BELLSOUTH

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Guy M. Hicks
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October 6, 2000

VIA HAND DELIVERY

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

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

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc.'s Petition for Stay and Affidavit of Guy M. Hicks. Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,

Guy M. Hicks

GMH:ch
Enclosure

231486

POSTED 10-9-00

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

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 PETITION FOR STAY

Pursuant to Tennessee Code Annotated § 4-5-316, BellSouth Telecommunications, Inc. ("BellSouth") hereby petitions the Tennessee Regulatory Authority ("Authority") for a stay of the Authority's September 22, 2000 Order Denying BellSouth's Petition for Appeal and Affirming the Initial Order of Hearing Officer ("Order"). BellSouth believes the Order is in error by (1) ordering BellSouth to pay reciprocal compensation for traffic bound for the internet through Internet Service Providers and (2) otherwise affirming the Initial Order of the Hearing Officer. BellSouth seeks a stay of the Order pending resolution of the appeal it intends to file.

BellSouth is likely to be successful on the merits of its appeal for all of the reasons articulated in BellSouth's Post-Hearing Brief (copy attached hereto), which is incorporated herein by reference. BellSouth should not be required to incur the administrative expense and risk associated with payment of reciprocal compensation for Internet traffic to AVR of Tennessee, L.P. d/b/a Hyperion of Tennessee, L.P. ("Hyperion") only to, perhaps, later be in the position of

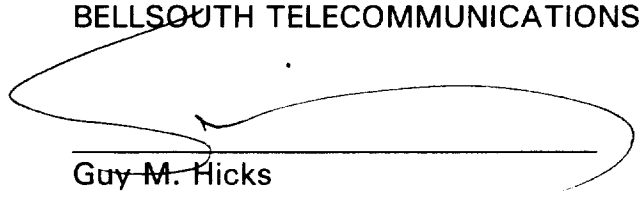
seeking return of the money after a successful appeal. Awaiting a determination on appeal before requiring any payment of reciprocal compensation presents no hardship for Hyperion, as BellSouth is an established corporation with a substantial presence in Tennessee, including numerous physical assets. Furthermore, BellSouth's assets are sufficiently liquid so as to allow it immediately to pay Hyperion should the appeal be unsuccessful. Thus, there is no danger that, if the Order is stayed, Hyperion will be unable to collect the reciprocal compensation it alleges it is due.

It should be noted that BellSouth was not served with a copy of the Order. Instead, it first received notice of the Order on September 29, 2000, when, purely by happenstance, a BellSouth employee obtained a copy of the Order at the Authority's office in Nashville. *See* Affidavit of Guy M. Hicks (filed separately herewith). BellSouth has yet to receive the Order from the Authority through normal methods of service. *See id.*

For the foregoing reasons, the Authority should issue a stay of the Order, effective until such time as an appropriate court decides the merits of BellSouth's appeal.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.



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R. Douglas Lackey
E. Earl Edenfield, Jr.
675 W. Peachtree Street, Suite 4300
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BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

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

AFFIDAVIT OF GUY M. HICKS

I, Guy M. Hicks, being first duly sworn, depose and state as follows:

1. I am over eighteen years of age and have personal knowledge of the matters set forth herein.

2. I am an attorney licensed to practice law in the state of Tennessee and am employed by BellSouth Telecommunications, Inc. ("BellSouth") as General Counsel for the state of Tennessee.

3. I represent BellSouth in the above-captioned case before the Tennessee Regulatory Authority ("Authority"). This affidavit is submitted in support of BellSouth's Petition for Stay filed contemporaneously herewith.

4. I am the Authority's primary contact at BellSouth for cases pending before the Authority and I routinely receive correspondence and official documents from the Authority.

5. BellSouth was not served a copy of the Authority's September 22, 2000 Order Denying BellSouth's Petition for Appeal and Affirming the Initial Order

of Hearing Officer ("Order") in the above-captioned case. Instead on Tuesday, October 3, 2000, I first received a copy of the Order from Mr. Jerry Jones, a BellSouth employee who had obtained a copy of it with a group of other documents while at the Authority's Nashville office on unrelated business late on the afternoon of Friday, September 29, 2000.

6. BellSouth has yet to receive a copy of the Order from the Authority through normal methods of service.

FURTHER AFFIANT SAID NOT.

Guy M. Hicks

Sworn to and subscribed before me on October 6, 2000.

Carolyn Hanesworth
Notary Public

My Commission Expires:

1.27.2001

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2000, a copy of the foregoing document was served on the parties of record via facsimile, overnight, or US Mail, postage prepaid:

[ ] Hand
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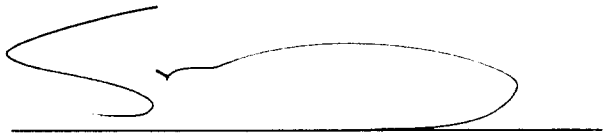

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BELLSOUTH

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Guy M. Hicks
General Counse

October 29, 1999

VIA HAND DELIVERY

Mr. David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

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

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Very truly yours,

Guy M. Hicks

GMH/jem

Enclosure

184457

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

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 POST-HEARING BRIEF

I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits its Post-Hearing Brief in this proceeding, which involves the interpretation of a voluntarily negotiated interconnection agreement ("Agreement") between BellSouth and AVR of Tennessee, L.P., d/b/a Hyperion of Tennessee, L.P. ("Hyperion"). The sole questions to be decided are: (1) whether Hyperion is entitled to amend the Agreement by substituting a reciprocal compensation provision from another interconnection agreement to replace the bill and keep arrangement to which Hyperion and BellSouth agreed: and (2) whether BellSouth and Hyperion shared a common intent (mutually agreed) to pay reciprocal compensation for Internet Service Provider traffic ("ISP-bound traffic"). Based on the plain language of the Agreement, the legal and regulatory framework within which the Agreement was executed, and the extrinsic evidence of intent, BellSouth submits that the Tennessee Regulatory Authority ("Authority") must answer both questions in the negative.

II. STATEMENT OF THE FACTS

Hyperion entered into the Agreement with BellSouth pursuant to Section 252(i) of the Telecommunications Act of 1996 ("1996 Act"), which permits a competing local exchange carrier such as Hyperion to "opt in" to a previously approved interconnection agreement between BellSouth and another carrier. Hyperion chose to "opt in" to an existing interconnection agreement between BellSouth and ICG Telecom Group, Inc. ("ICG"). Martin, Tr. at 18-6. Because Hyperion opted into an existing agreement, BellSouth and Hyperion did not negotiate the terms of the Agreement, and, other than changing the names and dates, Hyperion's Agreement with BellSouth is identical to the ICG agreement. Martin, Tr. at 33. The parties never discussed any substantive terms of the Agreement, and Hyperion did not question BellSouth as to what those terms meant. Martin, Tr. at 33; Hendrix, Tr. at 97-98.

Under the plain language of the Agreement, the parties agreed not to pay reciprocal compensation for terminating local traffic on the other carriers' network. Instead, the parties agreed to a "bill and keep" arrangement, under which no reciprocal compensation would be paid, at least until a specified threshold differential in local traffic termination had been met. Martin, Tr. at 27. Specifically, Section IV.C of the Agreement provides as follows:

> With the exception of the local traffic specifically identified in Section IV.H, *for purposes of this Agreement, the parties agree that there will be no cash compensation for local interconnection minutes of use exchanged by the parties during the term of this Agreement unless the difference in minutes of use for terminating local traffic exceeds three million (3,000,000) minutes per state on a monthly basis.* In such event, Hyperion may elect the terms of any compensation arrangement for local interconnection then in effect between BellSouth and any other telecommunications carrier, or in the absence of such an election, the parties will negotiate the specifics of a traffic exchange agreement which will apply on a going-forward basis.

Exh. 1 (Joint Stipulation ¶ 1) (emphasis added). The three million minute threshold was incorporated in the ICG agreement in response to fears by CLECs such as ICG that the balance of terminating traffic would be unequal in favor of BellSouth, requiring them to pay BellSouth a large amount for reciprocal compensation. Hendrix, Tr. at 79-03. This threshold allowed ICG to avoid paying reciprocal compensation to BellSouth if, as expected, ICG were to terminate more minutes of use on BellSouth's network than vice versa. *Id.*

At the time Hyperion opted into the ICG agreement in early 1997, Hyperion's marketing strategy was to be a "leading provider of integrated local telecommunications services to small, medium, and large business, government, educational end users and resellers, including [interexchange carriers] in its markets." Exh. 3 at 6; Martin, Tr. at 38. In early 1997, Hyperion was not targeting internet service providers ("ISPs"), and ISP-bound traffic did not represent much of Hyperion's business. Martin, Tr. at 50.

However, after executing the Agreement, Hyperion's marketing strategy changed. Specifically, Hyperion decided that it would "become an Internet Service Provider ('ISP') in all of its markets" and that it would target ISPs as customers. Exh. 4 at 2-3; Martin, Tr. at 39-41.[1]

Coincident with its change in marketing strategy to become an ISP and to target ISP customers, Hyperion wrote BellSouth on March 13, 1998 requesting an amendment to the Agreement. Relying upon Section XIX.B of the Agreement, referred to as the "most favorite nations" provision, Hyperion sought to replace the bill and keep arrangement in Section IV.C with the reciprocal compensation provision from BellSouth's interconnection agreement with

[1] Hyperion's change in marketing strategy is borne out by the growth of its ISP minutes of use. In January 1998, Hyperion had 216,945 ISP minutes of use in Tennessee. Twelve months later, Hyperion's ISP minutes of use had grown to 29,472,532 minutes in January 1999, or an increase of almost 135 times. Hendrix Exh. JH-1, Tr. at 79-12.

KMC Telecom, Inc. ("KMC"). Exh. 1 (Joint Stipulation ¶ 28); Martin, Tr. at 44. By letter dated July 2, 1998, BellSouth advised Hyperion that it was not entitled to amend the Agreement because the three million minute threshold had not been reached as required under Section IV.C. Exh. 1 (Joint Stipulation ¶ 29). On July 31, 1998, Hyperion filed its complaint with the Authority.

III. LEGAL AND REGULATORY FRAMEWORK

The cardinal rule in interpreting a contract is to ascertain the intention of the parties from the contract as a whole and to give effect to that intention consistent with legal principles. *Winfree v. Educators Credit Union,* 900 S.W.2d 285, 289 (Tenn. Ct. App. 1995); *Rainey v. Stansell,* 836 S.W.2d 117, 118 (Tenn. Ct. App. 1992). All provisions of a contract should reasonably be construed in harmony with each other so as to avoid repugnancy between the several provisions of a single contract. *Union Planters Nat'l Bank v. American Home Assurance Co.,* 865 S.W.2d 907, 912 (Tenn. Ct. App. 1993). In arriving at the intention of the parties to a contract, the intentions as actually embodied and expressed in the contract as written are critical, not the parties' state of mind at the time the contract was executed. *Id.*

In addition to the plain language of the contract, the intention of the parties must be determined by reference to the subject matter of the contract, the circumstances surrounding execution of the contract, and the construction placed on the contract by the parties in carrying out its terms. *Penske Truck Leasing Co., L.P. v. Huddleston,* 795 S.W.2d 669 (Tenn. 1990); *New Life Corp. of America v. Thomas Nelson, Inc.,* 932 S.W.2d 921 (Tenn. Ct. App. 1996); *see also Stovall v. Dattel,* 619 S.W.2d 125, 127 (Tenn. Ct. App. 1981) (in construing a contract, court must consider the "situation involving the parties, the nature of the business in which they are

engaged and the subject matter to which the contract relates"). A court may consider such evidence even in interpreting an unambiguous contract. As the Tennessee Supreme Court has explained:

> The court in interpreting words or other facts of the parties puts itself in the position which they occupied at the time the contract was made. In applying the appropriate standard of interpretation *even to an agreement that on its face is free from ambiguity, it is permissible to consider the situation of the parties and the accompanying circumstances at the time it was entered into* -- not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the meaning to be given to the agreement.

