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May 15, 2000

VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Complaint of AVR of Tennessee, LP dba Hyperion of Tennessee, L.P. Against BellSouth Telecommunications, Inc. to Enforce Reciprocal Compensation and "Most Favored Nation" Provision of the Parties' Interconnection Agreement*
Docket No. 98-00530

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc.'s Reply Memorandum in Support of Petition for Appeal. Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,

Guy M. Hicks

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Enclosure

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

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In Re: ***Complaint of AVR of Tennessee, L.P., d/b/a Hyperion of Tennessee, L.P. Against BellSouth Telecommunications, Inc. to Enforce Reciprocal Compensation and "Most Favored Nation" Provision of the Parties' Interconnection Agreement***

Docket No. 98-00530

BELLSOUTH TELECOMMUNICATIONS, INC.'S REPLY MEMORANDUM IN SUPPORT OF PETITION FOR APPEAL

I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully files this Reply Memorandum in Support of its Petition for Appeal of the Initial Order of the Hearing Officer on the merits of this case dated April 14, 2000. While understandably urging the Tennessee Regulatory Authority ("Authority") to adopt the Initial Order, ADR of Tennessee, L.P. d/b/a Hyperion of Tennessee, LP ("Hyperion") makes no serious attempt to respond to BellSouth's arguments detailing the reasons why the Initial Order is legally and factually flawed. Despite filing a seven-page response, Hyperion has no answer to BellSouth's arguments that the Initial Order overlooks the plain language of the parties' Interconnection Agreement, fails to address extrinsic evidence of the parties' intent, and disregards well-established principles of Tennessee contract law. Accordingly, the Authority should reject the Initial Order and remand this matter to the Hearing Officer for further proceedings.

II. DISCUSSION

A. BellSouth And Hyperion Did Not Mutually Agree To Pay Reciprocal Compensation For ISP-Bound Traffic.

According to Hyperion, BellSouth's claim that the Initial Order did not and could not find that BellSouth and Hyperion mutually agreed to pay reciprocal compensation for traffic to Internet Service Providers ("ISPs") is "startling," "inaccurate," and "inexplicable." Hyperion Response at 2. Yet, despite such hyperbole, Hyperion fails to point to any finding in the Initial Order that BellSouth and Hyperion mutually agreed to pay reciprocal compensation for ISP traffic. This is understandable since the Hearing Officer made no such findings.

Hyperion's reliance upon the Hearing Officer's conclusion "that the intentions of the parties at the time the Agreement was signed was that ISP-bound traffic be treated as local traffic" is seriously misplaced. Hyperion Response at 2. As BellSouth previously explained, the purported "treatment" of ISP-bound traffic as local is not the issue. BellSouth's Petition at 7-12. What is at issue is whether the parties mutually agreed to pay reciprocal compensation for ISP-bound traffic when: (1) the Interconnection Agreement does not contemplate the payment of reciprocal compensation for any traffic, let alone ISP-bound traffic; and (2) Hyperion was advised in August 1997 about BellSouth's position that ISP-traffic was interstate in nature and not subject to the payment of reciprocal compensation, seven months before Hyperion sought to amend the Agreement in March 1998. The Initial Order does not address these facts, which are given equally short shrift by Hyperion.

Hyperion's argument that it would be "novel" to consider its knowledge about BellSouth's position on ISP-bound traffic in March 1998 in determining whether BellSouth and Hyperion mutually agreed to pay reciprocal compensation for ISP-bound traffic is unpersuasive. Hyperion Response at 3. Under Tennessee law, there is nothing "novel" about considering contemporaneous statements of one party to a contract in ascertaining contractual intent. *See, e.g., Frank Rudy Heirs Associates v. Sholodge, Inc.,* 967 S.W.2d 810 (Tenn. Ct. App. 1997) (in arriving at the intention of the parties to a contract, the court may properly look into the course of previous dealings, the circumstances in which the contract was made, and the situation of the parties). Here, BellSouth stated in August 1997 that it considered ISP-bound traffic to be interstate traffic not subject to reciprocal compensation, which belies any notion that BellSouth agreed to pay reciprocal compensation for such traffic seven months later when Hyperion sought to amend the Interconnection Agreement in March 1998.[1]

