BEFORE THE
TENNESSEE REGULATORY AUTHORITY

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" Provisions of the Parties' Interconnection Agreement	DOCKET NO. 98-00530

POST-HEARING BRIEF

OF

AVR OF TENNESSEE, L.P., D/B/A HYPERION OF TENNESSEE, L.P.

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INTRODUCTION

AVR of Tennessee, L.P., d/b/a Hyperion of Tennessee, L.P. ("Hyperion"), by its counsel, hereby submits its Post-Hearing Brief in this matter. This proceeding arises out of a dispute between Hyperion and BellSouth Telecommunications, Inc. ("BellSouth") over the terms of an Interconnection Agreement (the "Agreement") that was effective as of April 1, 1997.[1]

The dispute addresses Hyperion's right to amend the Agreement to incorporate the reciprocal compensation provisions of any other interconnection agreement. One basis to amend the Agreement is found in Section XIX, in what is termed the "Most Favored Nations" ("MFN") clause. That clause permits Hyperion to incorporate, among other enumerated provisions, the "local interconnection service"– which by BellSouth's own admission includes reciprocal compensation[2] – of any other BellSouth interconnection agreement if the terms of that agreement are materially different than those in the Hyperion Agreement. The other basis to amend the Agreement is found in Section IV.C. That section permits Hyperion to adopt the reciprocal compensation provisions of any other agreement whenever Hyperion is terminating 3 million minutes per month more than BellSouth.

Hyperion sought to amend the Agreement under both sections to incorporate the reciprocal compensation provisions from the separate agreement that BellSouth had entered into with KMC Telecom, Inc. ("KMC"): First under the MFN clause and second based on the fact that the traffic it terminated from BellSouth exceeded the minimum threshold. BellSouth refused for what Hyperion contends are wholly unsupported grounds.

This case varies from prior decisions of the Authority on this issue only in that it involves, first, Hyperion's right to incorporate the reciprocal compensation terms of another agreement and, second, only then seeking payment under the terms of that amended agreement.

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[1] *See* Agreement Between BellSouth Telecommunications, Inc. and Hyperion of Tennessee, LP, effective April 1, 1997, as amended on April 28, 1999 and June 2, 1999, approved by the Tennessee Regulatory Authority (the "Authority") on April 28, 1997, Docket No. 97-00983. The Agreement has been amended twice in ways that are not material to this case.

[2] *See, infra*, p. 6, n. 7.

Nevertheless, it is nothing more than the latest in a seemingly endless string of cases in which BellSouth has refused to comply with its legal and contractual obligations to compensate CLECs for calls to Internet service providers ("ISPs") even in the face of adverse decisions from five state commissions in its service territory that have decided the issue, including this Authority.[3]

One basis for a decision requiring reciprocal compensation is the Agreement's MFN clause, which could not be more explicit. Whenever BellSouth enters into an agreement with another CLEC on terms that are materially different from those available to Hyperion, BellSouth is deemed to have offered those very same terms to Hyperion. In this case, Hyperion learned that the interconnection agreement between BellSouth and KMC (the "KMC Agreement") contained reciprocal compensation provisions that were materially different than those in the Hyperion Agreement. By letter dated March 13, 1998, Hyperion accepted BellSouth's deemed offer of those terms to Hyperion. BellSouth refused to permit Hyperion to amend the agreement under this section. BellSouth's view of the MFN clause essentially renders that provision meaningless as it relates to the parties' obligations to compensate each other for the exchange of local traffic, a result plainly at odds with the clear terms of the Agreement.

Alternatively, Hyperion sought to amend the Agreement under Section IV.C. BellSouth also refused to permit Hyperion to utilize this section and its stubborn refusal is perhaps even more problematic. BellSouth's position stems from its misguided view that calls to ISPs are not considered to be local for reciprocal compensation purposes. Yet, BellSouth can not point to a single provision of the Agreement which excludes ISP traffic from any aspect of the parties' relationship and it runs completely counter to this Authority's decision in the *Brooks Fiber* case[4]

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[3] BellSouth has appealed each of these rulings. Recently, commissions in South Carolina and Louisiana declined to award reciprocal compensation for ISP traffic. As we set forth below, those cases are distinguishable on their facts and law from this case.

[4] On September 30, 1999, the United States District Court for the Middle District of Tennessee denied BellSouth's motion to stay the Authority's Brooks Fiber decision pending ultimate consideration of BellSouth's appeal. The District Court concluded that BellSouth has little likelihood of success on the merits and that its staunch refusal to pay reciprocal compensation for ISP calls harmed the public interest and was severely anti-competitive. A copy of the Order of the District Court may be

and the FCC's long-standing treatment of ISP traffic as local. Under the unambiguous terms of the Agreement, as well as the unequivocal evidence of the parties' intent, Hyperion is entitled to include ISP traffic in determining whether it has met the minimum threshold. The evidence demonstrates that Hyperion met this threshold and, therefore, it had the absolute right to incorporate the reciprocal compensation provisions of the KMC Agreement when that requirement was met.

Hyperion contends that BellSouth is wrong on both counts and that Hyperion should have been permitted to amend the Agreement as early as March 13, 1998, when it accepted BellSouth's "deemed offer", but certainly no later than April 1, 1998, when it met the required threshold. We request the Authority to direct BellSouth to amend the Agreement to incorporate the reciprocal compensation provisions of the KMC Agreement and to compensate Hyperion for transporting and terminating all traffic, including traffic to ISPs, retroactive to the date the Agreement is amended.

THE EVIDENCE

Hyperion is a diversified telecommunications company that provides a broad range of telecommunications services, including local exchange services to consumers in Tennessee. (Martin Direct at 3, and Tr. at 20-21).[5] BellSouth and Hyperion are authorized by this Authority to provide local exchange service in the State of Tennessee. (Tr. at 21). Under the Telecommunications Act of 1996 (the "Act") and Tenn. Code Ann. §65-4-124, Hyperion and BellSouth entered into the Agreement to facilitate the interconnection of their networks to permit the transportation and termination of local traffic exchanged between them. (Martin Direct at 5). Hyperion targets all businesses, some of whom happen to be ISPs; Hyperion does not give its services away to ISPs at little or no cost and it does not have any agreement to share reciprocal compensation revenues with any ISPs. (Martin Rebuttal at 6-7; Tr. at 26). Hyperion sells its

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found in the Supplemental Exhibit Book accompanying this brief.

