q. Was the contract language at issue in this case, specifically, that the parties agreed to treat all LATAwide traffic as local except for those calls that originated or terminated through switched access arrangements as established by the State Commission or FCC, part of the parties' resolution of the ISP traffic issue?
>
> A. Yes, that was one of the parts of the resolution.
>
> Q. The language that sets forth the definition of local traffic and contains the exception for switched access arrangements, that was not put in the contract as part of the parties' resolution of the voice over internet protocol calls issue, was it?
>
> A. Yes, the exclusion was placed there such that, again, there were – there were specifically two issues that our understanding was that BellSouth had offered this language; and that dealt with ISP, whether or not dial-up ISP traffic would be considered interstate versus local and voice over IP, whether that would be compensated at – via reciprocal compensation rates and other access services that were not specifically addressed in the negotiations.

Ex. 9 (NC Tr. Vol. 1 at 216, 218-19).

Other than having its witness recant testimony and testify inconsistently with his prior testimony, AT&T's other retort in its North Carolina brief to the documentary

evidence that contradicts AT&T's latest version is to claim that it would have been impossible for the parties to have completed negotiations regarding the treatment of ISP traffic between July 11 and July 19, because it was a "very controversial issue." That "argument" is likewise contradicted by the facts. The fact is that the parties did not complete their negotiations. Rather, they simply inserted "placeholder" language stating that they would subsequently amend their agreement to incorporate the FCC's ISP Order on Remand, which they were legally bound to follow. With respect to VOIP, they simply agreed to disagree and to abide by future rulings.

2. AT&T's primary "fact" witness, Billy Peacock, did not testify consistently or truthfully. The conflicting testimony quoted above is not the only case where Mr. Peacock changed his story. He testified at his deposition, again in accord with Ms. Shiroishi, that:

> Mississippi was a negotiated arrangement that was kind of a stand alone arrangement done prior to, because we didn't want to arbitrate in Mississippi. So, we have one set of language in Mississippi, then we have other sets of language similar in the other states – identical in the other states.

Ex. 6 (Peacock Depo.) at 23-24. At the North Carolina hearing, however, Mr. Peacock disagreed with and disavowed completely the deposition testimony he gave just two days before the hearing. Ex. 9 (NC Tr. Vol. 1) at 197-98.

Mr. Peacock also contradicted Mr. King and undermined AT&T's principle contract interpretation argument set forth in Mr. King's testimony.[9] Mr. King testified that

---

[9] Mr. King testified that the primary purpose of his direct testimony was to testify as to the meaning of the definition of local traffic in the Interconnection Agreement. Tr. at 83. Indeed, notwithstanding the fact that he is neither a lawyer nor was he involved in the negotiation of the contract, Mr. King testified that the "proper rules of contract construction and interpretation" support AT&T's "interpretation" of the Agreement, though he never specified those rules upon which he claimed to rely. Tr. at 42-43.

it is only "by virtue" of the "interrelated" language in section 5.3.3 of Attachment 3 that "calls that are originated or terminated through switched access arrangements" as used in section 5.3.1.1 means "Switched Access Traffic" as that phrase is specially defined in section 5.3.3, *see, e.g.*, Tr. at 43-44, and that is the basis for AT&T's argument that the contract is unambiguous in a manner that supports AT&T's interpretation. Mr. Peacock testified under cross-examination by Staff Counsel, that, to the contrary, the "interrelated" language is not necessary to support AT&T's interpretation of the Interconnection Agreement. Tr. at 192.

In addition to changing his own testimony completely and undermining AT&T's contract interpretation argument, there is additional record evidence that shows that Mr. Peacock did not testify truthfully. After changing his story at the North Carolina hearing from his prior sworn testimony that the ISP and VOIP provisions in the Interconnection Agreement were not tied to the local traffic definition and exclusion for calls carried over switched access arrangements and apparently to attempt to bolster the newer version of his testimony, Mr. Peacock claimed in his pre-filed testimony filed in this case that BellSouth proposed the LATAwide local traffic definition with its exception for calls traversing switched access arrangements *after* the parties reached agreement on how to handle ISP traffic and VOIP calls. Mr. Peacock testified that "when it came time to draft language relative to these issues, in addition to the specific language for each issue, BellSouth *eventually* also proposed the following language in section 5.3.1.1 of Attachment 3 that '[a]dditionally, the Parties agree to apply a "LATAwide" local concept . . . except for those calls that are originated or terminated over switched access

---

Notably, however, despite his alleged expertise at contract interpretation when testifying in support of AT&T's claims, when confronted with a different contract on cross-examination, Mr. King demurred: "I don't construct the interconnection agreements."

arrangement. . . .'" Tr. at 162 (emphasis added). The facts show that is not what happened, however. As noted above, it is undisputed that BellSouth first proposed the LATAwide language with its exception for calls carried over switched access arrangements on May 22, 2001, and that the first draft proposals of the provisions addressing ISP and VOIP traffic did not appear in the red-lined agreement until mid-July 2001. Moreover, there is nothing in the approximately 15 pages of AT&T's meeting notes that cover the period between May 22 and July 19, 2001, the date the parties reached agreement on all of the contract language, that supports Mr. Peacock's story.