Equally unpersuasive is Hyperion's argument that BellSouth's intent in March 1998 that reciprocal compensation should not be paid for ISP-bound traffic "is completely irrelevant." Hyperion Response at 3-4. Hyperion's argument is premised upon the misguided view that, because Hyperion was seeking to adopt the reciprocal

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[1] The failure of the Initial Order to consider the significance of Hyperion's knowledge about BellSouth's position on ISP-bound traffic in March 1998 cannot be blamed on BellSouth, as Hyperion seeks to do. BellSouth raised this issue explicitly and clearly in its Post-Hearing Brief, notwithstanding Hyperion's claim to the contrary. *See* BellSouth's Post-Hearing Brief at 18-19 (noting that Hyperion was aware of BellSouth's position that ISP-bound traffic is interstate in nature and not subject to the payment of reciprocal compensation, which "is fatal to any claim that BellSouth agreed to pay reciprocal compensation for ISP-bound traffic").

compensation provisions of BellSouth's interconnection agreement with KMC, the Authority should only consider "the intent and understanding of the parties who wrote it – KMC and BellSouth." Hyperion Response at 3. However, this argument cannot be reconciled with Tennessee law, which requires that in ascertaining contractual intent consideration must be given to the intent of the contracting parties. *See Hamblen County v. City of Morristown,* 656 S.W.2d 331, 334 (Tenn. 1983) (in interpreting a contract, the court "puts itself in the position which [the parties] occupied at the time the contract was made"). Here, even assuming Hyperion were entitled to amend the Interconnection Agreement in March 1998 (which BellSouth submits is not the case), the payment of reciprocal compensation for ISP-bound traffic necessitated a mutual agreement to make such payments by Hyperion and BellSouth in March 1998, which was totally lacking.[2]

The absence of such critical findings is not salvaged, as Hyperion attempts to do, by the Hearing Officer's ruling that "the parties agreed to treat calls to ISPs as local for the purposes of reciprocal compensation" under the April 1, 1997 Interconnection Agreement. Hyperion Response at 4. First, this ruling cannot be reconciled with compelling evidence bearing directly on the parties' intent at the time,

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[2] Notwithstanding Hyperion's erroneous suggestion to the contrary, BellSouth has never argued that "the relevant issue" in ascertaining the intent of Hyperion and BellSouth "is the understanding between KMC and BellSouth." Hyperion Response at 3. BellSouth cited the Louisiana Commission's decision interpreting the KMC agreement simply to underscore the Hearing Officer's failure to make any findings that BellSouth and Hyperion mutually agreed to pay reciprocal compensation for ISP-bound traffic when Hyperion sought to amend the Interconnection Agreement in March 1998.

such as the fact that: (1) the payment of reciprocal compensation for any traffic, let alone for ISP-bound traffic, was never even raised during negotiations; (2) Hyperion had no plans to serve ISPs, and ISP-bound traffic did not represent much of Hyperion's business at the time; and (3) Hyperion agreed to a bill and keep arrangement, which would make no economic sense for Hyperion if Hyperion reasonably understood that ISP-bound traffic constituted "local traffic" under the Interconnection Agreement. Hyperion has no response at all for these points. It simply ignored BellSouth's arguments.

Second, even assuming that "the parties agreed to treat calls to ISPs as local" under the April 1, 1997 Interconnection Agreement (which BellSouth submits is not the case), they certainly did not mutually agree to pay reciprocal compensation for such traffic, since the Agreement contained a bill and keep provision. Any obligation to pay reciprocal compensation would have arisen, if at all, in March 1998, when Hyperion sought to amend the Interconnection Agreement. Thus, before ordering BellSouth to pay reciprocal compensation for ISP-bound traffic beginning in March 1998, the Hearing Officer was required to find that BellSouth and Hyperion mutually agreed to pay reciprocal compensation for such traffic in March 1998, which the Hearing Officer did not and could not do.