[5] David Martin is the regional vice president for Hyperion's parent company, Hyperion Telecommunications Inc.

services to ISPs out of the same local tariffs, and at the same rates that it sells its local services to other businesses. (*Id.*)

Mr. Martin was the principal negotiator of the Agreement for Hyperion, however, as he testified, and BellSouth agreed, the Agreement was not negotiated in the traditional sense. (Martin Direct at 5; Tr. at 21). Instead, in accordance with Section 252(i) of the Act, Hyperion elected to "opt in" to a previously approved interconnection agreement between BellSouth and ICG Telecom Group, Inc. ("ICG"). (Tr. at 21, 81). Consequently, many issues were never discussed by the parties. The parties concede that they did not discuss their respective views of ISP traffic or the interplay between Sections IV.C. and XIX. (Tr. at 33, 34, 96).

At the time the Agreement was entered into, Hyperion understood that based on the FCC's long-standing treatment of calls to ISPs as local, such calls were within the definition of "local traffic" in the Agreement. (Martin Direct at 11). In contrast, BellSouth contends that it held a different view of calls to ISPs. BellSouth claims that calls to ISPs do not terminate at the ISP and, as a result, always were considered to be interstate. (Hendrix Direct at 8-9; Tr. at 83). However, in April 1997, when the Agreement was executed, BellSouth was aware that several CLECs were contending that calls to ISP's were eligible for reciprocal compensation, and that every state commission considering the issue had adopted the CLEC view. (Tr. at 83).

Once their networks were interconnected, BellSouth's customers could reach Hyperion's, and vice versa. (Tr. at 21). Under the Agreement, if a BellSouth end-user places a call to a Hyperion customer, including an ISP customer, Hyperion is required to terminate the traffic to the Hyperion customer. (Martin Rebuttal at 4). Hyperion's facilities are used by BellSouth's customers for as long as they remain connected to the Hyperion customer, even if that customer is an ISP. (*Id.*). If Hyperion were not providing these services, BellSouth or someone else would have to transport and terminate this traffic. (*Id.*). The payment of reciprocal compensation between carriers reflects the fact that the originating carrier is making use of the terminating carrier's facilities rather than its own facilities. (*Id.*)

Initially, the Agreement did not provide for the parties to compensate each other for the exchange, transport and termination of traffic; instead, it provided for a "bill-and-keep" arrangement. (Agreement, Section IV.C). The Agreement includes two means by which it can be amended to incorporate the reciprocal compensation provisions of a separate agreement. (Martin Direct at 5-7). One method is found in Section XIX. Under that section, Hyperion was given the option of adopting materially different terms from any other interconnection agreement whenever BellSouth enters into an agreement "which provides for any of the arrangements covered by this Agreement upon rates, terms or conditions that differ in any material respect from the rates, terms and conditions for such arrangements set forth in this Agreement ("Other Terms"). (Agreement, Section XIX(B); Jt. Stip., ¶¶ 23, 24).[6] In that event, then BellSouth "shall be deemed thereby to have offered such arrangements to Hyperion upon such Other Terms, which Hyperion may accept as provided in Section XIX.E." (*Id.*). In that regard, Section XIX.E. provides that "Hyperion *in its sole discretion*, may accept such offer . . . by accepting the Other Terms that directly relate to any of the following as a whole: . . . (a) any local interconnection service . . .." (*Id.*; emphasis added). BellSouth admits that the term "Local Interconnection Service", as it is used in the Agreement, is quite broad and covers all aspects of local interconnection, including reciprocal compensation. (Tr. at 90).[7]

The other method for amending the Agreement is found in Section IV.C. That section states that once "the difference in minutes of use for terminating local traffic exceeds three million (3,000,000) minutes per state on a monthly basis," then Hyperion became entitled to "elect the terms of any compensation arrangement for local interconnection then in effect

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[6] "Jt. Stip." refers to the Joint Stipulation of Undisputed Facts, Exhibit 1.

[7] The parties' obligations to compensate each other are found in Section IV of the Agreement, which is titled "Local Interconnection". Mr. Hendrix agreed that the notion of "Local Interconnection Service" as it is used in Section XIX included all of the obligations set out in Section IV as well as services discussed in several attachments. Plainly, then, Mr. Hendrix agrees that the parties reciprocal compensation obligations are included within "Local Interconnection Services".

between BellSouth and any other telecommunications carrier . . .." (Id.). As BellSouth admits, this provision was added for the benefit of CLECs because there was a concern that the balance of terminating traffic would favor BellSouth. (Hendrix Rebuttal at 3; Tr. at 91). This did not occur here; instead, Hyperion terminated more traffic than BellSouth. (Ex. 1, Jt. Stip. ¶¶2-21).

By letter dated March 13, 1998, Hyperion notified BellSouth that it accepted the "deemed offer" of the reciprocal compensation provisions of the KMC Agreement. (Martin Direct at 8; Jt. Stip., ¶ 28 and Ex. A thereto). BellSouth refused to permit Hyperion to amend the Agreement under that Section, arguing that the MFN clause did not apply to reciprocal compensation. (Martin Direct at 9; Jt. Stip., ¶ 29 and Ex. B thereto). Instead, BellSouth argued that Hyperion could only amend the Agreement under Section IV. (Hendrix Direct at 3-4).

Hyperion disagreed but, to preserve its rights under all applicable provisions, advised BellSouth that it would amend the Agreement under either Section IV or Section XIX. (Complaint, Ex. 6). BellSouth refused Hyperion's request to amend under that Section, as well, arguing that the provisions of Section IV.C. are not available because Hyperion had not met the three million (3,000,000) minute threshold. BellSouth's position is predicated on its view that minutes attributable to ISP traffic cannot be counted towards the total since, according to BellSouth, they do not qualify as "local traffic." (Hendrix Rebuttal at 5-6).

There is no support for BellSouth's position in the record or in applicable law. "Local Traffic" is defined in the Hyperion Agreement as, "any telephone call that originates in one exchange and terminates in either the same exchange, or an associated Extended Area Service ("EAS") exchange." (Agreement, Section I.SS at 5; Jt. Stip., ¶ 26). This definition does not distinguish between calls to ISPs and other calls that fit the definition and, as the evidence demonstrates, there was no reason to distinguish calls to ISPs because, for all other purposes, calls to ISPs are considered to be local.