Mr. Peacock also told the Commission that AT&T had been attempting to get a definition of local traffic that included all calls within a LATA since the 1996 Act was passed. Tr. at 154. He claimed that if BellSouth did not agree to the definition AT&T wanted, then AT&T would have arbitrated the issue with BellSouth, but that BellSouth had agreed to treat all intraLATA calls at local before AT&T filed its petition for arbitration of the 2001 Interconnection Agreement. Tr. at 154-55. Once again, undisputed evidence proves that Mr. Peacock's testimony is not accurate. First, AT&T agreed in its 1997 Interconnection Agreement (after passage of the 1996 Act) without arbitrating the issue to a definition of local traffic that did *not* include all traffic in a LATA. Tr. at 100. Second, BellSouth never agreed, as Mr. Peacock testified that it did, to pay reciprocal compensation rates for all LATAwide traffic before (or after) AT&T filed its petition for arbitration of the 2001 Interconnection Agreement. It is true that when AT&T filed its arbitration petition, it claimed that BellSouth had agreed to such language. Tr. at 121-22. Importantly, however, BellSouth stated expressly in its response to AT&T's petition that the version of the interconnection agreement that AT&T filed with its petition contained misstatements of the parties' agreement and BellSouth stated specifically that

it did not agree to a LATAwide definition of local traffic. Tr. at 122-24; Ex. 18. AT&T produced no evidence that BellSouth ever agreed to its LATAwide proposal in 2000. Mr. Peacock never told Mr. King that BellSouth made clear in its response that it did not agree with LATAwide local traffic definition set forth in the agreement AT&T filed with its petition. Tr. at 124-26. And AT&T never amended its arbitration petition to make the definition of local traffic an issue for this Commission to determine. Tr. at 126.

Mr. King offered that at least part of the reason AT&T did not amend its petition to have the Commission arbitrate the definition was the Commission's consideration of the identical issue in its generic reciprocal compensation docket. Tr. at 126. In Docket No. 000075-TP, the Commission considered, among other issues, what the appropriate local traffic definition in parties' interconnection agreements should be in the absence of agreement by the parties. The Commission rejected AT&T's proposal to adopt the same LATAwide definition of local traffic that it is seeking here and instead adopted the proposal advocated by BellSouth's Ms. Shiroishi to use the originating carrier's retail local calling area for purposes of reciprocal compensation. FL PSC Order No. PSC-02-1248-FOF-TP; *see also* Tr. at 126.

3. The testimony of Ms. Stevens does not corroborate Billy Peacock's testimony. Moreover, her testimony, like Mr. Peacock's, is not credible. Ms. Stevens' testimony does not corroborate Mr. Peacock's story, as AT&T claims that it does. First, Ms. Stevens testified that "[d]uring the negotiations of the [Florida] agreement local traffic was never discussed. It was not an issue that the parties were negotiating." Ex. 9 (NC Tr. Vol. 1 at 133-34). Ms. Stevens did not even have *any* recollection of BellSouth proposing new language addressing this issue in May 2001, that the parties agreed to with slight modification, even though one of her primary responsibilities was to

keep up with the redlined contracts the parties exchanged throughout their negotiations. Tr. at 216; *see* also Ex. 9 (NC Tr. at 130, 134-35). Thus, by her own admission, Ms. Stevens cannot testify about what any party may have said during the negotiations of the local traffic definition and exclusion for calls carried over switched access arrangements.

