BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

March 14, 2000

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**

INITIAL ORDER OF HEARING OFFICER ON THE MERITS

This matter came before the Tennessee Regulatory Authority ("Authority" or "TRA") on July 31, 1998, by a complaint filed on behalf of AVR of Tennessee, L.P. d/b/a Hyperion of Tennessee, L.P. ("Hyperion") against BellSouth Telecommunications, Inc. ("BellSouth") to "*Enforce Reciprocal Compensation and 'Most Favored Nation' Provision of the Parties' Interconnection Agreement*" (hereinafter the "Complaint"). Hyperion's Complaint alleges that BellSouth violated two (2) provisions of the then existing Interconnection Agreement ("Agreement") between the parties. On August 18, 1998, at a regularly scheduled Authority Conference, the Directors of the Authority unanimously appointed Chairman Melvin J. Malone as Hearing Officer to hear this matter on the merits.

I. TRAVEL OF THE CASE AND POSITIONS OF THE PARTIES

The effective date of the Agreement between the parties was April 1, 1997. The Authority approved the Agreement on July 1, 1997, in TRA Docket No. 97-00983.

Notwithstanding the Complaint, Hyperion and BellSouth amended the Agreement on April 26, 1999, and the Authority approved the April 26th amendment on May 24, 1999, in TRA Docket No. 99-00311. On July 29, 1999, BellSouth filed a new interconnection agreement between BellSouth and Hyperion dated June 2, 1999. The Authority approved this interconnection agreement on August 24, 1999, in TRA Docket No. 99-00541. According to Hyperion, neither the April 26th amendment nor the subsequent interconnection agreement is material to the issues in this proceeding.[1]

In its Complaint against BellSouth, Hyperion seeks to enforce the reciprocal compensation and "most favored nation" provisions of the Agreement. The dispute in this matter concerns both the interpretation and implementation of Sections IV.C and XIX.B of the Agreement. Section IV.C 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.

Section XIX.B provides as follows:

> In the event that BellSouth, either before or after the effective date of this Agreement, enters into an agreement with any other telecommunications carrier, including, without limitation, an agreement resulting from an arbitration pursuant to 47 U.S.C. § 252(b), (an "Other Interconnection 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"), 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

[1] *See Hyperion Post-Hearing Brief,* note 1, p. 1.

> XIX.E. In the event that Hyperion accepts such offer within sixty (60) days after the Commission approves such Other Interconnection Agreement pursuant to 47 U.S.C. § 252, such Other Terms shall be effective between BellSouth and Hyperion as of the effective date of such Other Interconnection Agreement. In the event that Hyperion accepts such offer more than sixty (60) days after the Commission approves such Other Interconnection Agreement pursuant to 47 U.S.C. § 252, such Other Terms shall be effective between BellSouth and Hyperion as of the date on which Hyperion accepts such offer.

Hyperion asserts in its Complaint that BellSouth has materially breached the Agreement based upon the following arguments: (1) BellSouth has refused to pay Hyperion reciprocal compensation for the transport and termination of traffic bound for either an internet service providers or an enhanced service provider (collectively "ISPs"); and (2) BellSouth has refused to recognize Hyperion's election under Section XIX.E of the Agreement to adopt and incorporate into the Agreement the "local interconnection service" provisions, including reciprocal compensation, contained in BellSouth's interconnection agreement with KMC Telecom, Inc. (the "KMC Agreement"). Hyperion specifically requests that the Authority apply the decision reached in *In re: Petition of Brooks Fiber to Enforce Interconnection Agreement and for Emergency Relief*[2] and declare that the Agreement's provisions for the transport and termination of local exchange traffic apply to ISP-bound traffic. Hyperion further requests that the Authority order BellSouth to amend the Agreement, as requested by Hyperion, and order BellSouth to pay Hyperion reciprocal compensation on a per minute of use basis, together with interest, as provided under Sections IV.C and XIX.F of the Agreement.

On August 26, 1998, BellSouth filed its Response to Hyperion's Complaint. BellSouth responds that the Agreement does not require the parties to compensate each other for the termination of any local traffic, including ISP traffic. BellSouth states that the parties agreed that "there w[ould] be no cash compensation for local interconnection minutes of use exchanged by

the parties" during the term of the Agreement unless a specified threshold differential in the termination of local traffic had been exceeded."[3] Further, BellSouth asserts that in determining whether this threshold differential has been exceeded, ISP traffic must be disregarded, since such traffic is jurisdictionally interstate and does not constitute "local traffic." BellSouth acknowledges that many state commissions have held that ISP traffic is local traffic; however, BellSouth argues that the Federal Communications Commission ("FCC") has not yet made its determination of whether ISP traffic is local and subject to the payment of reciprocal compensation.[4]

BellSouth denies that it breached the Agreement by refusing to permit Hyperion to adopt the reciprocal compensation provisions contained in the KMC Agreement. BellSouth argues that it has no obligation to amend the Agreement's provision regarding the transport and termination of local traffic unless and until a specified threshold differential in local traffic termination has been exceeded. BellSouth contends that the Agreement's threshold differential has not been exceeded. Alternatively, BellSouth argues that even if the threshold were exceeded, allowing Hyperion to adopt the reciprocal compensation provisions from the KMC Agreement would violate well-established principles of law. Finally, BellSouth denies that Hyperion is entitled to the relief it seeks, and furthermore requests that the Authority convene a contested case and hold this matter in abeyance pending a decision by the FCC on the issue of ISP traffic.

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[2] TRA Docket No. 98-00118 (August 17, 1998).

[3] *Answer of BellSouth*, p. 1.

[4] BellSouth's position has been modified since the release of the FCC's Order in *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, 1999 FCC, WL 98037 (Feb. 26, 1999) (Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68) (hereinafter the "FCC Declaratory Ruling" or "Declaratory Ruling"). According to BellSouth, 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 . . ." *Post-Hearing Brief of BellSouth*, p. 6.

On September 25, 1998, Hyperion filed a Motion for Summary Judgment, a Memorandum of Points and Authorities in Support of Complainant's Motion for Summary Judgment, and a Joint Stipulation of Undisputed Facts. Hyperion argued that there were no genuine issues of material fact in dispute and that this matter should be disposed of as a matter of law.

On October 9, 1998, BellSouth filed a Memorandum in Opposition to Summary Judgment and argued therein that there were genuine issues of material fact that precluded the summary disposition of Hyperion's claims. Generally, BellSouth claimed that issues of material fact existed as to: (1) whether the parties intended to pay reciprocal compensation before the threshold differential in local traffic termination is met; (2) whether the threshold differential in local traffic termination has been met; and (3) whether Hyperion is entitled to the relief it seeks under Section IV.C, including the payment of reciprocal compensation on a per minute of use basis in the amount of $0.009 per minute, together with interest from February 24, 1997.[5]

On October 16, 1998, Hyperion filed a Reply Memorandum of Points and Authorities in Support of Complainant's Motion for Summary Judgment, reiterating its position that no genuine issues of material fact exist that would preclude the Authority from summarily entering judgment in favor of Hyperion.