As explained by Mr. Martin, ISP calls are viewed as terminating at the ISP for regulatory purposes, even if they are not viewed as terminating at the ISP by the FCC for jurisdictional purposes. (Martin Rebuttal at 2). For example, when Hyperion receives a call from BellSouth

and delivers the call to the telephone exchange service of the ISP bearing the called telephone number, the call is "answered" by the ISP and answer supervision is returned. (*Id.*). By long standing industry practice, the call is considered to have terminated at the ISP. (*Id.*)

Moreover, BellSouth has itself consistently treated ISP-bound traffic as local traffic: (1) BellSouth customers access their ISPs by dialing a seven-digit local number (Tr. at 96); (2) BellSouth charges its own ISP customers local rates pursuant to BellSouth's tariffs (Martin Direct at 12); (3) BellSouth provides services to ISP customers pursuant to its local exchange tariff (Tr. at 94-95); (4) when a BellSouth local exchange service customer places a call to an ISP in the same exchange as the caller's, BellSouth rates and bills such customer for a local call pursuant to the terms of BellSouth's local tariffs. (Martin Direct at 12); and (5) BellSouth treats the revenues associated with local exchange traffic to its ISP customers as local for purposes of separations and ARMIS reports (Tr. at 96-97).

Moreover, as further evidence of BellSouth's true understanding of the nature of the ISP traffic, there is no requirement in the Agreement for either party to track, separate, and exclude ISP-bound traffic for any purpose, let alone from Hyperion's local billing records. (Martin Direct at 5). BellSouth and Hyperion exchange traffic to ISPs pursuant to the Agreement, but there is no compensation provision for ISP-bound traffic in the Agreement other than the reciprocal compensation provisions.

More critically, BellSouth's revisionist view of ISP traffic cannot be reconciled with, and is undercut entirely by, its own earlier and contemporaneous positions. For example, in 1989 BellSouth argued to the Florida Commission that calls to ISPs should be viewed as local. (Tr. at 99; JA, Tab 2A). Similarly, in August 1997, five months *after* the Agreement was signed, BellSouth sent a memo to all CLECs which referred – no less than three times – to traffic as "terminating" at ISPs. (Ex. 6, Bush Memorandum; Tr. at 101).[8] Finally, in his own pre-filed testimony, Mr. Hendrix twice referred to traffic as "terminating at ISPs." (Hendrix Direct at 11).

[8] The Bush Memorandum uses the term "ESP" for enhanced service providers. ISPs are a subset of ESPs.

He changed this testimony at the hearing but his reason for the change – that his earlier testimony simply was "sloppy writing" (Tr. at 77) – entirely lacks credibility.

ARGUMENT

I. THE EXPLICIT TERMS OF THE AGREEMENT ALLOW HYPERION TO ADOPT THE MORE FAVORABLE TERMS OF ANY OTHER BELLSOUTH INTERCONNECTION AGREEMENT

The explicit provisions of Sections XIX and IV.C allow Hyperion to adopt the reciprocal compensation provisions of any other BellSouth interconnection agreement. The only precondition to invoking Section IV.C is that the difference in terminating minutes exceed the three million (3,000,000) minute threshold. By BellSouth's own numbers, the aggregate number of minutes terminated by Hyperion exceeded the threshold as early as April 1998. (Ex. 1, Jt. Stip. at ¶¶ 14-17). While BellSouth cannot and does not deny these numbers, it does not count ISP-bound traffic and therefore claims the threshold has not been met. That is not a sustainable position given this Authority's position in the *Brooks Fiber* matter, the FCC's recent *Declaratory Ruling* on the subject of compensation for ISP traffic and the decisions of four other state commissions in BellSouth's service territory.

The only precondition to Hyperion exercising its rights under the MFN clause (Section XIX) is that the terms and conditions of some other BellSouth agreement differ in material respect from the Hyperion Agreement. It is undisputed that the KMC Agreement contains materially different and more favorable reciprocal compensation terms than the Hyperion Agreement. There are no limitations or qualifications set forth in Section XIX and no suggestion in either Section XIX or IV.C. that one operates to the exclusion of the other. Under Tennessee law:

> The cardinal rule for interpretation of a contract is to ascertain the intention of the parties in consideration of the instrument as a whole. (citations omitted). In construing contracts, the words expressing the parties' intentions should be given their usual, nature and ordinary meaning and neither party is to be favored in their construction. (citations omitted).

> In the absence of fraud or mistake, a contract must be interpreted and enforced as written, even though it contains terms which may be thought harsh and unjust. (citations omitted).[9]

Mere reference to the plain language in Sections IV.C and XIX leads to the inevitable conclusion that Hyperion has an unfettered right under either section to adopt the reciprocal compensation terms of the KMC Agreement. Nevertheless, BellSouth claims that the only way to reconcile Section IV.C and XIX is to interpret Section IV.C as creating an implied exception to Section XIX. In other words, because IV.C requires a three million minute threshold before Hyperion can adopt the reciprocal compensation provisions of another agreement, Section XIX cannot be read to allow the adoption of such provisions without this condition having been met. However, BellSouth's interpretation only make sense by reading into Section XIX a limitation which does not exist.

The language of Section XIX is clear: it provides that whenever BellSouth enters into an agreement with another carrier which contains "rates, terms or conditions" that differ in any material respect from the rates, terms and conditions in the Hyperion Agreement, then BellSouth shall be deemed to have offered those arrangements to Hyperion. Nowhere in Section XIX does it state, in words or substance, "except with respect to reciprocal compensation provisions" or "except as provided in Section IV.C."[10] Thus, the plain and ordinary meaning of the language in Section XIX is that Hyperion, *in its sole discretion*, may accept the deemed offer of more favorable terms from any other agreement – including the reciprocal compensation provisions of any other agreement.

BellSouth's argument is further undercut because Sections IV.C and XIX.B are completely harmonious. Both sections benefit Hyperion. Specifically, Section IV.C protects

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[9] *APAC-Tennessee, Inc., et al. v. J.M. Humphries Construction Co.*, 732 S.W.2d 601, 604 (Tenn. Ct. App. 1986).