Hamblen County v. City of Morristown, 656 S.W.2d 331, 334 (Tenn. 1983) (quoting Restatement of Contracts, section 235(d) and comment) (emphasis added).

In interpreting the Agreement at issue in this case, the reciprocal compensation rights and obligations of BellSouth and Hyperion must be governed by the law in existence when they entered into the Agreement. *See Winter v. Smith,* 914 S.W.2d 527 (Tenn. Ct. App. 1995); *see also Kee v. Shelter Ins.*, 852 S.W.2d 226 (Tenn. 1993) (laws affecting enforcement of a contract, and existing at time and place of its execution, enter into and form part of the contract). Here, BellSouth and Hyperion entered into the Agreement for the express purpose of "fulfilling their respective obligations" under the 1996 Act. Exh. 1 (Joint Stipulation ¶ 30, Exh. C at 1). One such obligation is the duty "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5).

Soon after the 1996 Act was passed and before the Hyperion and BellSouth Interconnection Agreement was executed, the Federal Communications Commission ("FCC") made plain that the duty to pay reciprocal compensation was limited to local calls. "[S]ection 251(b)(5) reciprocal compensation obligations should apply only to traffic that *originates and terminates within a local area*"; those obligations "*do not* apply to the transport or termination of

interstate or intrastate interexchange traffic." First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16013 ¶ 1034 (emphasis added), *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd in part, aff'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999).

In February of this year, the FCC squarely determined that the statutory reciprocal compensation duty does *not* apply to ISP-bound traffic precisely because that traffic does not both originate and terminate in the same local calling area:

> [S]ection 251(b)(5) of the Act and our rules promulgated pursuant to that provision concern inter-carrier compensation for interconnected *local* telecommunications traffic. We conclude in this Declaratory Ruling, however, that ISP-bound traffic is *non-local* interstate traffic. Thus, the reciprocal compensation requirements of Section 251(b)(5) of the Act and ... of the Commission's rules do not govern inter-carrier compensation for this traffic.

Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689, 3706 ¶ 26 n.87 (rel. Feb. 26, 1999) (second emphasis added) ("*Declaratory Ruling*").

Crucially, moreover, the FCC's holding on that point did not rest on any new rule of law, but rather on a straightforward application of "traditional" rules that the FCC has applied "consistently" for more than a decade, *all of which predate execution of the BellSouth and Hyperion Interconnection Agreement*. *Id.* at 3695, ¶ 10; *see id.* at 3697, ¶ 12 (referring to established "precedent" on this issue). The FCC stressed in this regard that it has long "determined the jurisdictional nature of communications at any intermediate points of switching or exchanges between carriers." *Id.* at 3695, ¶ 10. Application of that rule to the Internet context

led directly to the conclusion that Internet-bound calls *"do not terminate at the ISP's local server*, as CLECs and ISPs contend, but continue to the[ir] ultimate destination or destinations, specifically at a[n] Internet website." *Id.* at 3697, ¶ 12 (emphasis added).

To be sure, the same FCC order held open the possibility that incumbents may have voluntarily agreed to pay reciprocal compensation in circumstances not required by the 1996 Act. *See id.* at 3704, ¶ 24. The FCC also suggested in dicta some factors that a state commission might look to in determining whether such an agreement existed. *See id; see also id.* at 3717-18 concurring statement of Commissioner Powell) (refusing to subscribe to the "dicta" in which the FCC "speculate[s] on what bases there may be for upholding [state] decisions"). However, the FCC *never* suggested that a voluntary agreement could appropriately be found based on such factors when an agreement *expressly* limited reciprocal compensation obligations to those instances when a call "terminates" locally -- which, as the FCC explained elsewhere in the same order, Internet calls do not do. On the contrary, the federal agency stated that state commission decisions based on the premise that Internet calls *do* "terminate at an ISP server" in a local calling area might well need to be "revisited." *Id.* at 3706, ¶ 27.

IV. ARGUMENT

Based on the plain language of the Agreement, the legal and regulatory framework within which the Agreement was executed, and the extrinsic evidence of intent, the Authority should find that: (1) Hyperion is not entitled to amend the Agreement by substituting a reciprocal compensation mechanism from another interconnection to replace the bill and keep arrangement in the Agreement; and (2) BellSouth and Hyperion did not mutually agree to pay reciprocal compensation for ISP-bound traffic. Accordingly, Hyperion's Complaint should be dismissed.

A. Hyperion Bears the Burden of Proof

In asserting its claim that BellSouth has breached the parties' Agreement, Hyperion bears the burden of proving its contractual right to amend the Agreement as well as the existence of an obligation on the part of BellSouth to pay reciprocal compensation for ISP traffic under the Agreement. *See, e.g., Custom Built Homes v. G.S. Hinsen Co., Inc.*, 1998 Tenn. App. LEXIS 89 (Tenn. Ct. App. Feb. 6, 1998) (party asserting breach of contract has burden of establishing existence of enforceable contract and nonperformance amounting to a breach of contract); *Van Eman v. Keuffel & Esser of New Jersey, Inc.*, 1988 Tenn. App. LEXIS 388 (reversing award of damages for breach of contract when plaintiff failed to carry his burden of proof "in establishing his allegation of breach of contract"). Hyperion has utterly failed to carry its burden.

B. Hyperion Has No Contractual Right To Amend The Agreement

1. Hyperion cannot amend the Agreement under Section XIX because Section IV.C controls.

As evidenced by the plain language of the Agreement executed by the parties and approved by the Authority, BellSouth and Hyperion did not intend to pay reciprocal compensation for terminating local traffic on the other carriers' network. Indeed, as Hyperion concedes, the parties agreed to a "bill and keep arrangement," under which no reciprocal compensation would be paid, at least until a specified threshold differential in local traffic termination had been met. Martin, Tr. at 27.

Hyperion's assertion that it is entitled under Section XIX to elect a reciprocal compensation arrangement regardless of whether or not the three million minute threshold has been met is misguided. Martin, Tr. at 18-10. This assertion cannot be reconciled with the plain language of the Agreement, which reflects the parties' intention that, barring the development of

a substantial differential in minutes of use for terminating local traffic, no compensation would be paid for exchanging local traffic. The parties agreed to amend the Agreement to incorporate an alternative interconnection arrangement *only* in the event that the difference in minutes of use for terminating local traffic exceeded three million minutes per state per month. Accepting Hyperion's view that it can amend the Agreement at any time to take advantage of an alternative compensation scheme without regard to this threshold violates some of the most fundamental principles of contract interpretation under Tennessee law.

First, Hyperion's reading of the Agreement would render superfluous the language in Section IV.C, which established the three million minute threshold. Hyperion witness Martin admitted as much. According to Mr. Martin, under Hyperion's view of Section XIX, "there's absolutely no reason to ever look at" Section IV.C. Martin, Tr. at 31. However, under Tennessee law, all provisions of a contract should reasonably be construed in harmony with each other so as to avoid repugnancy between the several provisions of the single contract. *Park Place Center Enterprises, Inc. v. Park Place Mall Associates, L.P.*, 836 S.W.2d 113, 116 (Tenn. Ct. App. 1992). Furthermore, all words used in a contract are presumed to have meaning. *Associated Press v. WGNS, Inc.*, 48 Tenn. App. 407, 348 S.W.2d 507, 512 (1961). Under Hyperion's interpretation of the Agreement, the words establishing the three million minute threshold in Section IV.C are rendered meaningless.

Second, under Hyperion's interpretation of the Agreement, the general language in Section XIX would control the specific language in Section IV.C, which is contrary to basic principles of Tennessee contract law. *See Davidson v. Davidson*, 916 S.W.2d 918 (Tenn. Ct. App. 1995). As the Tennessee Supreme Court has held, when a contract contains "both general and special provisions relating to the same thing, the special provisions control." *Cocke County*

Board v. Newport Utilities Board, 690 S.W.2d 231, 237 (Tenn. 1985); *see also Park Place Center Enterprises, Inc.*, 836 S.W.2d at 116 (in the event two contractual provisions cannot be reconciled, the first and principle clause is controlling and subsequent provisions repugnant thereto are avoid and unenforceable)

Here, Section IV.C is the specific provision governing the parties' obligations governing compensation for the transport and termination of local traffic. Attachment B-1 to the Agreement, which sets forth the terms and conditions of "Local Interconnection Service," states "[n]o cash compensation initially" and refers explicitly to Section IV.C. Martin, Tr. at 32. Under Section IV.C, Hyperion could "elect the terms of any compensation arrangement for local interconnection then in effect between BellSouth and any other telecommunications carrier" only if the three million minute threshold was met. Martin, Tr. at 29.

By contrast, Section XIX is a general provision that permits Hyperion to adopt provisions from another interconnection agreement, including a provision relating to "any local interconnection service." This general provision cannot reasonably be read to control the specific language of Section IV.C. As BellSouth witness Hendrix explained, the term "local interconnection service" encompasses a multitude of features and functions that Hyperion could elect to adopt, but the parties understood that Section IV.C "would have to be met before any other rate or any other plan would be put in place for the exchange of traffic." Hendrix, Tr. at 88. This is clear from the plain language of Attachment B-1, which governs the "rates and charges" for local interconnection and which explicitly refers to Section IV.C; Section XIX is not even mentioned. Exh. 1 (Joint Stipulation ¶ 30, Exh. C).

2. Hyperion cannot amend the Agreement under Section IV.C because the three million minute threshold has not been met.

Hyperion is entitled to amend the Agreement only if the requirements of Section IV.C have been met, which is not the case. The evidence in the record is clear that the *difference* in minutes of use for "*terminating local* traffic" between BellSouth and Hyperion's networks in Tennessee has not exceeded three million minutes of use on a monthly basis, as would be required to amend the Agreement under Section IV.C. Hendrix, Tr. at 79-12, Exh. JH-1. Hyperion's attempt to overcome this hurdle by including ISP-bound traffic in the calculation ignores that such traffic does not constitute "*terminating local* traffic" under the Agreement.

The Agreement defines "local traffic" as

> any telephone call that originates in one exchange and terminates in either the same exchange, or an associated Extended Area Service ("EAS") exchange. The terms Exchange, and EAS exchanges are defined and specified in Section A.3 of BellSouth's General Subscriber Service Tariff.

Exh. 1 (Joint Stipulation ¶ 26). Section IV.C requires that a three million minute differential exist in "*terminating local* traffic" before the parties' existing bill and keep arrangement can be changed. The reference to "*terminating local* traffic" only reinforces the notion that only traffic which "terminates" locally is to be considered, which does not and cannot include ISP-bound traffic.

The only way ISP-bound traffic can be understood to be "*terminating local* traffic" is if it is divided into two parts: (1) a local call from the end-user that allegedly "terminates" at the ISP's premises and (2) a separate call from the ISP to the Internet site or sites that the end-user wants to access. And, in fact, Hyperion relied on this two-call theory in its Complaint and has espoused this theory for more than a year. Hyperion Complaint ¶ 28; Exh. 5 at 16 (Brief in

Support of Petition of Brooks Fiber to Enforce Interconnection Agreement, Docket No. 98-00118) ("A local call terminated to an ISP is a local call regardless of where or how the ISP provides its information service").