On February 25, 1999, the Hearing Officer concluded that genuine issues of material fact existed and entered an Initial Order denying Hyperion's Motion for Summary Judgment. Subsequent to the completion of discovery and the submission of pre-filed testimony, the Authority issued a Notice setting this matter for hearing on July 14 and 15, 1999. At the request

[5] BellSouth argues that "Consistent with the language in Section IV.C, the parties intended that any compensation arrangement elected by Hyperion or negotiated by the parties after the 3,000,000 minute threshold is satisfied will

of BellSouth, and without objection from Hyperion, the hearing was postponed. Thereafter, the Authority set the hearing, by agreement of the parties, for September 15, 1999. Again at the request of BellSouth, and without objection from Hyperion, the hearing was re-set for September 17, 1999.

The hearing was held on September 17, 1999, before Chairman Melvin J. Malone, acting as Hearing Officer. The parties were represented by counsel as follows:

Appearing on behalf of AVR of Tennessee, L.P. d/b/a Hyperion of Tennessee, L.P., Henry Walker, Esq., Boult, Cummings, Conner & Berry, 414 Union Street, Suite 1600 Nashville, Tennessee 37219, and Michael L. Shor, Esq., Swidler, Berlin, Shereff & Friedman, LLP, 3000 K Street, N.W. Suite 300, Washington, D.C. 20007; and

Appearing on behalf of BellSouth Telecommunications, Inc., Guy M. Hicks, Esq., BellSouth Telecommunications, Inc., Room 2101, 333 Commerce Street, Nashville, Tennessee 37201; and Bennett L. Ross, Esq., BellSouth Telecommunications, Inc., Suite 4300, 675 West Peachtree St., NE, Atlanta, Georgia 30375.

Prior to the start of the hearing, the parties sought resolution of certain preliminary matters. First, the Joint Stipulation of Undisputed Facts, filed on September 25, 1998, was admitted, without objection, into the evidentiary record. Next, the Hearing Officer considered Hyperion's Motion to Strike, filed on September 15, 1999, and the Supplement to the Motion to Strike, filed on September 16, 1999. Hyperion's motion and supplement were considered in the context of a Notice issued pursuant to Tenn. Code Ann. § 4-5-308 on September 9, 1999. Said Notice required the parties to file all pre-hearing motions on or before September 13, 1999, with responses thereto being due on or before September 15, 1999.[6] Hyperion failed to file its Motion

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apply on a 'going-forward basis.' The parties never intended to pay reciprocal compensation retroactively." *BellSouth's Opposition Memo*, p. 22.

[6] Tenn. Code Ann. § 4-5-308 provides as follows:

> (a) The administrative judge or hearing officer, at appropriate stages of the proceedings, shall give all parties full opportunity to file pleadings, motions, objections and offers of settlement.

to Strike consistent with the deadlines of the Notice, and as a result, the Hearing Officer held that the motion, and the supplement thereto, were untimely.

After these preliminary matters were resolved, the parties proffered the live testimony of Mr. David Martin, Mr. Jerry Hendrix and Mr. Albert Halprin. Mr. Martin, Mr. Hendrix and Mr. Halprin were made available for cross-examination during the hearing. On October 29, 1999, the parties filed post-hearing briefs.

II. JURISDICTION OF THE TENNESSEE REGULATORY AUTHORITY

The Agreement specifically acknowledges the Authority's jurisdiction in this matter. Moreover, the Authority is directly empowered by both state and federal statutes. To wit:

1. Both Hyperion and BellSouth are authorized to provide local exchange services in the State of Tennessee pursuant to certificates issued by this Authority, or by the Authority's predecessor administrative agency.[7]

2. Pursuant to the Telecommunications Act of 1996 (the "Act"), and particularly 47 U.S.C. §§ 251 and 252, Hyperion and BellSouth negotiated the Agreement at issue herein, effective April 1, 1997. The Agreement was filed with the Authority on May 1, 1997, and was approved on July 1, 1997, in TRA Docket No. 97-00983.[8]

(b) The administrative judge or hearing officer, at appropriate stages of the proceedings, may give all parties full opportunity to file briefs, proposed findings of fact and conclusions of law, and proposed initial or final orders.

(c) A party shall serve copies of any filed item on all parties, by mail or any other means prescribed by agency rule.

[7] Hyperion was granted certification to provide service in Tennessee by the Tennessee Public Service Commission on August 24, 1995, in TPSC Docket No. 94-00661.

[8] Under Section 252(i) of the Act, Hyperion opted into the interconnection agreement between ICG Telecom Group, Inc. and BellSouth, which was approved by the Authority in June 1997.

3. In the Declaratory Ruling the FCC specifically stated that "Section 252 imposes upon state commissions the duty to approve voluntarily-negotiated agreements and to arbitrate interconnection disputes. As we observed in the Local Competition Order, state commission authority over interconnection agreements pursuant to section 252 'extends to both interstate and intrastate matters.'"[9]

4. Having been authorized to review and either approve or reject § 252 interconnection agreements, it necessarily follows that the Authority has the authority to enforce the interconnection agreements that it approves.[10]

5. The terms of the Agreement at issue in this matter specifically provide for the right of either party to petition the Authority "[i]f the parties are unable to resolve issues related to a Dispute . . . ."[11]

Thus, the Authority has jurisdiction to enforce the terms of the Agreement.

III. DECISION ON THE MERITS

The resolution of this Complaint involves the determination of the following three (3) issues:

(1) whether calls to ISPs should be treated as local calls for purposes of the payment of reciprocal compensation under the Agreement;[12]

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[9] *See FCC Declaratory Ruling*, Para. 25.

[10] *Initial Order of Hearing Officer, In Re: Petition of Brooks Fiber to Enforce Interconnection Agreement and For Emergency Relief*, TRA Docket No. 98-00118, p. 12 (April 21, 1998) (citing *Iowa Utilities Board v. Federal Communications Commission*, 120 F.3d 753, 803 (8th Cir. 1997), *cert. granted*, 522 U.S. 1089, 118 S.Ct. 879 (1998), *aff'd in part and rev'd in part*, 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999)).

[11] Agreement at Section XXI.A. Moreover, it should be noted that the Authority has plenary jurisdiction over public utilities pursuant to Tenn. Code Ann. §§ 65-4-104 and 65-4-117(1).

[12] Hyperion specifically requests that the Authority declare that the Agreement's provisions for the transport and termination of local exchange traffic apply to ISP-bound traffic, and that BellSouth be directed to compensate Hyperion for the termination of local traffic originated by BellSouth to Hyperion's end user customers, including ISP

(2) whether Hyperion met the 3,000,000 minute threshold that would permit it to exercise its rights under Section IV.C of the Agreement; and

(3) whether Section XIX of the Agreement permits Hyperion to opt into the KMC Agreement.

Issue I: **Reciprocal Compensation**

INTRODUCTION

The crucial question here is whether, under the Agreement, the parties agreed that ISP-bound traffic should be treated as local traffic for purposes of payment of reciprocal compensation.[13] The present conflict arises from, as both parties acknowledge, the failure to have negotiated a face-to-face Agreement in the traditional sense. Unquestionably, it behooves both parties to a contract, whether pre-existing or penned from the bottom up, to attempt to eliminate with specificity any apparent contradictions which could be reasonably known and about which a future controversy could well arise. Of course, it is recognized that this task is easier said than done; still, prior to executing a contract, it is in the interests of the parties, and this is particularly crucial in today's highly fluid and highly technical environment, to exert their best efforts to recognize and eliminate potential discrepancies. Both parties, nevertheless, ventured forward, and Hyperion, as was its right, and in lieu of a formal negotiation process,

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customers, pursuant to Sections IV.C and XIX (which Hyperion argues provides for the adoption of the rates for reciprocal compensation from any other agreements in effect) of the Agreement.