[10] The parties certainly knew how to create exceptions when they wanted to. *See, e.g.*, Agreement, Section IV.C. ("With the exception of the local traffic specifically identified in Section IV.H., for purposes of this Agreement, ...")

Hyperion against the prospect of having to pay large sums of reciprocal compensation to BellSouth in the event the traffic imbalance favors BellSouth. At the same time, in the event the imbalance favors Hyperion – which it did – and the required threshold is met, then "Hyperion may elect the terms of any compensation arrangement for local interconnection then in effect between BellSouth and any other telecommunications carrier."[11]

Similarly, Section XIX.B grants Hyperion the unconditional right to adopt more favorable terms and conditions of another, entirely separate, interconnection agreement by accepting BellSouth's deemed offer of those very same terms and conditions. Thus, Section XIX.B is a one-way street that grants Hyperion, "in its sole discretion," the right to accept BellSouth's deemed offer of specified sections of other BellSouth interconnection agreements.[12]

Contrary to BellSouth's arguments, it is not inherently contradictory to allow Hyperion to incorporate reciprocal compensation terms using Section XIX.B instead of Section IV.C. Notwithstanding Mr. Hendrix's views to the contrary[13], under established Tennessee law, Hyperion, as the beneficiary of both contract clauses, has the right to choose between those clauses.[14] Thus, Hyperion may choose to waive any protections available under Section IV.C by invoking Section XIX.B, whenever it believes, in its sole discretion, that BellSouth has entered into an agreement with any other carrier that contains reciprocal compensation rates, terms and conditions that are materially different from those in the Hyperion Agreement. These sections of the Hyperion Agreement offer Hyperion entirely different benefits and may be read together in a manner that does justice to both. Therefore, Section IV may not be said to supersede Section XIX.

Finally, the fundamental purpose of Section XIX is to give Hyperion the right to replace provisions of its Agreement by substituting terms, conditions and rates from other BellSouth

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[11] Hyperion Agreement, §IV.C .

[12] *See* Hyperion Agreement, §§XIX.B & XIX.E.

[13] Tr. at 91 - 92.

[14] *Bartlett v. Phillips-Cary Mfg. Co.*, 216 Tenn. 323, 392 SW2d 325 (1965)(provisions of contract must be read together to do justice to the overriding intent of the contract).

agreements. Whenever Hyperion, or any other CLEC, exercises its rights under an MFN clause, which are standard in the industry, it *always* "renders null and void" other provisions of the existing interconnection agreement. There would be no point in an MFN clause that could not do so. Thus, BellSouth's argument that amending the Agreement under Section XIX renders "null and void"[15] the threshold requirement of Section IV.C. is materially flawed and should be rejected. Moreover, both Sections IV.C and XIX are consistent with the goal of the Act and Tennessee law to promote non-discriminatory offering of services to CLECs. Allowing CLECs to select provisions freely from materially different interconnection agreements furthers that objective.

II. THE AGREEMENT UNAMBIGUOUSLY PROVIDES THAT CALLS TO ISPS SHOULD BE TREATED AS LOCAL TRAFFIC AND SHOULD BE COUNTED WHEN DETERMINING WHETHER THE REQUIRED THRESHOLD OF TERMINATING TRAFFIC HAS BEEN MET

Assuming, for these purposes only, that Hyperion can adopt the reciprocal compensation provisions of the KMC Agreement only if it meets the terminating traffic threshold in Section IV.C., then the Authority must decide whether Hyperion met that threshold in April 1998. This requires the Authority to determine whether calls to ISPs fit within the definition of Local Traffic and, therefore, should be counted in ascertaining whether the threshold was met. By the same token, if the Authority permits Hyperion to amend the Agreement under Section XIX, it still must decide whether calls to ISPs are eligible for reciprocal compensation under the Agreement, as amended, for the purpose of determining the extent of BellSouth's payment obligation. Otherwise, Hyperion would be forced to file a separate action to enforce the terms of the amended agreement. The Authority answered this question in the *Brooks Fiber* case and there is no reason to alter the essence, or the conclusion, of that decision here.

A. "Local Traffic" and "Termination" Are Unambiguous Terms In the Agreement And In the Telecommunications Industry And, As Those Terms Are Used, Calls To ISPs Are Treated As Local Traffic

[15] Hendrix Direct at 6.

In *Brooks Fiber*, 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 (the "Brooks Fiber Agreement"), included local calls to Internet Service Providers ("ISPs"). The Authority found that words such 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.[16]

The present proceeding raises, in part, these same questions. The Authority is being asked to interpret the meaning of "Local Traffic" in the Hyperion Agreement. Here again, BellSouth disputes the meaning of such terms as "Local Traffic" and "terminating" and offers testimony concerning the parties' intentions and motivations during the contract negotiations as to whether ISP traffic was intended to fit within those definitions.[17] BellSouth utterly 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 the term in the Brooks Fiber Agreement. Similarly, the concept of "termination" as it is used in this Agreement is the same as it was used in the Brooks Fiber Agreement. Surely BellSouth will not argue that the term "Local Traffic" and the concept of "termination" means one thing in the Brooks Fiber Agreement and something entirely different here.

Indeed, the myriad of factors which led the Authority to conclude in *Brooks Fiber* that ISP traffic should be treated as local are present here as well. Traffic to ISPs has been viewed and treated as local for virtually all purposes for almost two decades. BellSouth still treats ISP calls as local. BellSouth customers still access their ISPs by making a local call. BellSouth still

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[16] *See Cookeville's Gynecology & Obstetrics P.C. v. Southeastern Data Systems Inc.*, 884 S.W.2d, 458, 462 (Tenn. App. 1994).

[17] *See, e.g.*, Hendrix Direct at 6-10; Halprin Direct at 2-7; Hendrix Rebuttal at 6-10; Halprin Rebuttal at 4-11; Tr. at 83.

provides service to ISPs pursuant to its local tariffs. BellSouth still rates and bills the call to an ISP as a local call, and it still treats the revenues from the calls as local for purposes of interstate and ARMIS reports. (*See* Tr. at 94-97). Further, when a call is place by a BellSouth end-user to an ISP served by Hyperion, answer supervision is returned, indicating a completed connection between the ISP and the end user. (Martin Rebuttal at 2). Traffic to ISPs is treated no differently than traffic to any other local exchange end user.