However, Hyperion's theory is directly contradicted by decades of established law. Over fifty years ago, a federal court explained: "That the Communications Act contemplates the regulation of interstate wire communication *from its inception to its completion* is confirmed by the language of the statute and by judicial decisions. *United States v. AT&T,* 57 F. Supp. 451, 454 (S.D.N.Y. 1944) (emphasis added), *aff'd sub nom. Hotel Astor v. United States,* 325 U.S. 837 (1945). That same principle has been reiterated by both the courts and the FCC many times in the intervening decades.

Indeed, as long ago as 1966, both the FCC and the D.C. Circuit rejected the argument that a so-called "channel service," by which a cable television operator used an antenna to receive broadcast television signals and then delivered those signals to customers using local telephone lines, should be divided into its different, technologically distinct parts. *Order Requiring Common Carriers To File Tariffs With Commission for Local Distribution Channels Furnished for Use in CATV Systems,* 4 F.C.C.2d 257 (1966)). In language directly applicable here, the circuit court explained that, despite the different characteristics of the separate parts of the service, the "stream of communication is essentially uninterrupted and properly indivisible." *General Tel. Co. v. FCC,* 413 F.2d 390,401 (D.C. Cir.), *cert. denied,* 396 U.S. 888 (1969).

More recently, the FCC reached the same result in a similar case involving a "voice mail" telecommunications message system. There, the Georgia Public Service Commission had attempted to exercise jurisdiction on the theory that "when the voice mail service is accessed from out-of-state, *two* jurisdictional transactions take place: one from the caller to the telephone

company switch that routes the call to the intended recipient's location, which is interstate, and another from the switch forwarding the call to the voice mail apparatus and service, which is purely intrastate." *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corp.,* 7 FCC Rcd 1619, 1620, ¶ 8 (1992) (emphasis added). The FCC disagreed and preempted the state agency order. Because "there is a continuous, two-way transmission path from the caller location to the voice mail service," there could be but a single call. *Id* ¶ 9. That Order too was affirmed. *See Georgia Pub. Serv. Comm'n v. FCC, 5* F.3d 1499 (11th Cir. 1993) (table).

Similarly, when long-distance carriers began using 1-800 numbers (for credit-card calls and similar purposes), the FCC rejected arguments that two calls were created by the "second dial tone" heard when the long-distance carrier was reached. *Southwestern Bell Tel. Co. Transmittal Nos. 1537 and 1560 Revisions to Tariff FCC No. 68,* 3 FCC Rcd 2339, 2341, ¶¶ 24-28. (1988). The FCC held that, "[s]witching at the credit card switch is an intermediate step in a *single end-to-end communication." Id.* ¶ 28 (emphasis added). "[T]he jurisdictional nature of a call is determined by its *ultimate* origination and termination, and not . . . its intermediate routing." *Id* ¶ 26 (emphasis added). Many other cases are to the same effect.[2]

In sum, as BellSouth witness Halprin -- the former chief of the FCC Common Carrier Bureau -- explained, the argument that a separate communication "terminates" at the ISP ignores

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[2] As the FCC explained in yet another ruling making this same point:

> [B]oth court and Commission decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete such communications . [A] single interstate communication.. . does not become two communications because it passes through intermediate switching facilities.

Long Distance/USA, Inc., 10 FCC Rcd 1634, 1637, ¶113 (1995); *accord Teleconnect Co.* 10 FCC Rcd 1626, 1629-30, ¶112 (1995)), *affd,* 116 F.3d 593 (D.C. Cir. 1997).

"decades of FCC and court precedents ...." Halprin, Tr. at 118-22. Indeed, if it *were* true that a separate part of an Internet communication terminated locally at the ISP, logically that would lead to the preposterous result that long-distance *voice* services over the Internet -- services indistinguishable from those provided by AT&T or MCI -- would also be local. In fact, Hyperion's own witness acknowledged that, under Hyperion's theory, reciprocal compensation would be required for such long-distance voice traffic. Martin, Tr. at 62-63.[3]

Given this enormous body of precedent, which predates the parties' Agreement, it is not surprising that the FCC squarely determined this year that its reciprocal compensation rule did not apply to Internet-bound traffic. As discussed above, the FCC found that the statutory reciprocal compensation provision -- just like the Agreement at issue here -- applies only to traffic that "originates" and "terminates" in the same local calling area. First Report and Order,, 11 FCC Rcd at 16013, ¶ 1034. The FCC, applying the precedents described above, held that reciprocal compensation is not required for ISP-bound calls because, notwithstanding Hyperion's arguments to the contrary, those calls *"do not terminate at the ISP's local server,* as CLECs and ISPs contend, but continue to the[ir] ultimate destination or destinations, specifically at a[n] Internet website." *Declaratory Ruling,* 14 FCC Rcd at 3697, ¶ 12 (emphasis added). As the FCC

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[3] The decisive case law here is not limited to the precedent establishing that it is wrong to divide a communication into its component parts for this kind of analysis. In another set of decisions addressing "enhanced services," a category that includes Internet services, the FCC repeatedly concluded that they were jurisdictionally *interstate* and thus subject to the FCC's jurisdiction. *See* Notice of Proposed Rulemaking, *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers,* 2 FCC Rcd 4305, 4306, ¶ 7 (1987) ("[e]nhanced service providers . . . use the local network to provide interstate services"); MTS and WATS Market Structure, 97 F.C.C.2d 682, 715, ¶ 83 (1983) (enhanced service is "interstate"); Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, 3 FCC Rcd 2631, 2631, ¶ 2 (1988) (describing companies that provide such services as "interstate service providers").

explained: "[Internet]-bound traffic is *non-local* interstate traffic. Thus, the reciprocal compensation requirements of section 251 (b)(5) of the Act and.., of the Commission's rules do not govern inter-carrier compensation for this traffic." *Id.* at 3706, ¶ 26 n.87 (emphasis added).

The plain language of the Agreement should be read not only in the context of these decisions, but also with a healthy dose of common sense. The simple fact is that, if an end-user's call to the Internet actually "terminated" at the ISP's premises, it is impossible to explain how information is transmitted between the end-user and Internet sites all over the country and the world. The end-user can send and receive such information *only* because the ISP actually functions as an intermediary, sending the end-user's communication to Internet sites around the globe and then routing information back from the Internet site through the ISP's own facilities and on to the end-user. The receipt of that information is incomprehensible if one believes that the connection between the end-user and the ISP has terminated before the ISP connects to an Internet site. As Mr. Halprin explained, an ISP "establish[es] a real-time connection between the end-user who initiates the communication and the destination point or points he or she is seeking to reach on or beyond the Internet. Information travels in both directions over a so-called 'clear pipe,' without any change whatsoever between the two parties communicating .... Such a real-time communication cannot reasonably be characterized as involving [two calls]." Halprin, Tr. at 118-23.

Accordingly, to conclude that ISP-bound traffic is "*terminating local* traffic" that "originates" and "terminates" in the same calling area, one would have to disregard these real world facts, established case law, and the FCC's own authoritative interpretation of language that is *substantively identical* to that contained in the Agreement. The Authority should reject such a spurious proposition.

In apparent recognition of the weakness of its position, Hyperion has concocted a new theory, insisting that ISP-bound traffic "terminates" at the ISP for "regulatory purposes," even though it may not "terminate" there for "jurisdictional purposes." Martin, Tr. at 50. Hyperion's latest theory is as flawed as the two-call theory it previously espoused.

First, the FCC draws no distinction between the termination of ISP-bound traffic for "regulatory" as opposed to "jurisdictional" purposes. The FCC expressly held that calls to the Internet *"do not terminate at the ISP's local server ..,"* period. *Declaratory Ruling,* 14 FCC Rcd at 3697, ¶ 12 (emphasis added). When asked during cross-examination to point to any language in the *Declaratory Ruling* where the FCC drew a distinction between "regulatory" and "jurisdictional" termination, Mr. Martin was unable to do so. Martin, Tr. at 54.[4]

Second, Hyperion's argument that the jurisdictional treatment of ISP-bound traffic has no bearing on where such traffic "terminates" for reciprocal compensation purposes cannot be squared with the FCC's *Declaratory Ruling.* According to the FCC, "In order *to determine what compensation is due* ... [for ISP-bound traffic], *we must determine as a threshold matter whether this is interstate or intrastate traffic.*" *Declaratory Ruling,* 14 FCC Rcd. at 3696, ¶ 7 (emphasis added). The FCC further noted that its "conclusion that ISP-bound traffic is largely interstate might cause some state commissions to re-examine their conclusion that reciprocal compensation is due to the extent that those conclusions are based on a finding that this traffic terminates at an

[4] While the FCC has determined as a matter of policy to treat ISP-bound traffic "as though it were local," (*Declaratory Ruling*, 14 FCC Rcd at 3703, ¶ 23), the FCC has never stated that this traffic is local and has never concluded that this traffic terminates locally at an ISP.

ISP server ...." *Id.* ¶ 27. These statements make clear the FCC's view that the "termination" of ISP-bound traffic for jurisdictional purposes and for compensation purposes is one in the same.

Finally, the definition of "local traffic" and the use of the phrase "*terminating local* traffic" in the Agreement do not distinguish between the "jurisdictional" and "regulatory" termination of a call. Indeed, Mr. Martin acknowledged that he "probably" was not aware of any such distinction at the time the Agreement was executed. Martin, Tr. at 55. In construing the Agreement, the word "terminate" must be given its usual and ordinary meaning, which is the long-standing interpretation held by the FCC, not the newly discovered interpretation espoused by Hyperion. *See Winfree,* 900 S.W.2d at 289. When only those minutes of use of "terminating local traffic" are considered, it is clear that Hyperion cannot satisfy the three million minute threshold required to amend the Agreement under Section IV.C.

C. The Parties Did Not Mutually Agree To Pay Reciprocal Compensation For ISP-Bound Traffic.

Even assuming Hyperion were entitled to amend the Agreement (which is not the case), there is no mutual agreement by the parties to pay reciprocal compensation for ISP-bound traffic. This is evident from the fact that Hyperion and BellSouth expressly agreed not to pay each other any "cash compensation" for local traffic, let alone for ISP-bound traffic. Exh. 1 (Joint Stipulation ¶ 1). Thus, nothing in the Agreement even remotely suggests that Hyperion and BellSouth mutually intended to pay reciprocal compensation for ISP-bound traffic. *See, e.g., Johnson v. Central National Ins. Co.*, 210 Tenn. 24, 356 S.W.2d 277, 281 (1962) (to be enforceable, contract "must, among other elements, result from a meeting of the minds in mutual assert to terms..."); *Jamestowne on Signal, Inc. v. First Federal Sav. & Loan Ass'n*, 807 S.W.2d 559, 564 (Tenn. Ct. App. 1990).

This lack of mutual intent is not altered by Hyperion's desire to adopt the reciprocal compensation provisions of BellSouth's interconnection agreement with KMC. The KMC agreement defines the scope of the reciprocal compensation obligation by adopting the same language that appears in the statutory mandate of the 1996 Act, as interpreted by the FCC, which limits that obligation to the "transport and termination of telecommunications." Exh. 1 (Joint Stipulation ¶ 27); 47 U.S.C.§ 251(b)(5). The FCC interpreted the scope of this statutory obligation to apply "only to traffic that originates and terminates within a local calling area," which, according to the FCC, does not include ISP-bound traffic. Interconnection Order at ¶1034; FCC ISP Ruling, ¶12, ¶26, n. 87. Because reciprocal compensation for ISP-bound traffic is not within the statutory mandate of Section 251(b)(5), BellSouth and KMC did not mutually agree to pay reciprocal compensation for ISP-bound traffic either.