[13] *See supra* note 12.

chose to exercise its entitlement under Section 252(i) of the Act[14] to "opt in" to a previously approved interconnection agreement between BellSouth and ICG Telecom Group, Inc.

BellSouth maintains unequivocally "that it was not BellSouth's intent, nor was it discussed during negotiations, that ISP traffic would be subject to reciprocal compensation."[15] BellSouth further argues that "ISP Internet traffic is not, and never has been, local traffic, because it does not originate and terminate in the same local exchange;" and, "[t]hat is precisely the view held by BellSouth at the time the interconnection agreement was negotiated . . . ."[16] Moreover, BellSouth maintains that at the time the Agreement was negotiated, it had no reason to believe that ISP-bound traffic was anything other than jurisdictionally interstate.

Hyperion, equally as adamant in its view, contends that it was Hyperion's understanding that ISP-bound calls would be treated as local under the terms of the Agreement. Hyperion argues that it must prevail based on its understanding of the "FCC's long-standing treatment of calls to ISPs as local . . . and, therefore [are] within the definition of Local Traffic in the Agreement."[17] It is Hyperion's contention that "[s]ince all of the evidence before the Authority indicates that the FCC and parties . . . treated calls to ISPs as local for all regulatory purposes for over 16 years, it is plain that calls to ISPs are treated as if they terminate locally and, therefore, the parties intended to include calls to ISPs within the definition of local traffic."[18]

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[14] "Availability to Other Telecommunications Carriers.—A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 C.F.R. § 252(i) (1996 Act).

[15] *Pre-filed Direct Testimony of Jerry Hendrix*, p. 6.

[16] *Pre-filed Direct Testimony of Albert Halprin*, p. 9.

[17] *Pre-filed Direct Testimony of David Martin*, p. 11.

[18] *Id.* at 11.

Consequently, BellSouth has refused to pay Hyperion reciprocal compensation for the transport and termination of local exchange traffic where such traffic originates with BellSouth's customers and terminates with Hyperion's customers who are internet service providers.[19]

In the face of this dispute, and pursuant to the TRA's authority and obligation to act, as specifically addressed above, the Authority must now interpret the Agreement between BellSouth and Hyperion. Unfortunately, and arguably shortsightedly, the "negotiated" Agreement at issue here between BellSouth and Hyperion is expressly wanting with regard to the compensation arrangement for the transport and termination of ISP-bound traffic. BellSouth's and Hyperion's defenses for their respective positions, as noted above, demonstrate that exactness would have indeed been prudent – BellSouth's defense being based primarily on its understanding that jurisdiction of ISP-bound traffic is controlling with respect to the *nature* of said traffic, and Hyperion's defense being based on its understanding of the historical regulatory treatment of ISP-bound traffic.

Additionally, exacerbating the resolution of this issue is the notable absence of a federal rule governing inter-carrier compensation for ISP-bound traffic. The Agreement, nevertheless, neither acknowledges ISP-bound traffic as being indistinguishable from all other local traffic, nor does it carve out an exception affirmatively removing ISP-bound traffic from the pool of all other local traffic. Simply stated, the Agreement contains no express references to such traffic, and both parties confirm that this matter was not isolated for discussion during negotiations. Thus, it now falls upon the Authority to interpret the Agreement.

[19] *See Supra* note 12.

PARTIES' ARGUMENTS

The parties have presented nothing particularly fancy in support of their respective positions, but instead have appropriately staged what each considers to be controlling in championing its position.

HYPERION

The crux of Hyperion's argument is that the intent of the parties is clear because "at the time the [A]greement was signed, calls to ISPs were treated as local by everyone in the industry . . . ," and "this evidence of the prevailing industry practice is . . . clear evidence of the parties' understanding at the time the [A]greement was signed."[20] Moreover, Hyperion witness Martin maintains, "by the time this [A]greement was signed, it is my understanding several state commissions already had ruled that calls to ISPs were local for purposes of reciprocal compensation . . . ."[21] Continuing forward with its argument, Hyperion notes that at no point in the Agreement is there language concerning the *jurisdictional* nature of ISP-bound traffic, and that jurisdiction was never an issue. Hyperion asserts that "[l]ocal traffic is specifically defined for the purposes of this Agreement and it does not rely in any way on the 'jurisdictional' nature of the traffic at issue in this case."[22] Finally, Hyperion argues that "BellSouth can not dispute that Hyperion delivers the call from the BellSouth originating end-user to the telephone exchange

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[20] Hyperion presents four (4) examples: "First, local exchange carriers, including BellSouth and Hyperion, provide local exchange services to ISPs as they do to all other businesses out of their local exchange tariffs. Second, when a BellSouth customer places a call to an ISP in the same local calling area, BellSouth rates and bills its customers for a local call under BellSouth's local exchange tariff. Third, in its required filings with the FCC, BellSouth treats the calling traffic originating on its network and terminating in an ISP within the originating caller's local calling area, whether the ISP is served by BellSouth or Hyperion, as a local call for the purposes of jurisdictional separations and ARMIS reports. Fourth, customers of BellSouth and Hyperion generally reach their ISP by dialing a seven-digit local telephone number." *Hearing Transcript*, pp. 24-25.

[21] *Pre-filed Rebuttal Testimony of David Martin*, p. 5.

[22] *Pre-filed Direct Testimony of David Martin*, p. 11.

service of the ISP bearing the called telephone number and when it reaches the ISP, it is 'answered' and answer supervision is returned. By long-established industry practice, the call is considered to have been terminated at the ISP and the FCC's jurisdictional determination[23] does nothing to change this result."[24]

BELLSOUTH

BellSouth, appropriately, acknowledges that the "Agreement requires the termination of traffic on either BellSouth's or Hyperion's network for reciprocal compensation to apply," but denies that call termination occurs "when a CLEC serving as a conduit places itself between BellSouth and an ISP."[25] Further, BellSouth explains, "the definition of local traffic requires the origination and termination of telephone calls to be in the same exchange and EAS exchanges as defined and specified in Section A.3 of BellSouth's General Subscriber Service Tariff (GSST). Local traffic as defined in Section A.3 *in no way* implies ISP traffic."[26] (emphasis added). Specifically, BellSouth contends that ISP traffic does not terminate at the ISP, but that "[t]he call from an end user to the ISP only transits through the ISP's local point of presence; it does not terminate there. There is no interruption of the continuous transmission of signals between the end user and the host computers."[27] BellSouth further seeks to convince of its intent by stating that "[c]onsidering the FCC rules currently in effect, BellSouth would have no reason to consider

[23] *See FCC Declaratory Ruling.*
[24] *See Pre-filed Rebuttal Testimony of David Martin*, p. 2.
[25] *See Pre-filed Direct Testimony of Jerry Hendrix*, p. 3.
[26] *Id.*
[27] *Id.* at 8.

ISP traffic to be anything other than *jurisdictionally* interstate traffic when it entered into the Agreement with Hyperion."[28] (emphasis added).