B. Hyperion Is Not Entitled To Amend The Interconnection Agreement Under Either Section IV.C Or Section XIX.

1. Section IV.C

While latching on to the Hearing Officer's analysis of BellSouth's tariffs, Hyperion Response at 5, Hyperion has no real response to the fact that the Federal Communications Commission ("FCC") has held not once, but twice, that calls to ISPs do not "terminate" at the ISP. *See* Declaratory Ruling in CC Docket No. 96-98 in Notice of Proposed Rulemaking in CC Docket No. 96-68, *In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-bound Traffic*, 14 FCC rcd 3689, 3697 ¶ 12 (1999) (*"Declaratory Ruling"*), *rev'd Bell Atlantic Telephone Companies v. FCC*, Nos. 99-1094 et al. 2000 WL 273383 (D.C. Cir. March 24, 2000); Order on Remand, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147 et al., FCC 99-413, at 16 (Dec. 23, 1999) (*"Advanced Services Remand Order"*). The FCC's holding that an ISP call "terminates at Internet websites that are often located in other exchanges" was based upon agency and judicial decisions, the vast majority of which predate the parties' April 1, 1997 Interconnection Agreement. *See, e.g., Advanced Services Remand Order* ¶ 16; *Declaratory Ruling* ¶ 10.

Hyperion invests the D.C. Circuit's decision in *Bell Atlantic* with extraordinary importance, insisting that it "undercuts completely BellSouth's argument that calls to ISPs do not terminate at the ISP's location for the purposes of reciprocal compensation obligations." Hyperion Response at 5-6. However, the D.C. Circuit's

opinion does no such thing, if for no other reason than the D.C. Circuit did not establish any principles of law. Rather – as the court itself said over and over – it simply determined that the FCC had failed to provide a sufficient explanation for its conclusions in the *Declaratory Ruling*. For that reason, and that reason alone, the D.C. Circuit vacated and remanded the FCC's order to the FCC so that the agency would have an opportunity to provide a more complete explanation for its conclusion that ISP-bound traffic does not terminate at an ISP's premises. *See Bell Atlantic,* 200 WL 273383 at *9 (vacating and remanding "[b]ecause the Commission has not provided a satisfactory explanation"). Thus, far from holding that the FCC's traditional mode of "end-to-end" analysis "was not applicable" to ISP traffic, as Hyperion asserts, the circuit court remanded the case simply because the Commission had not explained sufficiently why using that analysis here "made sense in terms of the statute or the Commission's own regulations." *Id.* at 2. If the Authority should take anything from the D.C. Circuit's decision, it should take from it the premise that the Hearing Officer failed to provide sufficient explanation for his ruling.

Hyperion similarly errs in claiming that the D.C. Circuit determined that the FCC's "regulatory definition of 'termination'" includes calls to ISPs because ISPs are the "called party" under that regulation. Hyperion Response at 6. That claim makes no sense in light of the D.C. Circuit's disposition of the case. Since the FCC's rules require reciprocal compensation for all traffic that terminates locally, (47 C.F.R. § 51.701(b)(1)), if Hyperion were correct, there would be no need for an open-ended remand for further explanation. And, in fact, the language that Hyperion cites is best

understood in the context of a summary of the legal arguments that MCI WorldCom was making, not a statement of the court's holding. Indeed, the language relied upon by Hyperion comes at the end of a paragraph whose sole purpose is to encapsulate MCI WorldCom's claims. *Bell Atlantic,* 2000 WL 273883 at *5.

In short, as the FCC has now confirmed on two separate occasions, there is no "industry practice" that a call to an ISP "terminates" at the ISP. Rather, an ISP call "terminates" at the Internet site the end-user wishes to visit, which completely undermines the Hearing Officer's analysis of Section IV.C.

2. Section XIX

Hyperion has no response to BellSouth's argument that the Initial Order's interpretation of Section XIX ignores basic principles of Tennessee contract law, merely insisting that it "relies upon the Hearing Officer's analysis to demonstrate that BellSouth's argument is incorrect." Hyperion Response at 7. However, the Hearing Officer never addressed BellSouth's arguments that: (1) under the Hearing Officer's interpretation, the words establishing the three million minute threshold in Section IV.C is rendered completely superfluous, which is contrary to principles of Tennessee contract law; and (2) the express language in Attachment B-1 of the Agreement reflects the parties' intention not to pay reciprocal compensation to one another unless the three million minute threshold in Section IV.C was satisfied.

CONCLUSION

For the foregoing reasons, the Authority should reject the Initial Order and remand this matter to the Initial Order for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2000, a copy of the foregoing document was served on the parties of record via facsimile, overnight, or US Mail, postage prepaid:

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