Indeed, the Louisiana Public Service Commission recently recognized as much in dismissing a complaint brought by KMC against BellSouth seeking the payment of reciprocal compensation for ISP-bound traffic. Order No. U-23839, *KMC Telecom, Inc. v. BellSouth Telecommunications, Inc.*, Docket No. U-23839 (Oct. 28, 1999) (copy attached). The Louisiana Commission found that the terms of the KMC agreement did not obligate the parties to pay reciprocal compensation for ISP-bound traffic and concluded that "KMC failed to meet its burden of producing sufficient extrinsic evidence to establish that the parties mutually intended to pay reciprocal compensation for non-local, ISP traffic."

Since, as the Louisiana Commission found, KMC and BellSouth did not mutually agree to pay reciprocal compensation for ISP-bound traffic, Hyperion and BellSouth could not have mutually agreed to do so simply by virtue of Hyperion's electing the reciprocal compensation provisions of the KMC contract. This is particularly true when, prior to seeking to adopt the

reciprocal compensation provisions of the KMC contract in March 1998, Hyperion was in receipt of an August 1997 letter from BellSouth which stated clearly that ISP-bound traffic is "jurisdictionally interstate," not local, and thus is not "subject ... to reciprocal compensation agreements." Exh. 6. That contemporaneous statement of BellSouth's understanding is fatal to any claim that BellSouth agreed to pay reciprocal compensation for ISP-bound traffic.[5]

Hyperion makes much of the fact that the Agreement does not expressly exclude ISP-bound traffic from the definition of "local traffic." Martin, Tr. at 18-11. However, BellSouth correctly understood -- as the FCC has now squarely held -- that such traffic is *not* local. Hendrix, Tr. at 78-09. Accordingly, if ISP-bound traffic was to be treated like local traffic, it was Hyperion's responsibility to make plain that traffic that is *not* actually local should be "treated *as though* it was local" for reciprocal compensation purposes. *Declaratory Ruling*, 14 FCC Rcd at 3703, ¶ 23 (emphasis added). Put differently, just as BellSouth would have no duty expressly to exclude Atlanta from the category of cities in Tennessee, it had no duty to say that ISP-bound traffic is not local. BellSouth should not be made to pay millions of dollars to Hyperion because BellSouth did not exclude ISP-bound traffic from a category *in which it did not fit in the first place.*[6]

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[5] Furthermore, the Agreement between BellSouth and Hyperion must be construed "consistent with all applicable federal, state and local statutes, rules or regulations in effect as of the date of execution ...." Exh. 1 (Joint Stipulation ¶ 30, Exh. C at 8). As Mr. Martin acknowledged, there was no statute, rule or regulation in effect in April 1997 that required the payment of reciprocal compensation for ISP-bound traffic. Martin, Tr. at 47.

[6] It has been argued elsewhere that it was incumbent upon BellSouth to exclude expressly ISP-bound traffic from the "local traffic" definition in light of a 1989 decision by the Florida Public Service Commission in *Investigation Into The State-Wide Offering of Access to the Local Network for the Purpose of Providing Information Services,* Docket No. 880423-TP (Fla. Public Service Comm'n Sept. 5, 1989). This argument ignores that the Florida Commission expressly disagreed with governing FCC rules on the nature of ISP traffic and state authority to regulate

Hyperion also emphasizes the unremarkable fact that BellSouth's customers dial a seven or ten digit call to reach their ISP, that BellSouth charges its ISP customers local business line rates, and that BellSouth treats revenues from those customers as local for purposes of ARMIS reporting requirements. Martin, Tr. at 18-13. However, Hyperion does not emphasize that BellSouth was simply following existing legal requirements. Thus, while it is true that the FCC identified these factors in dicta as ones that a state commission *might* consider in determining intent, it is also undeniable that the FCC has long instructed incumbents to do these things. Halprin, Tr. at 118-09-14. For example, as part of its access charge exemption process, the FCC has directed incumbents to obtain compensation from ISPs through intrastate business tariffs (instead of interstate access charges). *See, e.g., Amendments of Part 69 of the Commission's Rules,* 3 FCC Rcd at 2635, n.8. Similarly, for ARMIS reporting purposes, the FCC has directed incumbents to treat revenues from ISPs as intrastate. Indeed, when an incumbent recently sought to characterize ISP revenues as interstate for separations purposes, the FCC specifically directed it to change such treatment. *See Letter to SBC Regarding Its Jurisdictional Separations Treatment of Internet Traffic,* 14 FCC Rcd 8178 (1999).

It would be perverse -- and remarkably unfair -- to find that BellSouth voluntarily agreed to a specific understanding of a contract simply because the company has properly adhered to existing legal rules. The fact that BellSouth followed the law sheds no light on the company's

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that traffic. *See id.,* slip op. at 12-15 (acknowledging the argument that the exercise of state jurisdiction "contradicts the mandates of the FCC's *Computer Inquiry* proceedings," but nevertheless exercising jurisdiction absent "conclusive legal precedent" from a federal court). This argument also overlooks that after the Florida Commission's decision, the FCC reiterated its conclusion that ISP traffic should be regulated at the federal level, and that decision was affirmed by the Ninth Circuit. *See Computer III Remand Proceedings,* 6 FCC Rcd 7571, 7632 ¶ 124 (1991), *aff'd in relevant part, California v. FCC,* 39 F.3d 919, 932 (9th Cir. 1994).

intent in entering into the Agreement. *See, e.g., AT&T Communications, Inc. v. BellSouth Telecommunications, Inc.*, 7 F. Supp. 2d 661, 670 (E.D.N.C. 1998) (concluding that it would "stretch the bounds of imagination" to find a voluntary agreement when BellSouth "was merely adhering to establish FCC rules"). Indeed, Mr. Martin acknowledged that BellSouth had no "control" over the factors delineated by the FCC as evidence of BellSouth's alleged intent. Martin, Tr. at 64.

Importantly, the only factor identified in dicta by the FCC over which BellSouth has some of control is whether any effort was made to meter ISP-bound traffic or otherwise segregate it from local traffic for the purpose of billing reciprocal compensation. In this case, the parties stipulated to precise minutes of use in Tennessee attributable to ISP traffic and to non-ISP traffic from January 1998 through May 1998. Exh. 1 (Joint Stipulation ¶¶ 3-21). BellSouth also introduced into evidence similar data segregating ISP-bound traffic from local traffic for the period January 1998 through February 1999. Hendrix, Tr. at 79-12, Exhibit JH-1. Such evidence clearly reflects BellSouth's ability to segregate ISP-bond traffic. Thus, the only factor identified by the FCC that involves voluntary conduct by BellSouth -- and the only factor arguably relevant to a determination of a party's intent under Tennessee law -- fully supports a finding that BellSouth and Hyperion did not mutually agree to pay reciprocal compensation for ISP-bound traffic.

D. The Authority's Decision In *Brooks Fiber* And The Decisions Of Other State Commissions Relied Upon By Hyperion Are Neither Controlling Nor Persuasive.

Hyperion urges the Authority simply to follow its decision in *In re: Petition of Brooks Fiber to Enforce Interconnection Agreement and for Emergency Relief*, Docket No. 98-0018 (August 17, 1998) ("*Brooks Fiber*"). BellSouth submits that it would be serious error for the

Authority to do so. In *Brooks Fiber*, the Authority found that ISP-bound calls constituted local traffic under the interconnection agreement at issue, relying upon the understanding that ISP-traffic involves two separate communications. *See* Initial Order, Docket No. 98-0018, at 18 (April 21, 1998) (finding that the information service provided by an ISP "... after the telecommunications service, as defined by the FCC, has terminated at the ISP ... is of no import in the analysis"). The Authority's two-call reasoning is flatly wrong, however, as the FCC made abundantly clear in its *Declaratory Ruling*. Whereas the Authority determined that ISP-traffic involves two separate calls (one of which is a local call that "terminates" at the ISP's premises), the FCC concluded that ISP-traffic involves a single call from the end-user that does not terminate at the ISP's premises but continues through the ISP and all the way on to the website that the end-user seeks to access. The FCC's holding leaves no room for continued adherence to the Authority's decision in *Brooks Fiber*.

Hyperion also places considerable emphasis on numerous state commission decisions addressing the issue of reciprocal compensation for ISP-bound traffic. Due to the page limitation, BellSouth cannot address each prior state commission decision. However, the Authority should decide this matter based on the unique facts and evidence adduced in this proceeding, rather than blindly following other state commission decisions based on facts and circumstances no present here as urged by Hyperion.

For example, the vast majority of the state commission decisions in BellSouth's region concerning ISP-bound traffic -- Florida, Georgia, North Carolina, and Tennessee --were rendered prior to the FCC's *Declaratory Ruling*. Those decisions were generally based exclusively on the two-call theory since repudiated by the FCC. One such case (North Carolina) has already been

remanded by a federal district court to the state commission for reconsideration in light of the FCC's *Declaratory Ruling.*

Other decisions relied upon by Hyperion involved arbitrations in which state commissions were establishing new contract terms, rather than interpreting existing agreements between the parties.[7] Still other decisions cited by Hyperion merely declined for "policy" reasons to disturb prior decisions rendered before the FCC's *Declaratory Ruling.*[8] Many state commission decisions relied upon by Hyperion were based upon facts specific to those particular cases that are not present here. For example, in *In re: Complaint of MFS Intelnet of Maryland, Inc. against Bell Atlantic-Maryland, Inc.*, Case No. 8731, Order No. 7520 (Maryland Public Service Comm'n June 21, 1999), the Maryland Commission ruled that Bell Atlantic must pay reciprocal compensation for ISP traffic under its interconnection agreement with MFS, noting that for months after the agreement took effect Bell Atlantic paid reciprocal compensation for

[7] *See, e.g.,* Arbitration Award, *In re: Petition of Global NAPS South, Inc. for the Arbitration of Unresolved Issues*, Docket No. 98-540 (Del. Public Service Comm'n March 9, 1999); Order Adopting Revised Arbitration Decision, *In re: Petition of Pac-West Telecomm, Inc. for Arbitration,* Docket No. 98-10015 (Nev. Public Utilities Comm'n April 8, 1999); Arbitrator's Decision Adopted As Revised, *In re: Petition of Electric Lightwave, Inc. for Arbitration,* Arb. 91 (Oregon Public Utility Comm'n March 17, 1999).

[8] *See, e.g.,* Order on Reconsideration, *In re: Complaint of Time Warner Communications of Indiana, L.P. against Indiana Bell Telephone Co., Inc.*, Cause No. 41097 (Indiana Utility Regulatory Comm'n June 9, 1999) (finding that it was "unsound policy to disturb agreements based upon events occurring subsequent to our approval of such agreements except in the rarest of circumstances or at the express direction of a reviewing court"); Decision Denying Exceptions, *ICG Telecom Group, Inc. v. US West Communications, Inc.*, Docket No. 98F-299T (Colorado Public Utilities Comm'n Aug. 17, 1999 (upholding arbitration decision requiring payment of reciprocal compensation for ISP-bound traffic because of the "reasonable expectations" by CLEC that its existing interconnection agreement provided for such compensation).

calls, including ISP-bound calls. In this case, there is no evidence that BellSouth ever knowingly paid or billed reciprocal compensation for ISP-bound traffic.

Hyperion's reliance upon *Illinois Bell Telephone Co. v. WorldCom Technologies, Inc.*, 179 F.3d 566 (7th Cir. 1999) is equally misplaced. In that case, the Seventh Circuit emphasized as "quite telling" that the relevant agreements "specifically granted to the [state commission] the right to define local traffic for reciprocal compensation purposes." *Id.* at 574. Furthermore, Ameritech apparently was content to pay reciprocal compensation under its agreements until it became clear that it was paying more than it was receiving. *Id.* at 569. Neither of those facts is present here. Furthermore, the Seventh Circuit declined, on jurisdictional grounds, to consider state-law contract issues, which are the very issues the Authority must resolve in this case.