Next, BellSouth states, in its defense, that the fact that the FCC treats information service providers as "end users" rather than "carriers" for interstate access charge purposes has no bearing on whether ISP-bound calls are local and therefore subject to reciprocal compensation. "The critical point here," BellSouth states, "is that the FCC has never held that by virtue of the ESP exemption, interstate ESPs or ISPs are subject to state jurisdiction for any other purpose, including reciprocal compensation. Accordingly, there is no basis for the Commission [sic] to conclude that the FCC's classification of ESPs as end users under the Part 69 regime in any way requires that calls to ISPs be subject to reciprocal compensation."[29] BellSouth then states that the FCC has "absolutely not" ever identified calls to ISPs as local calls.[30]

Finally, concluding its defense, BellSouth argues that "[s]ince, 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 agreements.' That contemporaneous statement of BellSouth's

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[28] *Id.* at 9.
[29] *Pre-filed Direct Testimony of Albert Halprin*, p. 25.
[30] *Pre-filed Rebuttal Testimony of Albert Halprin*, p. 8.

understanding is fatal to any claim that BellSouth agreed to pay reciprocal compensation for ISP-bound traffic."[31]

DISCUSSION

The Authority's charge is not an easy one, and is made even more complex by each party's invocation of identical "long-standing" FCC practices in support of its diametrically opposite position. Explication de texte, alone, nevertheless, will untangle this knotty issue to reveal persuasive characteristics in support of either party. The Hearing Officer's analysis, for that reason, must be nimble, and, most assuredly, must necessarily embrace a methodical exploration of germane regulatory environmental factors to be applied in construing the parties' contract to determine whether they intended that reciprocal compensation should apply to ISP-bound traffic. Succinctly stated, the Hearing Officer's decision must be erected upon the foundation of regulatory dynamics that existed at the time of the Agreement's execution.

Both Hyperion and BellSouth rely to varying degrees on the FCC's Declaratory Ruling.[32] While each party urges the adoption of its view of the results reached in the Declaratory Ruling, the Hearing Officer respectfully declines the invitation to do so; and, in so doing, remains mindful that the Declaratory Ruling was released *after* the execution of the Agreement at issue here. Seemingly, many, if not all, of the conclusions reached in the Declaratory Ruling were predicated on regulatory environmental factors that existed prior to the release of the same, and it

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[31] *BellSouth Post-Hearing Brief*, p. 18. The footnote to this statement reads: "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 . . . . 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."

[32] The U.S. Court of Appeals for the D.C. Circuit has since vacated and remanded the FCC's Declaratory Ruling. *See Bell Atlantic Telephone Companies v. Federal Communications Commission*, No. 99-1094, 2000 WL 273383, (D.C. Cir., Mar. 24, 2000).

is that "pre"- Declaratory Ruling environment that is most germane to the decision that must be made here.[33]

First, is the question of jurisdictional treatment versus regulatory treatment. Hyperion argues that the FCC's regulatory policy of treating ISP-bound traffic as local traffic provides prima facia proof that the parties intended ISP-bound traffic to be included in the definition of local traffic, and furthermore that the "Agreement . . . does not rely in any way on the 'jurisdictional' nature of the traffic at issue in this case."[34] BellSouth, conversely, asserts that the FCC's act of asserting jurisdiction[35] over ISP-bound traffic foreclosed any possibility that BellSouth could have considered ISP-bound traffic as local traffic. The Hearing Officer is keenly aware that the FCC has asserted jurisdiction over ISPs, and has, since 1983, exempted ESPs from the payment of interstate access charges. The Hearing Officer is likewise aware that the FCC chose to assert its jurisdiction by imposing a regulatory structure for ISPs that thrust the treatment of these entities squarely before the states. Thus, the FCC seemingly, although perhaps unintentionally, created a condition in which it seized a federal prerogative, namely jurisdiction over ISPs, only to discharge its prerogative by transferring the practical treatment of ISPs back to the states for the regulatory purpose of treating ISP-bound traffic as if it were local. The course taken by the FCC may appear and, in fact, may very well be contradictory. Still, what is critical here is whether the Authority can reasonably conclude that this apparent oxymoron could reasonably lead to an "unequivocal"[36] position that ISP-bound traffic is not local, and thus not

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[33] The Hearing Officer is, however, cognizant that reference to the Declaratory Ruling may be valid or useful to the extent that such reference is limited to the summary of regulatory actions and events that took place prior to its issuance.

[34] *Pre-filed Direct Testimony of David Martin*, p. 11.

[35] *See Pre-filed Direct Testimony of Jerry Hendrix*, pp. 6-11.

[36] BellSouth witness Hendrix proclaims that "I can *unequivocally* state that it was not BellSouth's intent, nor was it discussed during negotiations, that ISP traffic would be subject to reciprocal compensation." *See Pre-filed Direct Testimony of Jerry Hendrix*, p. 6. (emphasis added).

subject to reciprocal compensation, or that there existed an understanding that ISP-bound calls are treated as local based on the FCC's policy.

While BellSouth's jurisdictional argument is not without federal support, and, is, in fact, an accurate narrative of precisely the actions taken by the FCC, it quickly begins to weaken and fold in on itself as an instrument of persuasion. First, because it fails to even constructively acknowledge the FCC's treatment of ISP-bound traffic as if it were local traffic,[37] and then, perchance, to reconcile that reality with the FCC's jurisdictional stance. In fact, BellSouth's singular reference to the FCC's treatment of ISP-bound traffic as if it were local traffic is to discredit any significance the FCC decision has solely because the FCC restricted BellSouth's ability to assert any control over FCC-directed treatment for ISPs.[38] BellSouth, however, offers no insight as to how its lack of control over certain regulatory mandates invalidates, or even at a minimum, diminishes the effect of a regulatory edict that orders treatment for ISP-bound traffic as if it were local traffic.

Second, BellSouth's posture, in summarily dismissing the notion that ISP end-user status could conceivably be construed as revealing the local nature of ISP-bound traffic, runs counter to the very concept of an end-user, and the relative position an end-user must necessarily occupy among users of telecommunications services.[39] While the Hearing Officer is respectful of BellSouth's position that the designation of ISPs as end-users in no way "requires calls to ISPs be subject to reciprocal compensation," BellSouth's position, nonetheless, requires a conviction approaching blind faith to conclude that the ISP end-user designation could not have reasonably

[37] Although BellSouth conducted a vigorous cross-examination at the hearing on the distinction and/or significance of jurisdictional termination versus regulatory termination, still, it did not acknowledge that the FCC treated ISP-bound calls as if they were local calls. *See Hearing Transcript,* pp. 52-64.
[38] *See Hearing Transcript*, p. 64.

led to the understanding that such traffic would be treated as local traffic *because* the classification emanated from the FCC's Part 69 rules governing interstate access charges.[40] Absent a credible link, which is nonexistent here, between the reality of what is meant to be an end-user regardless of how so classified,[41] and the argument BellSouth now propounds, the Hearing Officer finds it painfully awkward to conclude, as BellSouth avers that it did, that ISP end-user status exempted ISPs from the pool of local traffic. This sentiment is particularly severe after again reviewing BellSouth's testimony that "there is no basis for the Commission [sic] to conclude that the FCC's classification of ESPs as end users under the Part 69 regime in any way requires that calls to ISPs be subject to reciprocal compensation."[42] As the Authority has noted earlier, and as the parties are well aware, a federal rule governing inter-carrier compensation for ISP-bound traffic does not exist.[43] Thus, the underlying relevant question to be asked and answered, for the purposes of this decision, is not whether there exists a *rule* that *forces* payment of reciprocal compensation for ISP-bound traffic; but, whether under the Agreement, given the regulatory landscape that existed at the time, the parties agreed that ISP-bound traffic should be treated as local traffic for purposes of payment of reciprocal compensation.[44] A mere recitation of existing Part 69 classes, absent a meaningful analysis of the treatment of end-users versus long-distance carriers, does little to achieve this goal.

