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September 15, 1999

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

RE: Complaint of AVR of Tennessee, LP d/b/a Hyperion of Tennessee, LP Against BellSouth Telecommunications, Inc. to Enforce Reciprocal Compensation and "Most Favored Nation" Provisions of the Parties' Interconnection Agreement

Docket No. 98-00530

Dear David:

Enclosed please find the original plus thirteen copies of the Motion to Strike Testimony Which Violates Parole Evidence Rule and the Memorandum of Law on the Parole Evidence Rule in Support of Hyperion's Motion to Strike which we would appreciate your filing in the above-captioned proceeding on behalf of AVR of Tennessee, L.P. d/b/a Hyperion of Tennessee, L.P.

Thank you for your assistance in this matter.

Sincerely,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

Henry Walker

HW/th
Enclosures
cc: All Parties of Record

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

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

Docket No. 98-00530

MOTION TO STRIKE TESTIMONY WHICH VIOLATES PAROLE EVIDENCE RULE

The above-captioned matter is set for hearing on Friday, September 17, 1999, before Chairman Melvin J. Malone, acting in as hearing officer. AVR of Tennessee, L.P. d/b/a Hyperion of Tennessee, L.P. ("Hyperion") hereby moves to strike portions of the pre-filed testimony offered by BellSouth Telecommunications, Inc. ('BellSouth"). Specifically, Hyperion moves to strike testimony concerning the meaning of the terms "Local Traffic" and "terminate" as used in the parties' 1997 interconnection agreement and whether local calls to Internet service providers ("ISPs") should be considered "Local Traffic" under the agreement. As the Authority has previously held, such testimony is inadmissible under the parole evidence rule. In support of this motion, Hyperion relies upon the decision of the Authority in *Petition of Brooks Fiber to Enforce Interconnection Agreement, et seq.*, Docket No. 98-00118, Initial Order issued April 28, 1998, Order Affirming the Initial Order of Hearing Officer issued August 17, 1998, ("*Brooks Fiber*").

Discussion

This issue is familiar both to the Hearing Officer and to BellSouth. In the *Brooks Fiber* case, the Authority held, as a matter of law, that the parole evidence rule prohibits BellSouth

from introducing testimony concerning whether the term "Local Traffic," as used in the interconnection agreement between BellSouth and Brooks Fiber, included local calls to Internet Service Providers ("ISPs"). The Authority found that such words as "terminate," as used in the agreement, are not ambiguous and that the dispute over ISP traffic "must be resolved within the four corners of the Interconnection Agreement." Initial Order, at 15. *See Cookeville's Gynecology & Obstetrics P.C. v. Southeastern Data Systems Inc.*, 884 S.W.2d, 458, 462 (Tenn. App. 1994).

The present proceeding raises, in part, the identical evidentiary issue. The Authority is being asked to interpret the meaning of "Local Traffic" in the interconnection agreement between BellSouth and Hyperion. Here again, BellSouth disputes the meaning of the terms "Local Traffic" and "terminates" and offers testimony concerning the parties' intentions and motivations during the contract negotiations. *See, e.g.*, Hendrix rebuttal, p. 6-10; Halprin rebuttal, 4-11 Halprin direct, 2-7; and Hendrix direct, 6-10. BellSouth, however, fails to address the simple fact that the definition of "Local Traffic" in the agreement at issue here is, for all practical purposes, identical to the definition of "Local Traffic" as used in the agreement that was before the Authority in *Brooks Fiber*. Similarly, the concept of "termination" as it is used in this agreement is the same as used in the *Brooks Fiber* agreement.[1] Surely BellSouth will not argue that the term

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[1] In *Brooks Fiber*, the interconnection agreement said, "The delivery of Local Traffic between *Brooks* and BellSouth shall be reciprocal and compensation shall be mutual." The term "Local Traffic" was defined as "any telephone call that originates and terminates in the same LATA and is billed by the originating party as a local call." Initial Order, at 16-17.