The above examples demonstrate that each individual case must be decided based upon its own particular set of facts. No other state commission was faced with the same set of facts adduced at the hearing in this proceeding concerning the respective intent of BellSouth and Hyperion under this Agreement. These facts conclusively demonstrate that Hyperion is not entitled to amend the Interconnection Agreement and that the parties did not mutually agree to pay reciprocal compensation for ISP-bound traffic.

VI. CONCLUSION

For the foregoing reasons, the Authority should find in favor of BellSouth and dismiss Hyperion's complaint.

Respectfully submitted,

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LOUISIANA PUBLIC SERVICE COMMISSION

ORDER NO. U-23839

KMC TELECOM, INC.
V.
BELLSOUTH TELECOMMUNICATIONS, INC.

Docket No. U-23839 - In Re: Petition of KMC Telecom, Inc. against BST to enforce reciprocal compensation provisions of the Parties' Interconnection Agreement.

(Decided at Open Session held October 13, 1999)

Nature of the Case

KMC Telecom, Inc. ("KMC") and BellSouth Telecommunications, Inc. ("BST") entered into an Interconnection Agreement (the "Agreement") on February 24, 1996 which was deemed approved by the Commission on June 20, 1997. That Agreement calls for the payment of reciprocal compensation for local calls[1] that originate on one company's network which are transported to and terminate on the other company's network. The reciprocal compensation rate is set out in the Agreement and is not at issue in this matter. What is at issue, however, is whether or not reciprocal compensation is owed for a particular type of call. KMC asserts that the parties must pay each other reciprocal compensation for calls that originate on one party's network that are directed to Internet service providers ("ISPs") which are located on the other party's network ("ISP traffic"). BST contests KMC's assertion, arguing, inter alia, that ISP traffic does not terminate locally on either party's network and that ISP traffic is interstate, switched exchange access traffic rather than local, and hence no reciprocal compensation is due for these calls

Jurisdiction

Jurisdiction for the Louisiana Public Service Commission is provided for in the Louisiana Constitution, Article IV, Section 21, which states:

> The commission shall regulate all common carriers and public utilities and have such other regulatory authority as provided by law. It shall adopt and enforce reasonable rules, regulations, and procedures necessary for the discharge of its duties, and shall have other powers and perform other duties as provided by law.

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[1]Local calls, as defined by §1.41 of the KMC/BST Interconnection Agreement.

The Commission has the authority to regulate the service of telephone utilities; its power is sufficiently broad to include adjustment of telephone service to customer needs. South Central Bell Tel. Co. v. Louisiana Public Service Commission, Supp. 1977, 352 So.2d 999. Further, the FCC, in its *Declaratory Ruling*[2] specifically stated, at ¶24, state commissions have the authority to construe "the parties' agreements to determine whether the parties so agreed" to pay reciprocal compensation for ISP-bound traffic

Additionally, the KMC/BST Interconnection Agreement provides:

> 36.8 Resolution of Disputes: Except as otherwise stated in this Agreement, the Parties agree that if any dispute arises as to the interpretation of the Agreement or as to the proper implementation of this Agreement, the Parties will petition the Commission or the FCC for a resolution of the dispute. However, each Party reserves any right it may have to seek judicial review of any ruling made by the Commission or the FCC concerning this Agreement.
>
> 36.9 Governing Law: This Agreement is subject to the Act, and the effective rules and regulations promulgated pursuant to the Act, and any other applicable federal law, as well as the rules of the Commission, and shall be further governed by and construed in accordance with the domestic law of the state of performance without regard to its conflicts of law principles.

Procedural History

KMC Telecom, Inc. ("KMC") filed this proceeding on January 5, 1999 to require BellSouth Telecommunications, Inc. ("BST") to pay reciprocal compensation under the KMC/BST Interconnection Agreement (the "Agreement"). The complaint was published in the Commission's Official Bulletin on January 22, 1999. On February 1, 1999 AT&T Communications of the South Central States, Inc. ("AT&T"), E.spire Communications, Inc. ("E.spire"), and ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom") all filed separate pleadings to intervene in this proceeding. Cox Louisiana Telcom II, L.L.C. ("Cox") filed a petition for intervention on February 2, 1999 and then on February 3, 1999 filed a Motion for Leave to File out of Time Intervention. BST's answer was received into the docket on March 1, 1999. BST filed a Motion to Strike Interventions or Alternatively to Limit Participation of Intervenors on March 3, 1999. ITC^DeltaCom and E.spire filed their oppositions to BST's motion on March 10, 1999. AT&T and Cox filed oppositions to BST's motion on March 15, 1999. A ruling was issued on April 12, 1999 which allowed partial

[2]Declaratory Ruling in CC Docket Number 96-98 and Notice of Proposed Rulemaking in CC Docket Number 99-68

participation by intervenors, including participation during potentially dispositive portions of the proceeding. Cox withdrew its request for intervention on April 12, 1999.

ITC^DeltaCom filed a Motion for Summary Judgment on March 17, 1999; KMC also filed a Motion for Summary Judgment on March 18, 1999. After the parties briefed the summary motions, oral argument was heard April 12, 1999. The Administrative Law Judge issued a Ruling denying the motions for summary judgment on May 24, 1999.

Testimony was filed by the parties and the hearing was held on May 26, 1999. Posthearing briefs were filed on August 8, 1999 by KMC, E.spire, BST, and Staff. Posthearing reply briefs were filed by KMC, E.spire, BST, Staff, and AT&T. Further, Leave to File Amicus Briefs was filed by Southeastern Competitive Carriers Association ("SECCA"), Cox, and Advance Tel, Inc. ("EATEL"). Cox had previously intervened in this proceeding, but withdrew its intervention upon the issuance of the Ruling on the Motion to Strike Interventions. SECCA also filed a Motion to Intervene with its Amicus Brief. BST filed a Response to the Motions for Leave to File Amicus Briefs and Opposition to SECCA's Motion for Leave to File Out of Time Interventions on August 25, 1999. Leave to file Amicus Briefs was granted on August 30, 1999. The new participants, SECCA, Cox, and EATEL wished to file responses for the limited purpose of replying to Staff's alleged expansion of the proceeding, and their briefs were accepted into the docket.

A proposed recommendation was issued by the Administrative Law Judge on September 10, 1999. Exceptions to the Proposed Recommendation were filed by Staff and BST on September 24, 1999. Replies to BST's and Staff's Exceptions were filed by KMC, E.spire, and SECCA on October 1, 1999. Cox filed a Reply to Exceptions on October 7, 1999.

Summary of Parties Contentions

KMC's Position

In this proceeding, KMC seeks to require BST to pay reciprocal compensation to KMC for calls that originate on BST's network which are directed to ISPs on KMC's network. KMC asserts that payment of reciprocal compensation for ISP-bound traffic is due under the KMC-BST Interconnection Agreement (hereinafter referred to as the "Agreement"), while BST argues that the Agreement does not require reciprocal compensation for this type of traffic.

KMC first asserts that ISP-bound calls have historically been treated by the FCC as local calls, thereby making the calls eligible for reciprocal compensation. KMC uses the 1996 Telecommunications Act (the "Act") and subsequent FCC orders to interpret the reciprocal compensation provisions of the Agreement. KMC especially points to the portions of the FCC's Declaratory Ruling in CC Docket Number 96-98 and Notice of Proposed Rulemaking in CC Docket Number 99-68 (the "*Declaratory Ruling*") wherein the FCC noted ISP traffic historically had been treated as local traffic and allowed state commissions to continue to interpret interconnection agreements. KMC urges that the *Declaratory Ruling* (at ¶23) states that the FCC has treated ISP-bound traffic as though it were local, and the FCC's statement that the traffic is jurisdictionally mixed does not affect the regulatory treatment state commissions may give the traffic. KMC argues that the FCC has, since at least 1983, exempted ISPs from paying interstate access charges. Further, KMC asserts that ISPs pay local rates and ILECs [incumbent local exchange carrier] treat expenses and revenues related to ISPs as local expenses and revenues. KMC also points to the language of ¶25 of the *Declaratory Ruling*, which states that the FCC's "policy of treating ISP-bound traffic as local for the purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic." KMC argues that this passage demonstrates that BST must pay reciprocal compensation for calls from BST customers to ISPs on KMC's network. Finally, KMC points to the multiple factors the FCC set out for state commissions' consideration for analyzing interconnection agreements (found in ¶24 of the *Declaratory Ruling*) for the Commission's consideration.

KMC further argues that the provisions of the Agreement clearly and unambiguously call for reciprocal compensation. KMC asserts that the agreement provides for two types of traffic only: local and toll. KMC further argues that ISP-bound traffic must fall into one of these two types of traffic, and that type must be local traffic. In support of this contention, KMC points to the Agreement's definition of local traffic (§1.41[3]) and argues that if BST wanted to exclude ISP-bound

[3]1.41: "Local Traffic" refers to calls between two or more Telephone Exchange service users where both Telephone Exchange Services bear NPA-NXX designations associated with the same local calling area of the incumbent LEC or other authorized area (e.g. Extended Area Service Zones in adjacent local calling areas). Local traffic includes the traffic types that have been traditionally referred to as "local calling" and as "extended area service (EAS)." All other traffic that originates and terminates between end users within the LATA is toll traffic. In no event shall the Local Traffic area for purposes of local call termination billing between the parties be decreased.

traffic from this definition, it would have done so. Further, KMC asserts that the industry treats this type of traffic as local, therefore the common understanding was that the definition of "local traffic" would include ISP-bound traffic.

KMC also argues that ISP-bound traffic terminates on KMC's network, at the ISP server. KMC points to the definition of "termination" found in In re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, August 8, 1996, ¶1040, which states that termination is "the switching of local telecommunications traffic at the terminating carrier's end office switch, and delivery of such traffic to the called party's premises." Thus, KMC argues, under the FCC definition, the call terminates at the ISP. Further supporting its contention that BST itself treats calls as terminating at the ISP server, KMC points to the 1997 Memorandum from Mr. Bush at BST to all CLECs [competitive local exchange carrier] to inform CLECs that BST would not be paying ISP traffic reciprocal compensation, BST refers to traffic terminating at the ISP server. KMC asserts that if there truly was a need to send this Memorandum to clarify BST's position on the ISP traffic reciprocal compensation issue, then there was some expectation that ISP-bound traffic would receive compensation.

KMC contends that the obligation of BST to pay reciprocal compensation on ISP-bound traffic is found in the Agreement. However, KMC asserts that extrinsic evidence additionally shows that reciprocal compensation is owed so that BST's argument that compensating for ISP-bound traffic would cost BST too much is unavailing. KMC also argues that courts cannot amend or annul a contract to avoid some alleged hardship to a party. KMC replies to BST's argument that there was no meeting of the minds regarding reciprocal compensation by urging that BST is misconstruing Louisiana contract interpretation law. KMC asserts that whether or not there was a meeting of the minds goes to whether or not a contract was formed, relating to offer and acceptance. In this proceeding, KMC urges, the dispute is not if a contract was formed but what the contract says--contract interpretation. KMC, citing C.C. Art. 2054, argues that if the contract is silent on a point, then the parties to the contract are bound to what law, equity, and usage determine should be the outcome.

KMC further states that if BST is not obligated to pay reciprocal compensation, absurd consequences will result in that BST would not have to pay for services rendered to it by KMC.