In short, the issue before the Authority now is the same issue that was before the Authority in *Brooks Fiber*. Hyperion contends that the Authority reached the right result in that case and there is no sustainable basis to deviate from it here. To be sure, *Brooks Fiber* was decided as a matter of law, and here the parties presented evidence, but that is a distinction without a difference because the evidence here overwhelmingly lends support for the decision the Authority reached in *Brooks Fiber*. Indeed, BellSouth presented no evidence whatever that should cause the Authority to reconsider the decision it reached in *Brooks Fiber*.

B. Even If the Agreement is Ambiguous, The Extrinsic Evidence Demonstrates That ISP Traffic Should Be Treated As Local Traffic For Purposes of Determining The Parties' Reciprocal Compensation Obligations

It is a well established under Tennessee law that, "parol evidence is not admissible to interpret a contract when there is no ambiguity on the face of the contract." [18] However, if the language of the contract is not free of ambiguity, extrinsic evidence, such as evidence of the interpretation of the parties themselves have given the contract, may be received to determine the intention of the parties.[19]

Although it is Hyperion's contention that the Agreement is unambiguous, if this Authority determines otherwise and looks beyond the four corners of the Agreement, the record and the extrinsic evidence clearly demonstrate that the parties agreed to include ISP traffic within

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[18] *Union Oil Co. of California v. Service Oil Co., Inc., 766 F.2d 224, 227 (6th Cir. 1985).*

[19] *GRW Enterprises, Inc. v. Davis*, 797 SW2d 606, 610 (Tenn. Ct. App. 1990).

their reciprocal compensation obligations. An ambiguous contract provision must be interpreted in light of the nature of the contract, equity, usages, and the conduct of the parties before and after the formation of the contract.[20]

Whether viewed for the purpose of determining when Hyperion met the minimum threshold requirement necessary to amend the Agreement or for the purpose of determining how much compensation is due, the extrinsic evidence proves conclusively that ISP-bound traffic is, or should be treated as, local traffic. Hyperion presented substantial evidence demonstrating that, at the time the Agreement was signed, and continuing today, BellSouth treats ISP-bound traffic as local in all other respects.[21] Hyperion also presented evidence indicating that, in a 1989 proceeding before the Florida Public Service Commission ("Florida PSC"), BellSouth argued that ISP traffic should be treated as local traffic, a view the Florida PSC adopted.[22] In that case, BellSouth's witness testified that:

> connections to the local exchange network for the purpose of providing an information service should be treated like any other local exchange service. . . . .[C]alls should continue to be viewed as local exchange traffic terminating at the ESP's location. Connectivity to a point out of state through an ESP should not contaminate the local exchange.[23]

The position BellSouth took in 1989 in Florida was fatal to the reciprocal compensation arguments it made to the Florida PSC in 1998[24] and it is fatal to the position BellSouth articulates

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[20] *Pinson & Assoc. Insurance Agency, Inc. v. Kreal*, 800 SW2d 486 (Tenn. Ct. App. 1990).

[21] *See, supra*, p. 7.

[22] *Investigation Into the Statewide Offering of Access to the Local Network for Purposes of Providing Information Services*, Docket No. 88-0423-TP, Order No. 21815 (Sept. 5, 1989, Fla. P.S.C.) (JA, Tab 2A).

[23] *Id.*at 24-25.

[24] *Complaint of WorldCom Technologies, Inc. Against BellSouth Telecommunication, Inc. for Breach of Terms of Florida Partial Interconnection Agreement Under Section 251 and 252 of the Telecommunications Act of 1996 and Request for Relief,* Docket No. 971478-TP, Final Order Resolving Complaints, at 14, (Fla. P.S.C. Sept. 15, 1998), *appeal pending*, No.4:98 CV 352-WS (N.D. Fla.) (JA,

here. While BellSouth now contends that the communications beyond the ISP prove that it is interstate, in front of the Florida PSC, BellSouth argued just the opposite, that the traffic was local, dismissing those same communications beyond the ISP as unimportant. BellSouth's success in having ISP traffic deemed local as a matter of law in Florida should apply equally in this proceeding.

Adding to that mountain of evidence, on several occasions since the Agreement was signed, BellSouth has referred to ISP traffic as terminating at the ISP – again, statements that directly contradict the arguments it makes to this Authority. For example, there are three references to traffic 'terminating at an ISP' in the August 1997 Bush Memorandum. (Tr. at 257, Ex. 6). Mr. Hendrix's feeble efforts to qualify or retract these statements should be rejected. The memo was prepared by a senior BellSouth executive intimately familiar with the telecommunications industry. (Tr. at 103). It was reviewed by at least five mid to senior level executives, including Mr. Hendrix, before it went out and not one corrected the language (Tr. at 103-104). Finally, no subsequent effort was made to send out a similar memo to the CLEC community further clarifying BellSouth's position. (Tr. at 106). In the face of this evidence, Mr. Hendrix offers only one explanation: that every single one of the individuals involved in sending out the Bush Memo simply was "sloppy." (Tr. at 109, Hendrix). As with the effort to explain the change to his own testimony, Mr. Hendrix's explanation wholly lacks credibility. The words of the Bush Memorandum should be given their clear and unambiguous meaning – BellSouth believed in 1997 that calls terminated at the ISP and the opposite position it takes today is one of convenience, nothing more.[25]

Finally, the FCC considered much of the background information relevant to this case, and has provided state commissions with a roadmap of key extrinsic evidence to consider if necessary to resolve this issue. Notably, the evidence Hyperion introduced concerning

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Tab 2B).

[25] *See, also, supra*, p. 8 for a discussion of the statements in Mr. Hendrix's pre-filed testimony concerning the fact that traffic terminates at ISPs.