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[39] In the Hearing Officer's view an end-user basically is the ultimate consumer of a finished product or is any entity which is the ultimate consumer. Moreover, an end-user purchases for consumption, not for resale purposes. *See also* 47 C.F.R. §§ 69.5(c) and 69.2(m).

[40] *Pre-filed Direct Testimony of Albert Halprin*, p. 25. The discussion in Mr. Halprin's testimony is constructed somewhat differently than the discussion here; however, the Hearing Officer has determined that, at its core, the implication made therein is consistent with these comments.

[41] BellSouth, for the purposes of this discussion, places significant emphasis on the fact that "the FCC in 1983, determined that interstate enhanced service providers (ESPs) should be treated as end users rather than interexchange carriers for interstate access charge purposes." *Id.* at 25.

[42] *Id.* at 25.

[43] *See Access Charge Reform*, CC Docket No. 96-262, First Report and Order, para. 50. (1997).

[44] *See supra* note 12.

Next, the Hearing Officer must reject BellSouth's contention that its August 1997 letter "is fatal to any claim that BellSouth agreed to pay reciprocal compensation for ISP-bound traffic."[45] It is not at all dispositive that a letter sent months after the effective date of the Agreement reflected BellSouth's intent on the date the Agreement in question was executed. In fact, the letter was apparently dispatched only after BellSouth decided that it needed to make clear what seemingly was not clear within the four corners, or during the negotiations, of multiple agreements in effect at the time. Instead of demonstrating BellSouth's intent at the time of the Agreement, the letter appears more to be a form of damage control issued, perhaps, in an attempt to effectuate a "paper" solution to what has become an incredibly contentious and substantive oversight, and is indicative that possibly few, if any, of BellSouth's negotiated Agreements clearly identified what constitutes local traffic.

While the conclusions reached above stand on their own, the interplay between Section A.1 of BellSouth's General Services Subscriber Tariff (GSST), which was approved and on file with the Authority at the time the Agreement was executed, and Section I.SS of the Agreement is noteworthy. Section I. SS of the Agreement defines: "Local Traffic"[46] 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.

It is an insightful exercise, in this instance, to weigh the definition contained in the Agreement against that contained in Section A.1 of BellSouth's General Services Subscriber Tariff

[45] *See BellSouth Post-Hearing Brief,* p. 19.

[46] Further, Section "QQ. 'Local Interconnection' includes 1) the delivery of local traffic to be terminated on each party's local network so that *end users* of either party have the ability to reach *end users* of the other party without the use of any access code or substantial delay in the processing of the call;" (emphasis added).

(GSST).[47] It is here that it is likely that a perceptive connection can be made between "local Traffic" and the language in the Agreement that defines "local Traffic." The attention now turns to BellSouth's GSST and the characteristics of "local traffic"[48] contained therein.

> First, **Local Service**[49] is defined in BellSouth's GSST as:
>
> [a] type of localized calling whereby a subscriber can ***complete calls*** from his station to other stations within a specified area without the payment of long distance charges. (emphasis added).

No party argues that BellSouth's end-users cannot reach ISPs without the payment of long distance charges. Next, a **Completed Call,**[50] in BellSouth's GSST is defined as:

> ...a calling attempt by the subscriber that results in an **"off hook"** condition at the receiving end. (emphasis added).

Thus far, it is seemingly clear from the language in BellSouth's GSST that a subscriber has placed a "local[] call[]" (utilized local service) *if* a call can be placed "without the payment of long distance charges" that results in an "off hook" condition at the receiving end. In order for ISP-bound calls to fit within this definition, it must first be determined whether an "off hook" condition results from calls placed to ISPs. Fortunately, BellSouth's GSST provides an explanation for when an "off hook" condition is present. BellSouth's GSST defines **Answer Supervision** [51] as:

> This feature provides the capability of delivering "off hook" supervision signals from the subscriber's serving central office to a line interface at the customer's premises. *These supervisory signals indicate when the called party has answered an incoming call* (gone **"off hook").** (emphasis added).

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[47] Additionally, as is discussed more fully herein, Hyperion raises an argument in which it defines the operation of "Answer Supervision." Answer Supervision is likewise defined in BellSouth's GSST.

[48] Local traffic, local service, local call, and local area are so interrelated insofar as they represent "subsets" of each other that, for the purposes of this analysis, the Hearing Officer construes "call fulfillment" patterns in any single category as tantamount to satisfaction of "call fulfillment" patterns in at least one or more of the remaining categories.

[49] BellSouth's General Services Subscriber Tariff (GSST), Section A.1, First Revised Page 11.

[50] *Id.*, Sixth Revised Page 5.

[51] *Id.*, Eleventh Revised Page 1.

This is the language that existed at the time of the parties' execution of the Agreement. The balance of the analysis has now been reduced to a straightforward proposition. It is uncontroverted in the record that a BellSouth subscriber can reach Hyperion's ISP customers without the payment of long distance charges. The call, however must be "completed," according to the definition in BellSouth's tariff, in order for the call to be considered a local call. The final piece of the puzzle to put in place in determining whether a call has been completed is if, as discussed above, it has gone "off hook." Hyperion witness Martin provided rebuttal testimony describing a call to an ISP. He states that:

> BellSouth can not dispute that Hyperion delivers the call from the BellSouth originating end-user to the telephone exchange service of the ISP bearing the called telephone number and when the call reaches the ISP, it is "answered" and *answer supervision* is returned. By long-established industry practice, the call is considered to have been terminated at the ISP and the FCC's jurisdictional determination does not change this result.[52]

The fact that Mr. Martin's testimony, in this instance, went unchallenged suggests that answer supervision with respect to ISP-bound traffic operates precisely as described, and as importantly, precisely as defined in BellSouth's GSST. By comparing ISP-bound calls to BellSouth's GSST definitions as discussed above, a corroborating equation materializes in which ISP-bound traffic quite simply equals local traffic. Consequently, intellectual consistency would appear, in this regard, to suggest that both BellSouth and Hyperion intended that ISP-bound traffic be included in the definition of local traffic. To argue otherwise would require intellectual rejection of the sameness in the characteristics between ISPs and BellSouth's GSST's definition of local traffic or would force the conclusion that BellSouth was unfamiliar or unaware of the definitions contained in its own tariffs.

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[52] *Pre-filed Rebutta,* p. 2.