In this proceeding, the agreement between Hyperion and BellSouth states, "The delivery of local traffic between the parties will be mutual according to the provisions of this agreement." The term "Local Traffic" is defined as "any telephone call that originates in one exchange and terminates in either the same exchange, or an associated Extended Area Service ("EAS") exchange." Hyperion Agreement, Section IV.B. See Direct Testimony of BellSouth

(continued...)

"Local Traffic" and the concept of "termination" mean one thing in the *Brooks Fiber* agreement and something entirely different here.

As the Authority ruled in *Brooks Fiber*, admission of such testimony violates the parole evidence rule. Attached to this motion is a memorandum of law discussing in detail the parole evidence rule as applied to contract disputes under Tennessee law.

Nothing has happened since the *Brooks Fiber* decision that would change the Authority's application of the parole evidence rule to the case at bar.

In *Brooks Fiber*, the Authority found that the interconnection agreement at issue "was negotiated and entered into under the existing law of the FCC." Therefore, the Authority interpreted the term "Local Traffic" as used in the agreement based on "the state of the law as it existed" in October 1996, when the agreement was signed. *Brooks Fiber*, Initial Order, at 11. Based on the Authority's understanding of the "existing law of the FCC" at that time, the Authority ruled that "Local Traffic," as used in the agreement, "includes, as a matter of law, calls to ISPs." Initial Order, at 19.[2]

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[1](...continued)
witness Hendrix, page 3.

Both agreements also contain similar "entire agreement" provisions. See, *Brooks Fiber*, Initial Order, at 16, n. 20; Hyperion Agreement, Section XXXII.

[2] The Florida Public Service Commission reached the same conclusion, holding, "Our finding that ISP traffic should be treated as local for purposes of the subject interconnection agreement is consistent with the FCC's treatment of ISP traffic at the time the agreement was executed, all pending jurisdictional issues aside." *In re: Complaint of WorldCom, et seq.*, docket 971478-TP, September 15, 1998, at p. 8.

No party to this case has argued or presented evidence alleging that the "state of the law" changed between September 1996, when the *Brooks Fiber* agreement was signed, and April 1997, when the Hyperion agreement was signed. To the contrary, the Authority's 1998 decision in *Brooks Fiber* continued to refer to the FCC's "long-standing position with respect to the treatment of ISPs" and added, "that position remains the position of the FCC today." *Brooks Fiber* Initial Order, at 11.

As both parties have pointed out, the FCC issued a Declaratory Ruling concerning ISP traffic in February, 1999. While acknowledging the agency's "long standing policy of treating this traffic as local," the FCC nevertheless declared that "ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate." *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-38, opinion released February 26, 1999, paragraphs 24 and 1. But the agency repeatedly emphasized that, pending the adoption of a federal rule to compensate carriers for ISP traffic, the parties "should be bound by their existing interconnection agreements as interpreted by state commissions. Id., at paragraph 1; see also paragraphs 21 and 25.

Therefore, the Authority's decision in *Brooks Fiber* remains intact and squarely applicable to the present proceeding. The Authority's determination of the "state of the law" at the time of the agreement between BellSouth and Brooks Fiber applies equally to the agreement between BellSouth and Hyperion. In both cases, the issue of whether "Local Traffic" includes calls to ISPs must be resolved based on the unambiguous language of the interconnection agreements and not on parole evidence of one party's alleged intentions. BellSouth's attempt to introduce evidence re-interpreting the meaning of "Local Traffic" and "terminate" in the parties'

1997 agreement because of a jurisdictional ruling issued by the FCC in 1999 is similarly prohibited under Tennessee law.[3]

In this proceeding, the Hearing Officer has previously denied Hyperion's motion for summary judgment. While acknowledging that "the issues raised in the matter at hand are substantially similar to the issues addressed in *Brooks Fiber*," the Hearing Officer expressly noted that the issues to be resolved in this hearing are "the circumstances under which Hyperion would be permitted to elect an alternative compensation arrangement and whether any such alternative compensation arrangement would apply on either a going-forward basis or retroactively." Initial Order on Motion for Summary Judgment, Feb. 25, 1999, at 6.