BellSouth's treatment of ISP calls as local with respect to customer access, billing, and revenue reporting separations is precisely the type of evidence the FCC suggested was appropriate for state commissions to consider when determining whether the parties to an interconnection agreement agreed to treat ISP traffic as local and to include that traffic in their reciprocal compensation obligations.[26] The clear implication of the FCC's statements is that the parties to an interconnection agreement can agree to treat ISP traffic as local. In this case, Hyperion submits that, if the Authority resorts to extrinsic evidence, the evidence demonstrates that the parties agreed to treat ISP traffic as local. Thus, it was proper to include ISP traffic in calculating the differential in terminating minutes and, therefore, it was wrong of BellSouth to refuse to amend the Agreement once that threshold was met in April 1998.[27]

III. AS A MATTER OF LAW, ISP-BOUND TRAFFIC QUALIFIES AS LOCAL TRAFFIC, AND IS ELIGIBLE FOR RECIPROCAL COMPENSATION UNDER THE AGREEMENT

A. In The *Declaratory Ruling*, the FCC Strongly Suggested that ISP Traffic Should Be Eligible For Reciprocal Compensation

In its *Declaratory Ruling*, the FCC addressed specifically the question of whether calls to ISPs are eligible for reciprocal compensation under the terms of interconnection agreements such as the one at issue here. The FCC concluded that such "traffic is jurisdictionally mixed", and

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[26] *Declaratory Ruling* at ¶ 24. Among the factors the FCC identified to resolve any perceived ambiguity in an agreement are: (1) negotiation of the agreements in the context of the FCC's longstanding policy of treating this traffic as local, and the conduct of the parties pursuant to those agreements, (2) whether incumbent LECs serving ESPs (including ISPs) have done so out of intrastate or interstate tariffs, (3) whether revenues associated with those services were counted as intrastate or interstate revenues, (4) whether there is evidence that incumbent LECs or CLECs made any effort to meter this traffic or otherwise segregate it from local traffic, particularly for the purpose of billing one another for reciprocal compensation, (5) whether in jurisdictions where incumbent LECs bill their end users by message units, incumbent LECs have included calls to ISPs in local telephone charges, (6) whether, if ISP traffic is not treated as local and subject to reciprocal compensation, incumbent LECs and CLECs should be compensated for this traffic. *Id.*

[27] Similarly, if the Authority permits Hyperion to amend the Agreement under Section XIX, then it is apparent from the evidence that ISP traffic should be treated as local for the payment of reciprocal compensation, as well.

that it had jurisdiction because it was "largely interstate."[28] At the very same time, the FCC noted that ISP traffic historically had been treated as local by all parties and, further, in the absence of any federal rules directly addressing inter-carrier compensation for such traffic, it "[found] no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic."[29] In its analysis, the FCC observed that since 1983, ISPs, as a subset of enhanced service providers, had been exempted from the payment of interstate access charges.[30] As a result, ISPs are treated as end-users who purchase their connections to the telephone network through *intra*state tariffs, not *inter*state tariffs,[31] a fact with which BellSouth agrees. (Tr. at 94-95, Hendrix). ISPs pay local rates for services and the expenses and revenues attributed to ISPs have been treated and characterized by incumbent LECs, such as BellSouth, as local.[32] Thus, the FCC noted, *it "discharge[d] its interstate regulatory obligations by treating ISP-bound traffic as though it were local."*[33]

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[28] BellSouth has seized on these two words from the *Declaratory Ruling* as dispositive. That is misguided. For the myriad of reasons set forth in the balance of its decision, the FCC observed that "nothing in this Declaratory Order precludes state commissions from determining, pursuant to contractual principles or other legal or equitable considerations, that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the rulemaking we initiate below." *Declaratory Ruling* at ¶ 27.

[29] *Declaratory Ruling* at ¶ 21.

[30] Interestingly, upon examining the 1983 order that gave rise to the access charge exemption, it becomes apparent that enhanced service providers had been using local exchange services for some extended period of time *before* the FCC exempted them from the access charge rules. Thus, the treatment of ESP/ISP traffic as local predates the 1983 order so heavily relied on by BellSouth. *See, e.g., In the matter of MTS and WATS Market Structure*, CC Docket No. 78-72, Phase I, Memorandum Opinion and Order, at ¶ 79 (rel. Aug. 22, 1983) ("enhanced service providers . . . obtain[] local exchange services [.]")

[31] *Declaratory Ruling* at ¶ 5.

[32] *Id.*; *See also*, Tr. at 96-97, Hendrix.

[33] *Declaratory Ruling*. at ¶ 5 (emphasis added); at ¶ 9 ("Moreover, the Commission has directed states to treat ISP traffic as if it were local, by permitting ISPs to purchase their [Public Switched Telephone Network] links through local business tariffs."); and at ¶ 23 ("Thus, although recognizing that it was interstate access, the Commission has treated ISP-bound traffic as though it were

The FCC also noted that, under the Act, when more than one carrier combines to transport and complete a call, compensation has been provided through either the access charge regime, or through reciprocal compensation. With respect to ISP-bound traffic, the FCC observed that there are no rules in place governing inter-carrier compensation arrangements. In the absence of any such rules, the FCC concluded that it was proper for the parties' interconnection agreements to treat ISP-bound traffic as local for reciprocal compensation purposes, and it was proper for the more than thirty state commissions that have decided the issue to date to require the payment of reciprocal compensation for such traffic.[34] Indeed, the FCC was quick to point out that, even though it had not yet adopted a rule governing compensation for ISP-bound traffic, "we note that ***our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic.***"[35]

B. Virtually All State Commissions Have Interpreted the FCC *Declaratory Ruling* to Require Reciprocal Compensation for ISP-Bound Traffic

Almost every state commission that has considered the issue since the *Declaratory Ruling* has held that reciprocal compensation is owed for ISP-bound traffic and has rejected the claims made here by BellSouth. Since the *Declaratory Ruling* was issued on February 26, 1999, incumbent carriers, including BellSouth, have stampeded to state commissions and federal courts to present the same arguments BellSouth submits here: that the FCC's *Declaratory Ruling* relieves them of their obligation to pay reciprocal compensation for local traffic to ISPs. The

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local.")

[34] *Id.* at ¶ 22.