Ms. Stevens was told by her boss, Mr. Peacock, that AT&T needed her to file testimony in this case because Ms. Stevens was AT&T's "official note taker" during the Interconnection Agreement negotiations and he needed her to confirm dates and conversations. Tr. at 227-28. Indeed, Ms. Stevens attached as Exhibit 1 to her testimony all of her meeting notes from February 2001 through December 2001. Tr. at 214. Those notes cover several issues that the parties discussed during that time period, and most of the notes are from meetings that took place after the parties agreed upon the contract language at issue in this case on July 19, 2001. Tr. at 214. Most significantly, Ms. Stevens admitted that there is nothing in her notes that confirms Mr. Peacock's allegation that Ms. Shiroishi stated during the parties' negotiations that BellSouth wanted the exception in the local traffic definition for calls carried over switched access arrangements in order to allay some unspecified concerns that BellSouth supposedly had with potential rulings regarding the jurisdictional nature of ISP traffic or VOIP transmissions. Tr. at 219-221.

Not only did Ms. Stevens admittedly fail to fulfill the stated purpose of her testimony, she also admitted that her pre-filed testimony was not accurate in at least two respects. Ms. Stevens stated in her pre-filed testimony that she "remember[ed" Ms. Shiroishi reiterating that the exclusion in the contract for calls carried over switched access arrangements referred to switched access arrangements purchased out of each

other's switched access tarrifs, but that occurred after the parties executed the Interconnection Agreement. Tr. at 221-22. Ms. Stevens admitted on cross-examination, however, that she did not in fact "remember" Ms. Shiroishi making any such statement. Tr. at 222. She conceded that her testimony was, rather, based solely on a reference in her notes from a meeting that occurred after AT&T disputed the plain meaning of the local traffic definition and Mr. King became involved in the parties' discussions. Tr. at 222-24. Also, in an attempt to refute Ms. Shiroishi's testimony that she drew diagrams when explaining the exclusion for switched access arrangements, Ms. Stevens purported to quote a reference from her meeting notes regarding diagrams about a separate issue. Tr. at 226. Ms. Stevens admitted on cross-examination that the quote she included in her testimony did not appear anywhere in the comprehensive set of notes she attached to her testimony. Tr. at 227.

E. AT&T agreed to include other language in the Interconnection Agreement that wholly undermines its contention that it believed that intraLATA calls carried over switched access arrangements would be treated as "local traffic."

AT&T agreed to include the following language in the Interconnection Agreement after BellSouth proposed the definition of local traffic with its exclusion for calls carried over switched access arrangements: "For terminating its intraLATA toll traffic on the other party's network, the originating party will pay the terminating party's intrastate or interstate terminating switched access rates as set forth in the effective intrastate or interstate access services tariff, whichever is appropriate." Tr. at 166-67. That provision effectively says the same thing as the "except" clause in the parties' definition of local traffic – that switched access rates will apply to certain intraLATA traffic. AT&T never objected to that provision, however. Tr. at 358-59; Ex. 9 (NC Tr. Vol. 2 at 7-8). On the day before the parties executed the Interconnection Agreement, and *after* the

parties agreed to the local traffic definition and exclusion set forth in section 5.3.1.1 of Attachment 3, Ms. Shiroishi realized that the provision quoted above was no longer necessary and, accordingly, she proposed deleting that language. Tr. at 167, 358.[10] AT&T agreed. Tr. at 168. Had BellSouth not proposed deleting the language at the eleventh hour because *it* believed that it was redundant with the exception in the local traffic definition, AT&T would have no room to argue that the exception does not mean that switched access rather than reciprocal compensation rates apply to intraLATA calls carried over switched access arrangements. The fact that AT&T, which was represented by counsel during the negotiations, never objected to a contract term that wholly undermines its interpretation of another term is strong evidence that AT&T intended at the time of contracting to pay switched access rates for intraLATA calls terminated over switched access arrangements purchased out of BellSouth's Switched Access Tariff, and that the Commission should reject AT&T's twisted, after-the-fact interpretation of the contract.

F. AT&T's reliance on the parties' Mississippi Interconnection Agreement is misplaced.

In their Mississippi Interconnection Agreement, the parties defined local traffic simply as "any telephone call that originates and terminates in the same LATA." AT&T claims that the Florida definition with its express exception for calls originated or terminated over switched access arrangements means the exact same thing as the Mississippi definition. Tr. at 102-03. AT&T seemingly argues that since Bellsouth