The evidentiary record compiled in this cause leads the Hearing Officer to conclude that it is reasonable to find that both Hyperion and BellSouth were very much aware of the FCC's long-standing policy of treating ISP-bound traffic as local at the time the Agreement was negotiated.[53] Failure by either party to specifically address the regulatory treatment of ISPs within the Agreement does not in any manner inspire a conclusion that the parties intended any treatment for ISPs that represented a departure from that local treatment historically received. Conversely, it is likewise reasonable to expect that a claim that parties intended and expected regulatory treatment that departed from that historically received be supported with clear and unambiguous excepting language. The Agreement here contains no such excepting language. Much has been made of the FCC's historical treatment of ISPs, but nothing has been offered that would lead the Hearing Officer to conclude that ISP-bound traffic is *treated* any differently than calls to end-users,[54] and as such regarded in exactly the same manner as any other local traffic subject to reciprocal compensation payments. Oddly, given BellSouth's stated position that ISP-bound traffic is not local and consequently is not subject to reciprocal compensation payments, the

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[53] BellSouth witness Hendrix stated in his affidavit that at the time the Agreement was negotiated, BellSouth had no reason to believe that ISP-bound traffic was anything other than jurisdictionally interstate. Mr. Hendrix's statement, in the Hearing Officer's opinion, evades the pivotal regulatory assessment that the FCC has, in fact, maintained a longstanding policy of treating ISP traffic as local. In fact, there is present in this case a suggestion that historical knowledge and understanding of the FCC's longstanding policy with respect to ISPs is what eventually precipitated the issuance, on August 12, 1997, of a BellSouth letter (signed by an Assistant Vice President of Regulatory and Planning) to all CLECs stating the BellSouth policy that reciprocal compensation would not be paid for ISP (ESP) traffic.

[54] While BellSouth acknowledges that the FCC determined that ISPs should be treated as end-users rather than interexchange carriers, the Company holds fast to its position that such designation does not mean that calls made to ISPs are "local." BellSouth reinforces its position with the belief that "the FCC never held that by virtue of the ESP exemption [ISPs are a sub-class of ESPs], interstate ESPs or ISPs are subject to state jurisdiction for any other purpose, including reciprocal compensation." *See supra* note 29. Here, BellSouth challenges the Authority's jurisdiction to decide issues involving ESPs, and consequently, BellSouth contends that the Authority is without any basis to conclude that calls to ISPs should be treated as any other local call. Not only must this position be rejected for the reasons cited in Section *II. JURISDICTION OF THE TENNESSEE REGULATORY AUTHORITY* of this Order, which clearly identifies the basis for the Authority's jurisdiction in this matter, but it must also be rejected because it fails, in the Hearing Officer's opinion, to address the totality of the impact of the FCC's actions and, as such, misses the mark.

Agreement contains no other provision, mechanism, or scheme providing for payment of the carriage of inter-carrier ISP traffic. The absence of an alternative compensation structure that singularly encompasses the treatment of ISP-bound traffic demonstrably elevates, in the Hearing Officer's view, the notion that BellSouth and Hyperion reasonably intended to treat ISP traffic as local for reciprocal compensation purposes.

In fulfilling the agency's statutory obligations in resolving this interconnection dispute between BellSouth and Hyperion, and based upon the Hearing Officer's review as discussed above, consistent with the regulatory dynamics that existed at the time of the Agreement's execution, the Hearing Officer concludes that the intentions of the parties at the time the Agreement was signed was that ISP-bound traffic be treated as local traffic.

In so concluding, the Hearing Officer's determination should not be construed as an endorsement of reciprocal compensation as an appropriate fixed inter-carrier compensation scheme for ISP-bound traffic. In fact, there exists fundamental concerns regarding the absence of a specific compensation mechanism for ISP-bound traffic.

Issue II. **Section IV.C and the 3,000,000 Minute Threshold**

Having concluded that under the terms of the Agreement the parties intended that ISP-bound traffic be treated as local traffic, the inquiry turns to the applicability and effect of Sections IV.C and XIX of the Agreement. As noted earlier, there were no negotiations or substantive discussions between the parties with respect to the Agreement.

"The cardinal rule for interpretation of contracts 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."[55] Further, "[t]he court, in arriving at the intention of the parties to a contract, does not attempt to ascertain the parties' state of mind at the time the contract was executed, but rather their intentions as actually embodied and expressed in the contract as written."[56] Finally, "[a]ll provisions of a contract should be construed as in harmony with each other, if such construction can be reasonably made, so as to avoid repugnancy between the several provisions of a single contract." *Id.* It is with the foregoing legal principles in mind that the interpretation of Section IV.C and Section XIX must be undertaken.

Section IV.C of the Agreement provides in part 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." Pursuant to Section IV.C, if "the difference in minutes of use for terminating local traffic exceeds three million (3,000,000) minutes . . . on a monthly basis[,]" Hyperion may elect to opt into "the terms of any compensation arrangement for local interconnection then in effect between BellSouth and any other telecommunications carrier," or it may "negotiate the specifics of a traffic exchange agreement which will apply on a going forward basis."

Based on the finding that ISP-bound traffic is treated as local traffic under the terms of the Agreement, ISP-bound traffic must be considered in determining whether the 3,000,000 minute threshold has been met. As evidenced by the *Joint Stipulation of Undisputed Facts* submitted by the parties, the difference in minutes of use for terminating local traffic, including ISP-bound traffic, exceeded 3,000,000 minutes in April of 1998. As set forth above, after this

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[55] *Winfree v. Educators Credit Union,* 900 S.W.2d 285, 289 (Tenn. Ct. App. 1995).
[56] *Union Planters National Bank v. American Home Assurance Compan,* 865 S.W.2d 907, 912 (Tenn. Ct. App. 1993).

occurrence Hyperion could elect to either opt into the terms of any compensation arrangement for local interconnection then in effect between BellSouth and other carriers or commence negotiations with BellSouth. As demonstrated by BellSouth's July 2, 1998, letter, which is attached to the *Joint Stipulation of Undisputed Facts* as Exhibit B, and the record, BellSouth concedes that if the 3,000,000 minute threshold is met, Hyperion may opt into the terms of another agreement.

Thus, irrespective of the outcome of the Section XIX issue, Hyperion is entitled to opt into the terms of any compensation arrangement for local interconnection in effect between BellSouth and other carriers, including the KMC Agreement, after April of 1998.

Issue III. Interrelationship of Sections XIX and IV.C

The final issue of the Complaint is whether Section XIX of the Agreement permits Hyperion to opt into the KMC Agreement. While as discussed above, Hyperion enjoyed an unabated contractual right to proceed under Section IV.C, Hyperion initially sought to proceed under Section XIX. *See March 13, 1998, letter from Hyperion to BellSouth, Exhibit A to Joint Stipulation of Undisputed Facts.*

Section XIX.B of the Agreement provides as follows:

> In the event that BellSouth, either before or after the effective date of this Agreement, enters into an agreement with any other telecommunications carrier, including, without limitation, an agreement resulting from an arbitration pursuant to 47 U.S.C. § 252(b), (an "Other Interconnection 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"), **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. In the event that Hyperion accepts such offer within sixty (60) days after the Commission approves such Other Interconnection Agreement

> pursuant to 47 U.S.C. § 252, such Other Terms shall be effective between BellSouth and Hyperion as of the effective date of such Other Interconnection Agreement. In the event that Hyperion accepts such offer more than sixty (60) days after the Commission approves such Other Interconnection Agreement pursuant to 47 U.S.C. § 252, such Other Terms shall be effective between BellSouth and Hyperion as of the date on which Hyperion accepts such offer. (emphasis added).

Section XIX.B is a derivative of 47 U.S.C. § 252(i),[57] commonly referred to as the "Most Favored Nations" provision. Generally, Section XIX.B affords Hyperion the ability to opt into certain specified arrangements contained in an agreement between BellSouth and any other telecommunications carrier. 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.

The question presented is whether Section IV.C was intended by the parties to solely control all issues related to the exchange of local traffic during the term of the Agreement and thus affecting a limitation upon Hyperion's most favored nations rights with respect to all issues related to the exchange of local traffic.