[35] *Id.*. at ¶ 25 (emphasis added). BellSouth cannot be heard to challenge here the FCC's authority either to treat ISP-bound traffic as local or its recognition of the role of state commissions in regulating such traffic under sections 251 and 252 of the Act, key aspects of the *Declaratory Ruling*. BellSouth already has litigated and lost that issue. *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998). The United States Court of Appeals for the Eighth Circuit has held that the FCC properly discharged its responsibility by allowing ISPs to subscribe to local, as opposed to long distance, services thereby subjecting ISPs to state regulation as local telephone customers. *Id.* at 543.

argument has been rejected by nearly every regulatory and judicial body that has considered substantially similar reciprocal compensation language in interconnection agreements – fifteen states and five federal courts to date. Notable among these affirmations of reciprocal compensation for ISP traffic are decisions from the United States Courts of Appeals for the Seventh[36] and Ninth Circuits[37], United States District Courts in Oklahoma[38], Alabama, Michigan, and Oregon[39] and, in addition to commissions in the BellSouth states of Alabama and Florida, commissions in California, Colorado, Delaware, Hawaii, Indiana, Maryland, Minnesota, Missouri, Nevada, New York, Ohio, Oregon, Pennsylvania, Rhode Island and Washington.[40] In each instance, the court or regulatory body in question rejected the same arguments BellSouth asserts here.[41]

In its ruling, the Seventh Circuit affirmed the underlying decisions of the District Court for the Northern District of Illinois and the Illinois Commerce Commission ("ICC"), which had

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[36] *Illinois Bell Telephone Company v. WorldCom Technologies, Inc., et al.*, 179 F.3d 566 (7th Cir. June 18, 1999)(JA, Tab 10).

[37] *US West Communications v. MFS Intelenet, Inc. et al*, 1999 WL 799082 (9th Cir. October 8,1999).

[38] *Southwestern Bell Tel. Co. v. Brooks Fiber Communications, Inc. et al.*, Case No. 98-CV-468-K (J), Order (N. D. Ok. Oct. 1, 1999).

[39] The Alabama, Michigan and Oregon decisions are found at JA, Tabs 1A, 14, 21B.

[40] JA, Tabs 1, 2, 6, 7, 8, 9, 11, 12, 15, 16, 17, 19, 20, 21, 22, 23, and 24.

[41] But see, *Complaint of MCI WorldCom, Inc. against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts for breach of interconnection terms entered into under Sections 251 and 252 of the Telecommunications Act of 1996*, Order, D.T.E. 97-116-C (Mass. D.T.E., May 19, 1999) (JA, Tab 13)(vacating earlier decision that required reciprocal compensation and advising parties to negotiate appropriate compensation arrangements); *Petition of Global NAPS Inc. for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with Bell Atlantic-New Jersey, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Decision and Order, Docket No. TO98070426 (N.J. B.P.U., July 12, 1999) (JA, Tab 18), *reconsideration pending* (ISP-bound traffic is not subject to the reciprocal compensation provisions of Bell Atlantic's interconnection agreement with MFS Intelenet; the New Jersey Board grossly misread the FCC *Declaratory Ruling*, which obligates state commissions to adopt alternative compensation mechanisms for ISP-bound traffic if reciprocal compensation provisions in interconnection agreements do not apply).

found that reciprocal compensation was owed for calls to ISPs.[42] The Seventh Circuit found that, "[t]here is nothing in the FCC ruling on reciprocal compensation which would prohibit a call from being a local call for some, but not all, purposes," and it also noted that the ICC correctly considered such relevant factors as Ameritech's treatment of calls as local for billing and other purposes.[43]

C. Virtually Every State Commission in BellSouth's Territory to Have Considered The Issue Has Concluded That ISP-Bound Traffic is Eligible For Reciprocal Compensation

In addition to this Authority, state Commissions in Alabama, Florida, Georgia, Louisiana, North Carolina and South Carolina all have been asked to interpret similar provisions of inter-connection agreements, and in virtually every instance those Commissions have found that the interconnection agreements at issue call for the payment of reciprocal compensation for ISP-bound traffic for many of the reasons Hyperion articulates here.[44] In a recent decision the Florida PSC resolved a dispute between e.spire Communications, Inc. and BellSouth over the same issue presented in this case, *i.e.*, should ISP traffic be counted in determining whether e.spire had met the minimum threshold in its interconnection agreement with BellSouth such that it could incorporate the reciprocal compensation provisions of another agreement.[45] Acknowledging that

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[42] *Illinois Bell, supra,* 179 F.3d 566.

[43] *Id.* at 573. *See also, Electric Lightwave, Inc. v. US WEST Communications, Inc.*, Order No. 99-285 (Or. P.U.C., Apr. 26, 1999) at 6 (Commission considered the historical treatment of ISP-bound traffic as local, the negotiations between the parties, and the treatment of the traffic as local for billing and other purposes, and found that the *Declaratory Ruling* supported its conclusion that reciprocal compensation was owed for ISP traffic.) (JA, Tab 21.C.); *Petition for Arbitration of an Interconnection Agreement between Electric Lightwave, Inc. and GTE Northwest Incorporated Pursuant to 47 USC Section 252*, Arbitrator's Report and Decision, Docket No. UT-980370 at 10-11,(Wa. U.T.C., May 12, 1999)("the FCC's policy of treating ISP bound traffic as local for all purposes of interstate access charges leads to the equitable conclusion that it also should be treated as local for purposes of reciprocal compensation charges.") (JA, Tab 23A))

[44] JA, Tabs 1A-B, 2A-F, 3A-D, 4A-B, and 5A-B.

[45] *In re Request for Arbitration Concerning Complaint of American Communication Services of Jacksonville, Inc., d/b/a e.spire Communications, Inc. and ACSI Local Switched Services, Inc. d/b/a e.spire Communications, Inc. Against BellSouth Telecommunications, Inc. Regarding Reciprocal*

the FCC recently had considered the jurisdictional nature of ISP traffic, the Florida PSC concluded that:

> Upon consideration, we find that the evidence demonstrates that the two million minute differential for terminating local traffic in Florida did occur in March 1998. We agree with BellSouth that the evidence also shows that e.spire included traffic to ISPs in determining that this threshold had been met. *e.spire's inclusion of the ISP traffic in its calculation of the differential was, however, appropriate in view of our determination that the parties did not intend to exclude traffic to ISPs from the definition of "local traffic" with their agreement.*[46]

This is the same conclusion reached in February 1999 by the Georgia PSC, which interpreted the same agreement between e.spire and BellSouth.[47] In that case, the Georgia PSC affirmed its earlier ruling that ISP traffic should be treated as local traffic for the purposes of reciprocal compensation and, on such treatment, e.spire was entitled to be paid reciprocal compensation for all traffic, including ISP traffic, because it had met the minimum threshold set forth in the agreement. These decisions from Georgia and Florida mirrored a similar decision from the Alabama PSC, which had interpreted several agreements similar to the Agreement at issue here and determined unequivocally that the parties intended to include calls to ISPs within

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Compensation for Traffic Terminated to Internet Service Providers, Docket No. 981008-TP, Post-Hearing Decision (Apr. 6,1999), *reconsideration denied*, Order No. PSC-99-1453-FOF-TP (F.P.S.C., July 26, 1999) (JA, Tab 2C). In that case, e.spire had not sought to amend its agreement under the MFN clause of that agreement, so the only issue before the Florida PSC was whether ISP traffic should be included in calculating the minutes of terminating traffic.