[10] Mr. Peacock testified that AT&T agreed to delete the provision, specifically stating that it would pay switched access rates for certain intraLATA traffic on the same day that it agreed to the local traffic definition with the exclusion for switched access arrangements. Once again, the documentary evidence proves that Mr. Peacock's sworn testimony is not accurate. Ms. Shiroishi proposed deleting the language in an e-mail to Mr. Peacock and others dated July 18, 2001. It reads: "Attached is a redline as a result of last night's call. I realized that we don't need the intraLATA stuff, so I've redlined that. Everything else that you accepted is shown as accepted." The local traffic definition and its exclusion are "shown as accepted," and AT&T never communicated otherwise. Tr. at 167

agreed to an all encompassing LATAwide definition in Mississippi, then that definition also applies in Florida (and the other BellSouth states). It was, at a minimum, unreasonable for a sophisticated behemoth like AT&T to honestly believe that the Florida language with its express exception means the same thing as the Mississippi definition. It plainly does not. There are several differences between the parties' Mississippi Agreement, where they agreed that they did not want to arbitrate, and their agreements in the other eight States. Tr. at 282. In addition to tossing the rules of contract formation aside, it is preposterous for AT&T to claim that language in one contract means the exact same thing as very different language in another contract because AT&T prefers the former.

G. AT&T's reliance on the BellSouth-Auglink Agreement also is misplaced.

AT&T argues that BellSouth's interconnection agreement with Auglink Communications supports AT&T's position in this case. AT&T is wrong. Auglink exercised its right under section 252(i) of the 1996 Act to adopt AT&T's Interconnection Agreement with BellSouth, but the parties agreed to some modifications. Tr. at 341; Ex. 26. In the local traffic definition, following "except for those calls that are originated or terminated through switched access arrangements," the parties inserted the following parenthetical, "(i.e., traffic that is exchanged over switched access trunk groups)." BellSouth and Auglink also defined "Switched Access Traffic" more broadly than the definition in the AT&T agreement, and they did not include the "interrelated" language contained in the AT&T contract. *See* Ex. 26. Ms. Shiroishi explained the reasons for the changes in response to questions from AT&T's counsel. First, BellSouth proposed the parenthetical in the exception portion of the local traffic definition because it was "concerned that another carrier who adopted the AT&T agreement may try to take

AT&T's interpretation of what this means, so we put in a clarification." Tr. at 341. Significantly, Auglink agreed to that reiteration and never suggested, as AT&T does, that the exclusion means something different than what the words plainly say. Second, Auglink was willing to accept BellSouth's position with respect to VOIP transmissions and since BellSouth did not have to compromise as it did with AT&T, the broader definition and interrelationship was not necessary or appropriate. Tr. at 342-43.

Ms. Shiroishi's testimony is the only evidence in the record regarding the Auglink agreement. AT&T, of course, is not a party to the Auglink agreement. Consequently, AT&T cannot offer any credible evidence as to BellSouth and Auglink's intent in adding the clarifying parenthetical. Consequently, the Commission should reject AT&T's speculative arguments that contradict the undisputed evidence on this point.

H. No other ALEC with the same definition of "local traffic" in its interconnection agreement with BellSouth has taken the position that intraLATA calls carried over switched access arrangements are ocal calls subject to reciprocal compensation rates.

Several ALECs other than AT&T have interconnection agreements with BellSouth that contain the same definition of local traffic as is at issue in this case. Tr. at 291. Notably, no other ALEC has taken the position that the exclusion means that they may pay reciprocal compensation rather than switched access rates for terminating intraLATA calls to BellSouth over switched access arrangements. If other ALECs believed AT&T's "interpretation" was a tenable one, they would have, at a minimum, intervened in this proceeding and supported a contract interpretation in which they also would benefit. AT&T's lone voice on this issue further demonstrates the unreasonableness of its position.

Additionally, AT&T has the identical local traffic definition in its interconnection agreements with BellSouth in all eight of the states other than Mississippi where

BellSouth operates as an incumbent local exchange carrier, but it has brought this complaint in only North Carolina and Florida. There is a reason that AT&T does not want those six Commissions to rule on this issue – because AT&T's case lacks merit.

CONCLUSION

For the foregoing reasons, the Commission should order that: (1) the Interconnection Agreement unambiguously excludes intraLATA calls originated or terminated through switched access arrangements from the definition of local traffic; or (2) in the alternative, that the Interconnection Agreement is ambiguous, but the extrinsic evidence demonstrates conclusively that at the time of contracting the parties intended to exclude intraLATA calls originated or terminated over switched access arrangements from the definition of local traffic.

Respectfully submitted this 3rd day of July, 2003.

BELLSOUTH TELECOMMUNICATIONS, INC.

Nancy B. White
NANCY B. WHITE (KA)
JAMES MEZA III
c/o Nancy H. Sims
150 South Monroe Street
Suite 400
Tallahassee, FL 32301
(305) 347-5558

Andrew D. Shore
ANDREW D. SHORE (KA)
Suite 4300, BellSouth Center
675 West Peachtree Street, N.E.
Atlanta, GA 30375
(404) 335-0765

492410