Hyperion does not object to BellSouth's testimony on those contractual issues delineated by the Hearing Officer. Those issues are unique to this proceeding. Hyperion's motion is aimed only at that testimony which "contradicts or supplements" (*Brooks Fiber*, Initial Order, at 14) the parties' contractual agreement that "Local Traffic" includes calls to ISPs. Here, as in *Brooks Fiber*, the parties' dispute must be resolved "within the four corners" of the Agreement and not on the basis of parole evidence.

Based on the Authority's previous interpretation of the parole evidence rule in *Brooks Fiber* and the near identical evidentiary questions presented here, Hyperion respectfully requests that those portions of BellSouth's testimony concerning the meaning of "Local Traffic"

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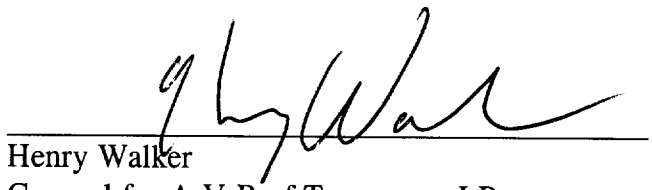
[3] Even if the FCC's decision to classify ISP traffic as interstate for jurisdictional purposes were relevant to the proper interpretation of a 1997 contract, BellSouth's pre-filed testimony on that subject is inadmissible. See Dempsey v. Correct Mfg. Corp., 755 S.W.2d 798, 806 (Tenn. App. 1988). (The content, meaning, and application of statutes and regulations are not a matter of fact to be proven by the affidavit of an expert witness, but are a matter of law to be presented by brief and argument of counsel supported by citations and authorities.) This case was also cited and relied upon by the agency in Brooks Fiber. See, Initial Order, at 16, n. 21.

and "terminate" and whether local calls to ISPs are considered "Local Traffic" under the agreement be excluded from the record.

Respectfully submitted,



Henry Walker
Counsel for A.V.R of Tennessee, LP
d/b/a Hyperion of Tennessee, LP

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via U.S. Mail, postage prepaid, to the parties listed below on this the 15 day of September, 1999.

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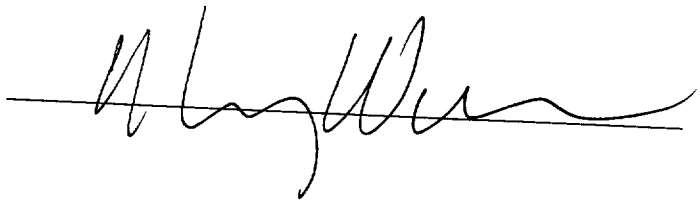

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MEMORANDUM OF LAW ON THE PAROLE EVIDENCE RULE IN SUPPORT OF HYPERION'S MOTION TO STRIKE

The parol evidence rule is a rule of substantive law intended to protect the integrity of written contracts. ***Maddox v. Webb Constr. Co.***, 562 S.W.2d 198, 201 (Tenn. 1978). " 'The parol evidence rule . . . defines the limits of the contract. It is not a rule of evidence and it is of itself not a rule of interpretation.'" ***Waring v. Polymer Materials***, 1997 Tenn. App. LEXIS 52* 2-3 (Tenn. Ct. App. 1997)(quoting ***McQuiddy Printing Co. v. Hirsig***, 23 Tenn. App. 434 at 445, 134 S.W.2d 197 (Tenn. Ct. App. 1939)) (citations omitted.). The parol evidence rule simply provides that contracting parties cannot use extraneous evidence to alter, vary or qualify the plain meaning of an unambiguous written contract. ***GRW Enters., Inc. V. Davis***, 797 S.W.2d 606, 610 (Tenn. Ct. App. 1990). Tennessee courts have noted that the parol evidence rule is *particularly applicable* where, as here, the contract at issue contains an "entire agreement" clause. ***Id.,*** (emphasis added) *and see* ***Waring****, supra., at 3.*