[46] *Id.* at 13. In examining the intent of the parties, the Florida PSC found that, "while BellSouth witness Hendrix argued that BellSouth did not intend for ISP traffic to be subject to reciprocal compensation, the evidence does not support his assertions for several reasons:" (1) Mr. Hendrix conceded that BellSouth did not have the capability of tracking traffic to ISPs, (2) the CLEC could not distinguish on a call-by-call basis whether the call is an ISP call, and (3) Hendrix acknowledged that ISP traffic was not discussed during negotiations. *Id.* at 6-8.

[47] *Complaint of e-spire Communications, Inc. Against BellSouth Telecommunications, Inc.*, Order Affirming and Modifying the Hearing Officer's Decision, Docket No. 9281-U (G.P.S.C. Feb. 16, 1999).

the scope of their reciprocal compensation obligations.[48] The Alabama Commission concluded "that the industry custom and usage at that time dictated that ISP traffic be treated as local and, therefore, subject to reciprocal compensation."[49] Hyperion submits that this Authority should follow the example of the overwhelming majority of more than thirty states and seven Federal Courts – from both before and after the *Declaratory Ruling* – that have found that reciprocal compensation is owed for ISP-bound traffic.[50]

IV. THE EQUITIES WEIGH HEAVILY IN HYPERION'S FAVOR

If reciprocal compensation were not paid to the terminating LEC for transporting and terminating ISP-bound traffic, the carriers' costs would be uncompensated for the services it provides for the originating carrier's customer. BellSouth already has observed to the FCC that such an uncompensated use of its facilities was unconstitutional[51]; therefore, some compensation mechanism must apply. Under the Act and in the absence of access charges, that mechanism should be reciprocal compensation. This sort of equitable resolution was identified by the FCC

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[48] *Emergency Petition for ICG and ITC DeltaCom for Declaratory Ruling,* Docket 26619, (A.P.S.C March 4, 1999)(JA, Tab 1B), aff'd,, *BellSouth Telecommunications, Inc. v. ITC DeltaCom Communications, Inc., et al.*, Memorandum Opinion and Order, Civil Action Nos. 99-D-287-N, 99-D-747-N (M.D. Ala. Aug. 18, 1999)(JA, Tab 1A).

[49] *Alabama Decision.* at 25-26.

[50] Recently, Commissions in Louisiana and South Carolina decided that reciprocal compensation is not due for ISP traffic. The Louisiana decision involved an enforcement action on an entirely different contract and, to date, no written order has been entered. *KMC Telecom Inc. v. BellSouth Telecommunications, Inc.*, Docket No. U-23839 (La. P.S.C., Oct. 13, 1999). From the comments of the Commissioners, it appears that the case was decided on a very contract-specific basis and, as such, offers no guidance to the Authority as it considers the case brought by Hyperion. Similarly, the South Carolina PSC declined to order reciprocal compensation for ISP traffic in the context of an arbitration of a new agreement. *Petition of ITC^DeltaCom Communications, Inc. for Arbitration with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, Docket No. 199-259-C, Order No. 1999-690, Order on Arbitration (S.C. P.S.C., Oct 4, 1999). The South Carolina Commission indicated that it would revisit the issue once the FCC had issued its expected rules.

[51] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, FCC 96-325, ¶ 1105 (rel. Aug. 8, 1996).

in the *Declaratory Ruling* as one basis, among many, on which state commissions could conclude that reciprocal compensation was owed for ISP-bound traffic.[52]

Hyperion clearly provides a service to BellSouth and to BellSouth's customers by receiving calls from BellSouth's customers and delivering those calls to the customers' ISP that is served by Hyperion. In fact, if Hyperion did not provide this service, BellSouth or someone else would have to transport and terminate this traffic. Further, BellSouth avoids the costs of the services provided by Hyperion and Hyperion incurs costs in providing these services to BellSouth. It is absurd to suggest, as BellSouth does, that Hyperion would have voluntarily agreed to provide these valuable services at no charge to BellSouth.

V. CONCLUSION

Hyperion is entitled to adopt the reciprocal compensation provisions of the separate agreement between KMC Telecom Inc. and BellSouth. The evidence in this case indicates that Hyperion can amend the Agreement under either Section XIX or Section IV.C. Therefore, Hyperion respectfully requests that the Authority: enter an order (1) directing BellSouth to amend the Agreement to permit Hyperion to adopt the reciprocal compensation provisions of the KMC Agreement effective as of either March 13, 1998 (if the amendment is pursuant to Section XIX) or April 1, 1998 (if the amendment is pursuant to Section IV.C.); (2) ruling that reciprocal compensation must be paid for all Local Traffic, including ISP-bound traffic; (3) directing BellSouth to pay for reciprocal compensation, together with interest as permitted by the Agreement, from the effective date of the amended agreement (either March 13, 1998 or April 1, 1998, as set forth above) until all amounts currently due to Hyperion and due in the future are fully paid; and, (4) such other and further relief as the Authority deems just and proper.

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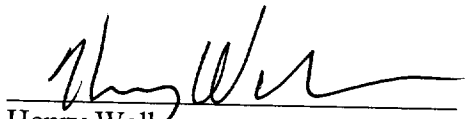
[52] *Declaratory Ruling* at ¶ 27.

Respectfully submitted,



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Dated: October 29, 1999

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 29th day of October, 1999.

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