Hyperion alleges in its Complaint that BellSouth refused to modify the Agreement "to permit Hyperion to adopt and incorporate the 'local interconnection service' provisions (including reciprocal compensation) from an interconnection agreement by and between

[57] *See supra* note 1.

BellSouth and KMC Telecom, Inc."[58] Hyperion asserts that the Agreement, pursuant to Section XIX.B, explicitly permits Hyperion to adopt any other more favorable terms by "accepting" a "deemed offer" for the terms of other agreements.[59] According to Hyperion, it "is independently entitled under the Agreement to exercise its 'most-favored-nation' rights to adopt any more-favorable terms granted to another CLEC."[60]

Citing *Bartlett v. Phillip-Carey Mfg. Co.*,[61] Hyperion asserts that "under established Tennessee law, Hyperion as the beneficiary of both contract clauses [Sections IV.C and XIX.B], has the right to choose between those clauses."[62] According to Hyperion, the result of this well-established legal principle grants Hyperion the ability to waive any protections available under Section IV.C by availing itself of Section XIX.B.[63]

BellSouth on the other hand maintains that Hyperion's request to use Section XIX as a method of obtaining a reciprocal compensation provision from another interconnection agreement constitutes an attempt to circumvent and render useless the specific requirements of Section IV.C. BellSouth contends that the plain language of Section IV.C reveals that it was the intention of the parties that IV.C solely control all issues relating to compensation for the exchange of local traffic. BellSouth denies that it breached the Agreement by refusing to permit Hyperion to adopt the reciprocal compensation provisions contained in the KMC Agreement. Specifically, as to Hyperion's claim under Section XIX, BellSouth asserts that it has no obligation to amend the Agreement's provision regarding compensation for the exchange of local traffic unless and until a specified threshold differential in local traffic termination has been

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[58] *Complaint*, p. 2.
[59] *Id.* at 2-3.
[60] *Id.* at 6.
[61] 216 Tenn. 323, 392 S.W.2d 325 (1965).
[62] *Hyperion Post-Hearing Brief*, p.10.

exceeded. In sum, BellSouth argues that Hyperion's application of Section XIX would render Section IV.C superfluous. In support of its arguments, BellSouth relies upon the legal principle that when a contract contains "both general and special provisions relating to the same thing, the special provisions control."[64]

"It has been wisely observed that there is no 'lawyer's Paradise where all words have a fixed, precisely ascertained meaning, . . . and where, if the writer has been careful, a lawyer, having a document referred to him may sit in his chair, inspect the text, and answer all questions without raising his eyes.'"[65] The diametrically opposed views of the parties herein concerning the interpretation and applicability of Sections IV.C and XIX evidence the absence of such a paradise. Instead of the lawyer's Paradise, we have what generally accompanies a breach of contract dispute - a logomachy. Still, after carefully considering the evidentiary record, it is the reasoned opinion of the Hearing Officer that the plain language of the Agreement squarely resolves this issue.

The parties cite two different cases as being dispositive of the issue. Hyperion relies upon *Bartlett,* while BellSouth casts its lot with *Cocke County.* First, with respect to *Bartlett,* one of the well-established principles flowing therefrom is that when two clauses of a contract are not so repugnant to each other that they cannot stand together, the clauses should be construed so that each of the clauses will be in harmony.[66] Applying Tennessee law, it is the

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[63] *Id.*
[64] Cocke County Board v. Newport Utilities Board, 690 S.W.2d 231, 237 (Tenn. 1985).
[65] E. ALLAN FARNSWORTH, CONTRACTS § 7.8 (3d. ed. 1999).
[66] 392 S.W.2d at 327.

opinion of the Hearing Officer that Section IV.C and Section XIX are not so repugnant that they cannot stand together.[67]

Conversely, BellSouth's reliance upon *Cocke County* must fail. The general principle set forth in *Cocke County* and relied upon by BellSouth must not be read or applied in a vaccum. In fact, the court in *Cocke County* recognized the same when it stated that the relevant principle articulated therein "is not universally or necessarily" always applicable and/or controlling.[68] The present circumstances are distinguishable from *Cocke County* in that Section XIX (the most favored nations clause agreed to by the parties) provides a clear, plain, and harmonious avenue by which Hyperion may accept certain terms in the place of, or as a substitute for, those presented in Section IV.C. Further, the acceptance of BellSouth's application of the *Cocke County* decision would have a consequence upon § 252(i) not contemplated by Congress.

Based upon the plain language of the Agreement, the two clauses may operate harmoniously. As a whole, the evidentiary record suggests that at the time of the execution of the Agreement, circumstances may have existed that would have justified, from one or both of the parties' perspectives, the presence of both clauses.[69] Further, nothing in the language of

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[67] *Id. See also, e.g., Davidson v. Davidson,* 916 S.W.2d 918, 922-23 (Tenn. App. 1995) ("Taking its words in their ordinary and usual meaning, no substantive clause must be allowed to perish by construction, unless insurmountable obstacles stand in the way of any other course. Seeming contradictions must be harmonized if that course is reasonably possible. Each of its provisions must be considered in connection with the others, and, if possible, effect must be given to all. A construction which entirely neutralizes one provision should not be adopted if the contract is susceptible of another which gives effect to all of its provisions. The courts will look to the entire instrument, and, if possible, give such construction that each clause shall have some effect, and perform some office.").

[68] 690 S.W.2d at 237.

[69] *See e.g., TRA Hearing Tr.,* Docket No. 98-00530, Sept. 17, 1999, p. 34 ("[W]e really focused in on the most favored nations clause. . . . [T]he most favored nations clause, was really the most important issue to us at the time.") (testimony of Hyperion witness Martin); *Pre-filed Rebuttal Testimony of Jerry Hendrix*, p. 3 ("The three million minute threshold did not benefit BellSouth, and it was added only at the insistence of various CLECs."). BellSouth's argument ignores the undisputed fact that neither party envisioned Hyperion as the party that would exceed the threshold. Hyperion states at page 6 of its Post-Hearing Brief:

> As BellSouth admits, this provision was added for the benefit of CLECs because there was concern that the balance of terminating traffic would favor BellSouth (Hendrix Rebuttal at 3, Tr. At 91)

either Section IV.C or Section XIX persuasively suggests that the parties intended the clauses to be mutually exclusive. To conclude otherwise, absent express language demonstrating such an intent to limit Section XIX to items and issues other than the transportation and termination (exchange) of local traffic, would result in this agency superimposing its conclusions over the plain language set forth in the Agreement. While the clauses may overlap to some degree, the overlapping does not, in and of itself, render the clauses repugnant. If in fact BellSouth wished to preclude Hyperion from protecting its position by virtue of both Section IV.C and Section XIX, as concerning the specific issues presented herein, the appropriate time and place for such was prior to the execution of the Agreement.

> This did not occur here; instead, Hyperion terminated more traffic than BellSouth (Ex. 1, Jt Stip. Paras. 2-21)

BellSouth states in its Post-Hearing Brief, at page 3:

> 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."

With full recognition of the multiple factual scenarios that may have reasonably developed between the parties, there is no language in the Agreement which indicates that the parties contemplated that Hyperion would be the party that would exceed the threshold. Regardless of who reaches the threshold, under the terms of the Agreement, Hyperion is the party that is permitted to make the election if it so chooses. If, as contemplated by the parties, BellSouth were accumulating minutes toward the 3,000,000 threshold, Hyperion may not have wished to opt into another agreement that provides for payment of reciprocal compensation. Hyperion may have chosen to wait until BellSouth exceeded the threshold.