KMC asserts that even if the Commission believes there was no meeting of the minds regarding the payment of reciprocal compensation, the doctrine of unjust enrichment calls for BST to pay for the services rendered.

BST's Position

BST asserts that the only issue before the Commission is whether or not BST and KMC shared a common intent to pay reciprocal compensation for ISP-bound traffic under the Agreement. BST contends that the parties did not so intend, and that it should not be obligated to do so now.

BST first frames its argument in terms of what is required of ILECs under the Telecommunications Act of 1996. BST cites the portions of the Act, 47 USC 252 (d)(2), which provide for reciprocal compensation for local traffic. BST contends that calls to ISPs do not constitute local traffic, nor terminate at the ISP server, therefore there is no reciprocal compensation obligation for this traffic owed to KMC.

BST argues that because the FCC stated in the *Declaratory Ruling* that ISP-bound traffic is largely interstate, that traffic is not subject to reciprocal compensation. Further, BST asserts, ISP traffic is subject to the FCC's regulation governing the transport and termination of interstate or intrastate interexchange traffic. Therefore, to be subject to federal regulation, the traffic cannot be completely local.

BST also cites portions of the *Declaratory Ruling* wherein the FCC discusses the nature of the call from an end user to an ISP. BST asserts that in ¶12-13, the FCC states that the nature of the call is analyzed by looking at the end-to-end communication, and the call is not broken down into pieces. Therefore, the ends of ISP-bound traffic are the end user and the remote Internet site--not the ISP server, as the call goes through the server to the Internet site. Using this argument, BST asserts that ISP-bound calls do not terminate at the ISP server, but actually terminates at the Internet site accessed, wherever that site may be. Following this argument, BST contends that ISP-bound traffic is interstate, not local, and thus not subject to the reciprocal compensation obligation of the KMC Agreement.

BST states that ISPs use the LEC's local network to institute calls by and to ISP end user customers. BST asserts that the FCC has stated that the portion of the call that is from the LEC to

the ISP is interstate in nature. Typically, there is an interstate access charge assessed by ILECs to LECs for interstate calls. However, the FCC exempted ESP calls from the access charge in the early 1980's to promote the growth of the ESP industry. BST asserts that though the exemption results in the treatment of certain aspects of ISP-bound traffic as local, the fact that the FCC had to exempt it shows that the traffic is not truly local.

BST states that the Act does not require reciprocal compensation when a call originates on one LEC's network and terminates on a remote Internet site. However, the FCC stated there are circumstances where state commissions may find reciprocal compensation is owed: 1) Where parties have agreed to reciprocal compensation and 2) Where the state commission arbitrates the agreement. In this instance, the Commission did not arbitrate the Agreement; rather, KMC and BST came to an Agreement. BST asserts that the Agreement does not provide for reciprocal compensation for ISP-bound traffic.

BST argues that ISP traffic has always been interstate in nature, and if there is any doubt regarding this designation, the law at the time of entering the Agreement controls. BST asserts that the legal understanding at the time the contract was entered into was that the FCC treated ISP-bound traffic as non-local for some purposes. Further, BST asserts that KMC bears the burden of proving the existence of an obligation under the Agreement. To do so, argues BST, KMC must prove that ISP-bound calls are transported by KMC, are terminated on KMC's network, and are local.

BST cites many provisions of the Louisiana Civil Code regarding contract interpretation, using these rules to argue KMC did not carry its burden of proving that parties shares a common intent to pay reciprocal compensation for non-local ISP-bound traffic. Further, BST asserts KMC did not provide any compelling extrinsic evidence regarding intent, as KMC Witness Ms. Breckenridge stated that KMC did not negotiate the contract but merely opted into a contract that was negotiated by some other company. BST also cites the testimony of Ms. Breckenridge to show that KMC did not specifically consider reciprocal compensation at the time KMC opted into the Agreement.

BST argues that KMC's complaint stems solely from the mistaken belief that calls from the end user to the ISP are local and terminate at the ISP server. Further, BST argues that KMC mistakenly believes that reciprocal compensation is required under the Act. BST asserts KMC's

witness Breckenridge could not point to any FCC language that stated ISP-bound calls terminate at the ISP server for purposes of reciprocal compensation.

BST urges that KMC must take the Agreement that it opted into as KMC finds it. Further, BST asserts that under Louisiana contract law, the contract must be interpreted against the obligee (KMC) and in favor of the obligor (BST) when a dispute arises. Additionally, BST addressed the application of the FCC factors regarding interpretation of the Agreement. To this point, BST argued that the factors set forth are only illustrative. Furthermore, BST asserts that many of the factors suggested by the FCC already have FCC rules regarding the factors, calling for LECs to treat the ISP-calls in certain ways. Therefore, BST argues, these factors cannot be used to prove intent of BST.

BST argues that the other state commissions' decisions that KMC cited are not dispositive of this matter. BST asserts that many of the decisions were issued prior to the *Declaratory Ruling* and thus are based on a two-call analysis regarding ISP-bound traffic. The *Declaratory Ruling*, argues BST, did not accept the two-call analysis and any decision based on that analysis must be reconsidered. Additionally, BST argues that some of the cases cited by KMC were arbitrations, and/or the interconnection agreements at issue were not quite the same as the Agreement in this proceeding. Finally, BST argues that those other cases cited by KMC dealt with factual circumstances very different from the facts of this particular case.

BST asserts that their witness, Mr. Hendrix, established that at the time of the contract, BST understood ISP-bound traffic was not local. Further, BST did not then and does not now believe the Act mandates reciprocal compensation. BST argues that the definition of "local traffic" in the Agreement does not implicitly include ISP-bound traffic, therefore there was no need to exclude such traffic. Additionally, the ISP-bound traffic does not terminate at the ISP server, argues BST, asserting technical words must be given technical meanings, contrary to KMC's statement. BST also argues that it has never knowingly paid reciprocal compensation for ISP traffic. In support, BST claims that it began holding all reciprocal compensation billings in October of 1995 and identified a process at least as early as January of 1997 to ensure that it did not bill reciprocal compensation on ISP traffic. BellSouth implemented this process in September of 1997 and wrote off most all prior traffic that it had held.

Finally, BST argues that if it was obligated to pay reciprocal compensation on ISP-bound traffic, that result would be absurd as KMC would then make 338% more revenue from reciprocal compensation than it does from providing service to its 10 ISP customers.

Further, BST asserts that Sections 1.59 and 1.6 of the Agreement are relevant provisions which demonstrate that the parties intended to pay reciprocal compensation only on that traffic which is within the scope of the 1996 Act.[4] BST also argues that ISPs provide Switched Exchange Access Service, therefore such traffic is excluded from reciprocal compensation under Section 1.41 of the Agreement.

BST argues that there is no evidence that KMC is providing a service to BST for which KMC is not being compensated and that KMC is compensated for any such costs in the same manner as BellSouth, from the revenues that it receives from its ISP customers.

Staff's Position

Staff asserts that the FCC has determined that calls to ISPs are to be analyzed as one call, that is, the call that goes from the customer to the ISP to the ultimate Internet site is considered one call. Per this rationale, Staff states that ISP-bound traffic is not subject to state enforcement just because the call is local, for the call is not entirely such. Staff further asserts that the FCC, in the *Declaratory Ruling*, says that state commissions have the power to interpret interconnection agreements, which may bind parties to pay reciprocal compensation for ISP-bound traffic. Thus, Staff contends, the Commission must interpret the Agreement.

Staff maintains that the factors set forth by the FCC in the *Declaratory Ruling* for determining whether or not parties intended to pay reciprocal compensation for calls to ISPs are illustrative only, and the state commissions are the ultimate arbiters of what factors are relevant to interpreting parties' intentions. Staff states that in examining the intent of KMC and BST, it is not within the province of the court to make new contracts for the parties, and the court is confined to only interpreting the agreement between the parties. Staff concludes that given the evidence presented at the hearing,

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[4] 1.59: "Reciprocal Compensation" is as described in the Act, and refers to the payment arrangements that recover costs incurred for the transport and termination of the Telecommunications traffic originating on one Party's network and terminating on the other Party's network.

1.6: "As Described in the Act" means as described in or required by the Act and as from time to time interpreted in the duly authorized rules and regulations of the FCC or the Commission.

KMC and BST had different intentions when entering into the Agreement. Therefore, Staff urges, there was no meeting of the minds, or alike understanding, which is necessary for a valid contract. Ultimately, Staff argues, reciprocal compensation is not owed under the Agreement because KMC and BST did not share an understanding of the treatment of ISP-bound traffic.

Staff further asserts that KMC bears the burden of proof in this proceeding and must prove that the parties intended for reciprocal compensation to be owed for ISP-bound traffic. Staff argues that KMC has not carried its burden of proof and KMC put on an insufficient amount of direct or extrinsic evidence to support its claim that the parties mutually agreed to pay reciprocal compensation. Furthermore, Staff states, there were no negotiations in the reaching of the Agreement, as KMC only opted into an existing Interconnection Agreement. Staff points to the testimony of KMC's witness, Ms. Breckenridge, wherein she testified that KMC did not specifically consider reciprocal compensation. Staff asserts that her testimony proves there was no meeting of the minds regarding the issue of reciprocal compensation for calls to ISPs.

Staff also took a stance on policy issues surrounding reciprocal compensation. Staff asserts that the Commission's duty is to promote efficient entry by new providers into the local exchange market. Staff maintains that the unqualified payment of reciprocal compensation does not promote real competition. Staff argues that to follow KMC's prayed for result, all that would result would be cost shifting, taking money from one source and shifting it to another, which does not bring about a true increase in competition. Finally, staff urged that reciprocal compensation is not owed by BST to KMC for ISP-bound traffic.

Staff filed two brief exceptions to the Proposed Recommendation. Staff, like BST, asserts that KMC properly has the burden of proof at hearing because KMC is demanding performance of the contract. Staff, also like BST, asserts that it objects to the classification of the Agreement as a standard form because no party raised such issue at hearing. Further, Staff urges that KMC came to the negotiating table with BST with the Agreement, therefore if the Agreement is standard form, it is KMC's standard form.

Intervenors' Positions

Intervenors, E.spire, Cox, EATEL, AT&T and SECCA, through their individual filings

adopted the positions and arguments expressed by KMC. Intervenors also urged the Commission to expressly limit its decision in this proceeding to the dispute regarding the KMC/BST Interconnection Agreement.

Factual Findings

1. KMC and BST both provide local exchange services in Louisiana. BST is the incumbent local service provider. KMC has two switches within Louisiana, a Shreveport switch which became operational in November, 1997, and a Baton Rouge switch which became operational in December of 1997. (Tr. Breckenridge at 19, 57)

2. Under Section 901.D of the Louisiana Public Service Commission's Competition Regulations, local exchange carriers are required to interconnect their networks, to transport and terminate local traffic exchanged on those networks, and to make arrangements for mutual compensation for providing transport and termination services.

3. KMC and BST signed an interconnection agreement February 24, 1997 ("Agreement"). The Agreement is a regional agreement between KMC and BST in Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee. (Agreement at 1)

4. In accordance with provisions of Section 252(i) of the Telecommunications Act of 1996, KMC opted into an existing agreement between Metropolitan Fiber Systems and BST. Therefore, the parties did not negotiate the terms of the Agreement in the traditional sense; there were no meetings to hammer out terms of the Agreement between KMC and BST. (Tr. Breckenridge at 27)

5. The Agreement was submitted to the LPSC for review, and approved by the Commission in Order Number U-22404, issued June 20, 1997, pursuant to USC 252(e). No other determination was made with regard to the provisions contained in either 47 USC 251 or 47 USC 271.