A. The parol evidence rule bars the introduction of extrinsic evidence when contract is clear and unambiguous.

The proper interpretation of a contract is a matter of law. ***Park Place Ctr. Enters., Inc. v. Park Place Mall Assocs. L.P.***, 836 S.W.2d 113, 116 (Tenn. Ct. App. 1992). The cardinal

rule for interpretation of a contract is to ascertain the intention of the parties in consideration of the instrument as a whole. See generally, ***Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc.***, 521 S.W.2d 578 (Tenn. 1975); ***Rodgers. v. Southern Newspapers, Inc.***, 214 Tenn. 335, 379 S.W.2d 797 (Tenn. 1964). In construing contracts, the words expressing the parties' intentions should be given their *usual, natural and ordinary meaning*, and neither party is to be favored in their construction. ***Brown v. Tennessee Auto, Ins. Co.***, 192 Tenn. 60, 237 S.W.2d 553 (Tenn. 1951); ***Ballard v. North American Life & Casualty Co.***, 667 S.W.2d 79 (Tenn. Ct. App. 1983).

In determining whether the meaning of a contract is clear or ambiguous, courts must examine the contract language in the context of the entire agreement. ***Cocke County Bd. of Highway Commrs. v. Newport Utils. Bd.***, 690 S.W.2d 231, 237 (Tenn. 1985). "'Whatever the law implies from a contract in writing is as much a part of the contract as that which is therein expressed, and if the contract, *with what the law implies*, is clear, definite, and complete, it cannot be added to, varied, or contradicted by extrinsic evidence.'" (emphasis added). ***Dunn v. United Sierra Corp.*** 612 S.W.2d 470, 474 (Ct. App. 1980) (citations omitted). Additionally, "'[t]he law conclusively presumes parties to a contract to understand its obligations, and *evidence is not admissible to show their understanding to have been otherwise.*'" ***Id.***

The language of a contract is ambiguous *only when* its meaning is uncertain and when it can be *fairly construed* in more than one way. ***Farmers-Peoples Bank v. Clemmer***, 519 S.W.2d 801, 805 (Tenn. 1975) (emphasis added). "Words can have *more than one meaning and still not be ambiguous* because the shades of meaning intended are determined by the context in which the words are used." (emphasis added) ***Welker v. Southern Home Ins. Co.***, 1989 Tenn. App. LEXIS 287 (Tenn. Ct. App. 1989) (citing ***Snelling & Snelling, Inc. V. Parnell***, 59 Tenn. App. 258, 266,

440 S.W.2d 23, 27 (1968)). "In constructing contracts, the words expressing the parties' intentions should be given the usual, natural and ordinary meaning and in the absence of fraud or mistake, the contract must be interpreted and enforced as written, *even though it contains terms which may be thought harsh and unjust.*" (emphasis added) ***Heyer-Jordan & Assoc. v. Jordan***, 801 S.W.2d 814, 821 (Tenn. App. 1990); ***Jaffee v. Bolton***, 817 S.W. 2d 19, 25 (Tenn. App. 1991). "A strained construction may not be placed on the language used to find ambiguity where none exists." ***Farmers-People Bank v. Clemmer***, 519 S.W.2d at 805.

B. ***Even when the language in a contract is ambiguous, the parole evidence may still bar the introduction of extrinsic evidence in some instances.***

Even when the language in a contract is determined to be ambiguous, the parol evidence rule may still bar the introduction of extrinsic evidence to resolve the ambiguity. In determining whether the extrinsic evidence will be barred, the law distinguishes between patent ambiguities and latent ambiguities:

> A *latent ambiguity* is where the equivocality of expression or obscurity of intention does not arise from the words themselves, but from the ambiguous state of extrinsic circumstances to which the words of the instrument refer, and which is susceptible of explanation by the mere development of extraneous facts, without altering or adding to the written language or requiring more to be understood thereby than will fairly comport with the ordinary or legal sense of the words and phrase made use of.
>
> A *patent ambiguity* is one produced by the uncertainty, contradictoriness, or *deficiency of the language* of an instrument so that no discovery of facts, or proof of declarations, can restore the doubtful or smothered sense without adding ideas which the actual words will not themselves sustain . . .