> In its Post-Hearing Brief, BellSouth states:
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> "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."

There is no persuasive indication in the Agreement that the parties agreed to amend "only" upon one party exceeding the threshold. Such an interpretation would strip XIX.B and XIX.E of substantial meaning because there could have been a circumstance under which neither party exceeded the three million minute per month threshold.

When reviewing contracts, it is the duty of the fact finder to give effect to the intention of the parties. The foregoing notwithstanding, the "unexpressed intention is immaterial."[70] If the parties intended that Section XIX not apply with respect to terms and conditions related to the transportation and termination of local traffic, assuming the legality of the same, they could have easily expressed such intention within the four corners of the Agreement. No contortion of words or spinning of phrases is necessary to reach the conclusion that the intention of the parties as "actually embodied and expressed in the contract as written" at the time of the execution of the contract was that Section IV.C and Section XIX are not mutually exclusive.[71]

Section 252(i) expressly evidences Congress' intent to ensure that requesting carriers fairly receive the most generous terms available to any other carrier. Under § 252(i), Hyperion has an unfettered right to obtain the most favorable terms and conditions made available by BellSouth. Notwithstanding BellSouth's arguments presented herein, including its reliance upon the *Cocke County* decision, a legal right is not generally deemed waived unless such waiver is made expressly and knowingly. Under Tennessee law, "in order to constitute an abandonment or waiver of a legal right, there must be a clear, unequivocal, and decisive act of the party showing such a purpose, or acts amounting to an estoppel on [its] part."[72] Further, some jurisdictions have held that waivers of statutory rights are not favored.[73] Finally, courts have also opined that "a statutory right cannot be waived if waiver would violate public policy."[74]

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[70] *Bartlett*, 392 S.W.2d at 330.

[71] *Union Planters*, 865 S.W.2d at 912. *See also Rainey v. Stansell*, 836 S.W.2d 117, 119 (Tenn. Ct. App. 1992) ("In construing contracts, the words expressing the parties' intentions should be given their usual, natural and ordinary meaning[.]").

[72] *Kentucky National Ins. Co. v. Gardner,* 6 S.W.3d 493, 498 (Tenn. App. 1999) (citation omitted).

[73] *See, e.g., Havasu Heights Ranch and Development Corp. v. State Land Dept.*, 764 P.2d 37, 43 (Ariz. App. 1988).

[74] Haghighi v. Russian-American Broadcasting Co., 173 F.3d 1086, 1088 (8th Cir. 1999).

Even assuming that nothing in the Federal Telecommunications Act prohibits a requesting carrier from voluntarily foregoing, partially or wholly, the rights or protections set forth in §252(i), it is the opinion of the Hearing Officer that a federal statutory right so clearly established in so complex a field should not be discounted absent a known waiver.[75] The language in the Agreement does not rise to the level of a "clear" and "unmistakably" expressed waiver by Hyperion.

Although BellSouth's arguments may initially seem attractive, given the plain language of the Agreement, the Hearing Officer cannot reasonably conclude that Hyperion expressly and knowingly limited the application of §252(i) with respect to any and all issues related to compensation for the exchange of local traffic. Having, for whatever reason, failed to expressly limit §252(i) as concerning the transportation and termination of local traffic, BellSouth cannot here seek what would amount to a modification of the Agreement.[76]

William O. Douglas said in 1948 that "[t]he law is not a series of calculating machines where definitions and answers come tumbling out when the right levers are pushed." This case exemplifies said statement. Still, "[t]he rights of the parties must be determined by what they have put into their agreement. It is the duty of the courts to enforce contracts according to their

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[75] *See Resorts Int'l Hotel Casino v. National Labor Relations Board*, 996 F.2d 1553, 1559 (3rd Cir. 1993) ("[A] waiver of statutory rights may not be found unless there is a conscious relinquishment . . . clearly intended and expressed to give up the right," and the party claiming waiver of a statutory right must show that the waiver was "clear and unmistakable."); *Teamsters v. Southwest Airlines Co.*, 875 F.2d 1129, 1135 (5th Cir. 1989), cert. Denied, 493 U.S. 1043 (1990) ("[T]he contractual waiver of a statutory right under federal labor law must be clear and unmistakably expressed.").

[76] *See, cf., Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 101 (Tenn. 1999) ("[I]t is not the duty of courts of common law to relieve parties from the consequences of their own improvidence."). *See also Initial Order of Hearing Officer, In Re: Petition of Brooks Fiber to Enforce Interconnection Agreement and for Emergency Relief,* TRA Docket No. 98-00118 (April 21, 1998) ("[T]his Authority should not serve as the conduit through which [a party] is allowed to circumvent and/or modify contractual obligations which it entered into voluntarily.").

plain terms."[77] For the foregoing reasons, the Hearing Officer concludes that Section IV.C of the Agreement was not intended to operate as a limitation upon Section XIX of the Agreement with respect to the exchange of local traffic. Hence, BellSouth should have honored Hyperion's request under Section XIX.

IV. CONCLUSION

Based upon the foregoing analysis and conclusions reached herein, the Hearing Officer finds as follows: (1) that ISP-bound traffic shall be treated as local traffic under this Agreement; (2) that it is appropriate to include ISP-bound traffic for the purpose of determining whether the 3,000,000 minute threshold under Section IV.C of the Agreement has been exceeded and that Hyperion met the threshold; and (3) that Hyperion is entitled to amend the (interconnection) Agreement pursuant to the provisions of Section XIX.

IT IS THEREFORE ORDERED THAT:

1. BellSouth shall treat ISP-bound traffic as local traffic under this Agreement;

2. BellSouth shall recognize Hyperion's inclusion of ISP-bound traffic for the purpose of determining whether the 3,000,000 minute threshold under Section IV.C of the Agreement has been exceeded;

3. BellSouth shall honor Hyperion's request and permit amendment to the Interconnection Agreement consistent with the provisions of Section XIX of the same, including Section XIX.F;

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[77] *Cookeville Gynecology & Obstetrics, P.C. v. Southeastern Data Systems, Inc.*, 884 S.W.2d 458, 461-62 (Tenn. Ct. App. 1994).

4. Any party aggrieved by this initial decision may file a Petition for Reconsideration with the Tennessee Regulatory Authority within fifteen (15) days from and after the date of this Order. Such petition shall be considered by the Hearing Officer presiding herein;

5. Any party aggrieved by the decision of the Hearing Officer in this matter may also file a Petition for Appeal pursuant to Tenn. Code Ann. § 4-5-315 with the Tennessee Regulatory Authority within fifteen (15) days from and after the date of this Order. If the Tennessee Regulatory Authority or any of the parties herein do not seek review of this Initial Order within the time prescribed by Tenn. Code Ann. § 4-5-315, this Order shall become the Final Order;

6. That any party aggrieved by the Authority's Final Order in this matter has the right to judicial review by filing a Petition for Review with the United States District Court; and

7. That any time for the filing of a Petition for Review, Appeal, or Reconsideration of this Order shall commence to run from the date of the entry of this Order.

CHAIRMAN MELVIN J. MALONE,
AS HEARING OFFICER

ATTEST:

K. David Waddell, Executive Secretary