6. A series of amendments to the Agreement have been filed. In each instance the Commission did not specifically approve the Agreement; rather, the Commission published the application, allowed the 90 days to elapse, and with no interventions having been received, the agreement was "deemed" approved pursuant to 47 USC 252(1). Dates of Commission letters responding to amendment requests are April 3, 1998; April 17, 1998; July 20, 1998; October 19, 1998; November 5, 1998; January 12, 1999; May 17, 1999.

7. Section 5.8 of the Agreement sets forth the following terms regarding the obligation of the parties to pay reciprocal compensation:

   5.8.1 Reciprocal Compensation applies for transport and termination of local traffic (including EAS and EAS-like traffic) billable by BST or KMC when a Telephone Exchange Service Customer originates on BST's or KMC's network for termination on the other Party's network.

   5.8.2 The parties shall compensate each other for transport and termination of Local traffic (local call termination) at a single identical, reciprocal and equal rate as set forth in Exhibit 8. [The rate is $0.009 per minute.]

   5.8.3 The Reciprocal Compensation arrangements set forth in this Agreement are not applicable to Switched Exchange Access Service. All Switched Exchange Access

Service and all IntraLATA Toll Traffic shall continue to be governed by the terms and conditions of the applicable federal and state tariffs.

8. The Agreement provides the following definitions of certain key terms:

Section 1.59: "Reciprocal Compensation" is As Described in the Act, and refers to the payment arrangements that recover costs incurred for the transport and termination of Telecommunications traffic originating one Party's network and terminating on the other Party's network.

Section 1.6: "As Described in the Act" means as described in or required by the Act and as from time to time interpreted in the duly authorized rules and regulations of the FCC or the Commission.

Section 1.41: "Local Traffic" refers to calls between two or more Telephone Exchange service users where both Telephone Exchange Services bear NPA-NXX designations associated with the same local calling area of the incumbent LEC or other authorized area (e.g., Extended Area Service Zones in adjacent local calling areas). Local traffic includes the traffic types that have been traditionally referred to as "local calling" and as "extended area service (EAS)." All other traffic that originates and terminates between end users within the LATA is toll traffic. In no event shall the Local Traffic area for purposes of local call termination billing between the parties be decreased.

Section 1.70: "Telephone Exchange Service" is As Defined in the Act.

Section 1.63: "Switched Exchange Access Service" means the following types of Exchange Access Services: Feature Group A, Feature Group B, Feature Group D, 800/888 access, and 900 access and their successors or similar Switched Exchange Access services.

9. Tricia Breckenridge was the only person at KMC involved in the negotiation of the Agreement with BST. Tricia Breckenridge decided to opt into an agreement previously entered between BST and Metropolitan Fiber Systems, rather than negotiate the terms of an agreement with BellSouth. Ms. Breckenridge did not read the Agreement prior to deciding to opt into it. Further, Ms. Breckenridge was not specifically considering the issue of reciprocal compensation when she decided to opt into the Agreement. Ms. Breckenridge testified that at the time the Agreement was executed, KMC understood that ISP traffic was treated as local and was included in the Agreement's reciprocal compensation obligations. Post-Hearing Brief at 15, Tr., Breckenridge at 14-16, Prefiled Direct at 7. Ms. Breckenridge was unable, however, to point to any specific language in any rulings or orders that supported her understanding, except when prompted by her counsel.

10. Mr. Jerry Hendrix, the person who executed the Agreement on behalf of BST, testified that BST understood that ISP traffic, like all ESP traffic, is non-local interstate traffic, specifically exchange access traffic. Mr. Hendrix testified that, as such, BST understood that ISP traffic was not subject to the reciprocal compensation obligation contained in Section 252(b)(5) of the 1996 Act. Mr. Hendrix further testified that the Agreement expressly provides that the reciprocal compensation obligation covers only the traffic that is subject to this statutory mandate. Further, Mr. Hendrix testified that the Agreement expressly excludes switched exchange access services from the reciprocal compensation obligation and that the FCC has recognized since the early 1980's that enhanced service providers, of which ISPs are a subset, provide exchange access services. Therefore, the Agreement expressly excludes ISP traffic from the reciprocal compensation obligation contained therein.

11. KMC has billed BST a total of $2,326,464 in reciprocal compensation under the KMC Agreement. Of this amount, BST has paid KMC a total of $165,479 for local, non-ISP, traffic, leaving an outstanding balance of $2,160,985. Cochran Rebuttal at 5

12. KMC has a total of ten ISP customers being served by its two switches in Louisiana. The amount of reciprocal compensation generated by the traffic flowing to those ten ISP customers approximates the $2,160,985 outstanding reciprocal compensation balance that KMC claims to be owed by BST.

13. KMC generated approximately $636,427 in revenue from providing service to its ten Louisiana ISP customers during the same time period that it billed BST $2,160,985 in reciprocal compensation for traffic to those ten ISP customers.

14. BST began holding all reciprocal compensation billings to CLECs in October of 1995. At least as early as January of 1997, BST identified a process to ensure that ISP traffic would not be included in its reciprocal compensation billings to CLECs. BST implemented this process in September of 1997 and wrote off most all prior reciprocal compensation billings.

15. BST never knowingly billed or paid reciprocal compensation on any non-local traffic, including ISP traffic.

16. ISP traffic does not terminate locally at an ISP server, but rather transits through the ISP server for termination at a distant website, somewhere outside of the local calling area. ISP traffic is, therefore, interstate exchange access traffic that is not subject to the reciprocal compensation obligation contained in Section 252(b)(5) of the Telecommunications Act of 1996.

17. FCC regulations require that ISP traffic be exempted from the access charge regime. Pursuant to this exemption, ISPs are treated as end users for purposes of assessing access charges, and the FCC permits ISPs to purchase their links to the public switched telephone network through intrastate business tariffs rather than through interstate access tariffs. Thus, ISPs generally pay local business rates and interstate subscriber line charges for their switched access connections to local exchange company central offices. In addition, incumbent LECs are required to treat expenses and revenue associated with ISP traffic as intrastate for separations purposes.

18. There is no prevailing industry custom of treating ISP traffic as "local" for reciprocal compensation purposes. FCC regulations require that ISPs be treated as end users for only one purpose, the access charge exemption.

19. KMC failed to produce any evidence to support its claim that if it does not receive reciprocal compensation for transporting ISP traffic originating on BellSouth's network, that it will incur otherwise uncompensated costs.

20. ISPs are a subset of Enhanced Service Providers ("ESPs) that utilize interstate switched exchange access services to connect to local exchange company central offices.

FCC's Declaratory Ruling

On February 26, 1999, in Common Carrier Docket Number 99-68, the FCC declared that the 1996 Act , 47 U.S.C. sec. 251(b)(5), mandated reciprocal compensation for the transport and termination of ***local*** traffic ***only***. The FCC further held that this mandate does not extend to ISP-bound traffic, because ISP-bound traffic is not local but is interstate for purposes of the 1996 Act's reciprocal compensation provisions. ISP-bound traffic is not subject to state enforcement under the

1996 Act on the grounds that it is local traffic. *See* Declaratory Ruling at ¶ 12 and 26 n.87. The FCC ruling effectively undermined the jurisdictional claim of state utility regulators over ISP-bound traffic.

In ruling in favor of federal versus state regulatory jurisdiction over ISP-bound traffic and in construing 47 U.S.C. sec. 251(b)(5), the FCC focused on the "end-to-end" nature of the Internet communication. The initiating caller or customer is one "end" of the communication, and the terminating "end" is the web or other Internet site called by the customer. The FCC rejected arguments that would segment such traffic into intra- and inter-state portions and thereby also rejected a consequent, artificial segmentation of jurisdiction. Id. at ¶ 11. The FCC noted that it "analyzes the totality of the communication when determining the jurisdictional nature of a communication . . . [and] recognizes the inseparability, for purposes of jurisdictional analysis, of the information service and the underlying telecommunications." Id. at ¶ 13. The FCC considers each such commercial transaction as "one call" "from its inception to its completion" and accordingly rejected the jurisdictional limitation implied by arbitrarily isolating the initial part of the call from the rest of the stream of interstate commerce. Id. at ¶ 11.

In its ruling, however, the FCC did not in itself determine whether reciprocal compensation is due in any particular instance. Rather, the FCC held that parties should be bound by their existing interconnection agreements, as interpreted by state commissions. It found no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic, pending adoption of a federal rule establishing an appropriate interstate compensation mechanism.

Analysis

The central issue presented by KMC's complaint is whether KMC and BST shared a common intent (mutually agreed) to pay reciprocal compensation for traffic that originates on the network of one of the parties and is transported to an ISP customer served by the network of the other party (ISP traffic), even though neither the Telecommunications Act of 1996 or any other law or regulation requires the parties to pay reciprocal compensation for ISP-bound traffic. For the reasons stated below, the Louisiana Public Service Commission ("LPSC" or "Commission") finds that KMC and BST do not owe reciprocal compensation for ISP traffic under the terms of their Agreement.

Article 2045 of the Louisiana Civil Code provides that the "[i]nterpretation of a contract is the determination of the common intent of the parties." "When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent." La. Civ. Code art. 2046. "A party who demands performance of an obligation must prove the existence of the obligation." La. Civ. Code art. 1831; *see* Louisiana Gaming Corp. v. Rob's Mini-Mart, Inc. 666 So.2d 1268, 1270 (La. App. 2nd Cir. 1996)("The party claiming rights under the contract bears the burden of proof."); Woodward v. Felts, 573 So.2d 1312, 1315 (La. App. 2d Cir. 1991)("The party who asserts an obligation must prove it by a preponderance of the evidence."). Thus, KMC bears the burden of proving the existence of an obligation on the part of BellSouth to pay reciprocal compensation for ISP traffic under the KMC Agreement.

The provisions of the KMC Agreement provide that the parties are required to pay reciprocal compensation to each other only for the transport and termination of "Local Traffic" as defined in the KMC Agreement, and that "Switched Exchange Access Traffic" is expressly excluded from the terms of that obligation. *See* Factual Findings 7&8. Thus, KMC bore the burden of proving (1) that it "transports" the ISP traffic for which it claims reciprocal compensation, (2) that it "terminates" this ISP traffic on its network, (3) that such traffic falls within the definition of "Local Traffic" as defined in the KMC Agreement, and (4) that such traffic is not "Switched Exchange Access Traffic," as defined in the KMC Agreement.

ISP Traffic Does Not "Terminate" Locally.

One of the major disputes in this matter has been over whether ISP traffic "terminates" locally. When KMC initially filed its Complaint that established this docket, KMC argued that ISP traffic constituted "two components, a telecommunications component and an information services component." Complaint, ¶42. This argument is typically referred to as the "two-call model." KMC argued initially that the telecommunications component "terminated" locally at the ISP server. After the filing of its Complaint, the FCC issued its *Declaratory Ruling* on ISP traffic in which it stated unequivocally that ISP traffic does not terminate locally at the ISP server, but rather continues on to distant websites outside of the local calling area. *See Declaratory Ruling*, ¶12. The FCC based its determination on a consistent line of prior precedent dating back several decades. Further, the FCC

expressly considered and rejected the "two-call model," noting that its prior precedent has established a consistent, end-to-end analysis for determining where the call originates and terminates. In the Matter of Southwestern Bell Tel. Co., CC Docket No. 88-180, Order Designating Issues for Investigation, 3 FCC Rcd 2339, 2341 (1988)("[T]he jurisdictional nature of a call is determined by its ultimate origination and termination, and not ... its intermediate routing." Emphasis added.); BellSouth Memory Call, Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation, 7 FCC Rcd 1619, 1620(1992) ("there is a continuous path of communications across state lines between the caller and the voice mail service."); Teleconnect, Teleconnect Co. v. Bell Telephone Co. of Penn., E-88-83, 10 FCC 1626, 1629 (1995), aff'd sub nom. Southwestern Bell Tel. Co. v. FCC, 116 F.3d 593 (D.C. Cir. 1997)("[B]oth court and Commission decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete such communications. According to these precedents, we regulate an interstate wire communications under the Communications Act from its inception to its completion. [A]n interstate communication does not end at an intermediate switch. . . . The interstate communication itself extends from the inception of a call to its completion, regardless of any intermediate facilities.").