> Ambiguity that may be removed by parol evidence *is not a doubt thrown upon the intention of the party in the instrument by extrinsic proof tending to show an intention different from that manifested by the words of the instrument.* It must grow out of the question of identifying the person or subject mentioned in the instrument . . .'

Coble Sys. v. Gifford Co. 627 S.W.2d 359, 362 (Tenn. Ct. App. 1981) (citations omitted) (emphasis added). When the "alleged ambiguity in the instrument under consideration is one produced by the 'uncertainty, contradictoriness, or deficiency' of the language in the agreement [a patent ambiguity] . . . parol evidence . . . [is not] admissible to explain or vary the terms of the agreement." ***Id.*** Additionally, even when parol evidence is admissible, it is "admissible only to '*apply*' the description contained in a written instrument, and is inadmissible to '*supply*' a description omitted therefrom." ***Moon v. Webb***, 584 S.W.2d 803, 805 (Tenn. Ct. App. 1979) (quoting ***Parsons v. Hall***, 184 Tenn. 363, 199 S.W.2d 99, 101 (Tenn. 1947).

When presented with a patent ambiguity where extrinsic evidence is not permissible, the courts simply turn to the other rules of legal construction to interpret the contract, as noted in ***Coble***:

> First and most important is the primary rule that the intent of the parties must prevail. Second, the courts will construe the writing so as to avoid the conflict if possible. Third, if the provisions are so repugnant that they cannot stand together, the first shall be given effect and the latter rejected. Fourth, written or typewritten terms with control printed parts of an agreement where there is an apparent inconsistency. Fifth, doubtful language in a contract should be interpreted most strongly against the party who drew or prepared it. This last rule is to be applied, however, only where other rules of construction fail to give certainty to the written expression.

Coble, 627 S.W.2d at 363 (citations omitted).

C. *Under Tennessee's Parole Evidence Rule, BellSouth may not introduce extrinsic evidence to aid any interpretation of the contract.*

In this proceeding, the Tennessee Parole Evidence Rule excludes the introduction of extrinsic evidence to explain the term "Local Traffic" as used in the agreement. First, the term "Local Traffic" is adequately defined, and therefore, not ambiguous. There is nothing within the four corners of the contract that would remotely suggest that local calls to ISPs are treaded differently from other types of local phone calls. Moreover, there is nothing within the four corners of the contract that would suggest that the word "terminates" is unclear or ambiguous. BellSouth is attempting to create an ambiguity in the contract by interjecting an issue concerning ISPs that is not addressed in the contract.

BellSouth argues that there is some ambiguity in the usage of the word "terminate" and therefore extrinsic evidence is required in order to give meaning to the word as used in the contract. However, as noted above, because a word has more than one meaning does not make this usage in the contract ambiguous. Rather, the court looks to usage of the word in the context of the contract to determine its meaning. Only when the language can be fairly construed in more than one way is there an ambiguity. Rather than argue that the word "terminates" can be more clearly defined by examining extrinsic evidence, BellSouth argues for an alternative interpretation of the word, as a matter of law. This position further demonstrates that the issue before the TRA is one of legal construction and, consistent with Tennessee's parol evidence rule, there is no need to consider extrinsic evidence in this regard.

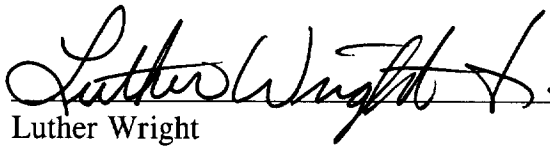
Alternatively, even if there were an ambiguity in the contract (which there clearly is not) BellSouth's argument is that the use of the word "terminates" is uncertain, or somehow deficient. By definition, BellSouth has argued that the contract contains a "patent ambiguity." Under Tennessee law, the parole evidence rule bars the introduction of extrinsic evidence to correct

a patent ambiguity. Rather, a court faced with a patent ambiguity when interpreting a contract looks to the other rules of contract construction as noted above.

Conclusion

For these reasons, Hyperion's Motion to Strike Testimony concerning whether the term "Local Traffic" as used in the agreement includes calls to ISPs should be granted.

Respectfully submitted,



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