After the issuance of the *Declaratory Ruling*, KMC abandoned its reliance on the "two-call model," and began to argue that for "regulatory purposes" ISP traffic is "treated" as terminating locally. In support of this new argument, KMC relies on general statements in the FCC's *Declaratory Ruling* and ¶1040 of the FCC Interconnection Order. First Report and Order, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, 11 F.C.C. Rcd. 15499 (August 8, 1996)("FCC Interconnection Order").

The *Declaratory Ruling* provides no support for KMC's claim; the FCC stated expressly that "the communications at issue here do not terminate at the ISP's local server, as CLECs and ISPs contend, but continue to the ultimate destination or destinations, specifically at a Internet website that is often located in another state." *Declaratory Ruling*, ¶12. As further support for the finding that a call has only one point of termination, the FCC recognized that its "conclusion that ISP-bound traffic is largely interstate might cause some state commissions to re-examine their conclusion that reciprocal compensation is due to the extent that those conclusions are based on a finding that this traffic terminates at an ISP server ...." Id. ¶27. Emphasis added. Thus, it cannot be seriously argued

that ISP traffic has more than one point of termination or that it actually does terminate locally at the ISP server, even though the FCC has stated emphatically that it does not.

For these very reasons, it is impossible to square KMC's interpretation of ¶1040 of the FCC Interconnection Order with the findings in the *Declaratory Ruling*. Indeed, if ISP traffic did terminate locally under KMC's interpretation of ¶1040, reciprocal compensation would be owed as a matter of law pursuant to section 251(b)(5) of the 1996 Act. It is undisputed, however, that reciprocal compensation is not required by law for this traffic. *See Declaratory Ruling*, ¶26, n.87 ("[T]he reciprocal compensation requirements of section 251(b)(5) of the Act and Section 51, Subpart H (Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic) of the Commission's rules do not govern inter-carrier compensation for this traffic.").[5]

Finally, KMC points to certain statements made by BellSouth in which it misuses the term "terminates." Such misuses do not affect the interpretation of the Agreement. Article 2047 of Louisiana's Code of Civil Procedure provides that "[w]ords of art and technical terms must be given their technical meaning when the contract involves a technical matter." The termination requirement has only one technical meaning, as recently confirmed by the FCC, and that is the ultimate end point of the communication. Thus, KMC has failed to carry its burden of proving that it actually does "terminate" ISP traffic on its network as is required by the reciprocal compensation obligation of the Agreement.

ISPs Provide Switched Exchange Access Service.

As previously stated, BST and KMC expressly excluded Switched Exchange Access Services from the reciprocal compensation obligation of the KMC Agreement. BST argues that ISPs provide switched exchange access services to their subscribers and that such traffic is therefore expressly excluded from the reciprocal compensation obligation of the Agreement. BST's claims are based upon the prior rulings of the FCC regarding Enhanced Service Providers ("ESPs"), of which ISPs are

[5]The FCC Interconnection Order interpreted the scope of the reciprocal compensation obligation: "We conclude that section 251(b)(5)'s reciprocal compensation obligations should apply only to traffic that originates and terminates within a local calling area. . . .

. . . .

We find that the reciprocal compensation provisions of section 251(b)(5) for transport and termination of traffic do not apply to transport or termination of interstate or intrastate interexchange traffic."

a subset. *See Declaratory Ruling*, ¶1, n.1. In response, KMC claimed that ISP traffic is not expressly excluded in the Agreement. Likewise, the Administrative Law Judge did not consider whether ISP traffic is switched exchange access traffic, but rather focused on the fact that a specific ISP exception was not included in the KMC Agreement.

This Commission chooses to consider the actual terms of the KMC Agreement, rather than speculate as to what terms could have been in the KMC Agreement. The FCC has recognized since the inception of the access charge regime that ESPs use switched exchange access services. In the MTS/WATS Market Structure Order, the FCC found that ESPs use interstate access service and exempted ESPs from paying access charges. MTS and WATS Market Structure, CC Docket No. 78-72, Memorandum Opinion and Order, 97 FCC 2d 682, 711 (1983)("Market Structure Order")("Among the variety of users of access service are ... enhanced service providers"). *See* also, Amendments to Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, Order, 2 FCC Rcd. 4305, 4306 (1987)(ESPs, "like facilities-based interexchange carriers and resellers, use the local network to provide interstate services"); Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, Order, 3 FCC Rcd 2631 (1988)(ESP Exemption Order)(FCC refers to "certain classes of exchange access users, including enhanced service providers").

The FCC confirmed the status of those services provided by ESPs, including ISPs, in its recent *Declaratory Ruling*: "Although the Commission has recognized that enhanced service providers (ESPs), including ISPs, use interstate access services, since 1983 it has exempted ESPs from the payment of certain interstate access charges. . . . Thus, ESPs generally pay local business rates and interstate subscriber line charges for their switched access connections to local exchange company central offices." *Declaratory Ruling*, ¶5 (Emphasis added).

In light of the above quoted FCC precedent that has found consistently that ISPs use switched exchange access services, such services do fall within the exception contained in Section 5.8.3 of the KMC Agreement. *See* Factual Finding No. 7.

The KMC Agreement Provides that the Parties Intended to do Nothing More Than the 1996 Act Required.

Any doubt as to the parties' intent, as expressed in the KMC Agreement, regarding the scope of the reciprocal compensation obligation is removed by the express statements regarding intent found in Sections 1.59 and 1.6 of that Agreement. *See* Factual Finding No. 8. Given that the parties expressly state that the reciprocal compensation obligation in the Agreement is "as described in or required by the [1996] Act and as from time to time interpreted in the duly authorized rules and regulations of the FCC," it is clear that the parties intended to do nothing more or less than the 1996 Act required. As previously stated, the 1996 Act does not obligate the parties to pay reciprocal compensation for any non-local, interstate traffic. The administrative law judge did not analyze these provisions of the KMC Agreement in reaching the conclusions contained in the proposed and final recommendations.

KMC Failed to Produce Extrinsic Evidence that the Parties Intended to Pay Reciprocal Compensation for ISP traffic.

Even if the terms of the reciprocal compensation obligation of the Agreement were found to be ambiguous, KMC failed to meet its burden of producing sufficient extrinsic evidence to establish that the parties mutually intended to pay reciprocal compensation for non-local, ISP traffic. The only representative of KMC that was responsible for deciding the terms of the interconnection agreement to be entered with BST, Ms. Tricia Breckenridge, testified that (1) neither she nor anyone else at KMC had any conversations with BST regarding the terms of the interconnection agreement (Hearing Transcript, pp. 24, 27), (2) she chose to opt into an agreement that some other company had negotiated with BST rather than negotiate her own agreement (Id. pp. 27-28), (3) she did not read the agreement that she chose to opt into (Id. p. 29), and (4) she was not looking specifically at reciprocal compensation issues when she was deciding what agreement to opt into. Id.

In light of the sworn testimony of the KMC witness, it is difficult to conceive of how KMC is in a position to claim the benefit of any possible ambiguity in the KMC Agreement, given the cavalier attitude that KMC took in entering the Agreement. Ms. Breckenridge claimed that she relied on various unspecified FCC orders and the fact that BST "treated" ISP traffic as local for other purposes and thus assumed that it would be "treated" as local for purposes of reciprocal

compensation. Ms. Breckenridge could not, however, specifically identify what FCC orders she actually relied upon. Even if Ms. Breckenridge was relying upon any specific FCC orders, it is clear that her interpretation of those orders was incorrect.

Not only did BST properly interpret the prior FCC rulings regarding the nature of ISP traffic, BST presented other extrinsic evidence to establish that it never intended to pay reciprocal compensation for non-local, ISP traffic and that it would never have agreed to pay reciprocal compensation for such traffic due to the negative economic consequences that such an arrangement would have ensured.

First, BST presented uncontroverted evidence of the efforts that it undertook to ensure that it did not bill any CLECs reciprocal compensation for ISP traffic, or any other non-local traffic. In October 1995, BST began holding all reciprocal compensation billings to CLECs, including reciprocal compensation billings for local traffic. Prior to entering the KMC Agreement, BST had identified a method to ensure that it would not bill reciprocal compensation for ISP traffic and was working to implement the enhancement to its billing system. This enhancement was implemented in September of 1997, before KMC had even begun billing BST for reciprocal compensation, and BST wrote off most all of the prior traffic that it had withheld from reciprocal compensation billing.

The uncontroverted evidence establishes that BST never knowingly billed or paid reciprocal compensation for ISP traffic. These facts distinguish this case from the numerous other cases upon which KMC cites and relies. Other Regional Bell Operating Companies ("RBOCs") did not undertake any effort to identify or separate out ISP traffic. Indeed, some RBOCs had established a course of conduct of billing and paying reciprocal compensation for several months before informing CLECs that they would no longer pay reciprocal compensation for ISP traffic.

Finally, BST put forth evidence that it would not have agreed to pay reciprocal compensation for ISP traffic because such an arrangement would have certainly resulted in economic harm to BST. Given that CLECs such as KMC primarily, if not exclusively, serve business customers including ISPs, while BST serves the vast majority of internet end-users, paying reciprocal compensation on ISP traffic would result in absurd amounts of reciprocal compensation flowing to the CLECs. Indeed, in this particular case, KMC billed BST reciprocal compensation for ISP traffic that was approximately 340% more than KMC received in revenue from providing actual service to its ten (10)

ISP customers in Louisiana. *See* Factual Findings Nos. 11-13. The negative impact on competition in the local market as well as the potential for abusing the reciprocal compensation obligation from permitting such an arrangement are obvious.

In response, KMC claims that if it does not receive reciprocal compensation for ISP traffic from BST, it will be providing a service to BST for free and will incur certain uncompensated costs. KMC did not put forth any evidence as to the nature or amount of these costs that KMC claimed would go uncompensated and the Commission refuses to simply take KMC's word at face value.

Docket Number U-23839 was considered and decided at the Commission's October 13, 1999 Business and Executive Session. On substitute motion of Commissioner Blossman and seconded by Commissioner Sittig, with Commissioner Dixon concurring and Commissioners Owen and Field dissenting, the Commission voted to reject the Administrative Law Judge's Recommendation and adopted the Staff Recommendation to reject KMC's claim for reciprocal compensation for ISP-bound traffic.

IT IS THEREFORE ORDERED

That KMC's request for payment of reciprocal compensation for ISP-bound traffic is hereby denied.

BY ORDER OF THE COMMISSION
BATON ROUGE, LOUISIANA
October 28, 1999

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/S/ JACK "JAY" A. BLOSSMAN, JR.
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VICE CHAIRMAN JACK "JAY" A. BLOSSMAN, JR.

DON OWEN (DISSENTING)
DISTRICT V
COMMISSIONER DON OWEN

/S/ IRMA MUSE DIXON
DISTRICT III
COMMISSIONER IRMA MUSE DIXON

/S/ LAWRENCE C. ST. BLANC
SECRETARY
LAWRENCE C. ST. BLANC

JAMES M. FIELD (DISSENTING)
DISTRICT II
COMMISSIONER JAMES M. FIELD

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 1999, 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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