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May 1, 2000

VIA HAND DELIVERY

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

Dear Mr. Waddell:

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

Very truly yours,

Guy Hicks by permission

Guy M. Hicks

GMH/jem

Enclosure

209906

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

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

Docket No. 98-00530

BELLSOUTH TELECOMMUNICATIONS, INC.'S PETITION FOR APPEAL

I. INTRODUCTION

Pursuant to Tennessee Code Annotated § 4-5-315, BellSouth Telecommunications, Inc. ("BellSouth") respectfully files its Petition for Appeal of the Initial Order of the Hearing Officer on the merits of this case dated April 14, 2000. The Initial Order never addresses the critical issue in this case -- whether BellSouth and ADR of Tennessee, L.P. d/b/a Hyperion of Tennessee, LP ("Hyperion") mutually agreed to pay reciprocal compensation for Internet Service Provider traffic ("ISP-bound traffic"). Such mutual agreement was totally lacking since: (1) under the parties' Interconnection Agreement executed in April 1997, Hyperion and BellSouth did not agree to pay each other reciprocal compensation for any traffic, let alone ISP-bound traffic; and (2) when Hyperion sought to amend the Interconnection Agreement in March 1998, Hyperion knew or should have known that BellSouth considered ISP-bound traffic to be interstate in nature and not subject to the payment of reciprocal compensation.

Instead of addressing these issues, the Initial Order focuses on whether ISP-bound traffic should be treated as local traffic under the parties' Interconnection Agreement. In so doing, the Initial Order fails to reconcile the fact that both the Telecommunications Act of 1996 ("1996 Act") and the parties' Interconnection Agreement limit the definition of local traffic to traffic that "originates" and "terminates" in the local calling area. Calls to an ISP do not "terminate" locally, as the Federal Communications Commission ("FCC") has made abundantly clear.[1]

The Initial Order also holds that Hyperion is entitled to amend the Interconnection Agreement under two different provisions of the Agreement. In reaching this conclusion, the Initial Order overlooks the plain language of the Agreement, fails to address extrinsic evidence of the parties' intent, and disregards well-established principles of Tennessee contract law. Accordingly, the Tennessee Regulatory Authority ("Authority") should reject the Initial Order.

II. DISCUSSION

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

In this case, Hyperion is seeking an award of reciprocal compensation for ISP-bound traffic from either March 13, 1998 or April 1, 1998 – relief that the Initial

[1] It is noteworthy that this Hearing Officer previously observed that while "the FCC may not have explicitly held that ISP-bound traffic is local traffic for purposes of reciprocal compensation arrangements, such a conclusion flows effortlessly, both legally and logically, from the long-established position of the FCC." Initial Order of Hearing Officer, *In re: Petition of Brooks Fiber to Enforce Interconnection Agreement and For Emergency Relief,* Docket No. 98-00118, at 17-18 (April 21, 1998). Of course, the FCC has expressly held otherwise.

Order would appear to grant. Hyperion Post-Hearing Brief at 3. However, the payment of reciprocal compensation for ISP-bound traffic is improper absent a finding that BellSouth and Hyperion mutually agreed to pay such compensation under the Interconnection Agreement. The Initial Order does not and could not make any such findings.

In determining whether BellSouth and Hyperion mutually agreed to pay reciprocal compensation for ISP-bound traffic, there are two critical time periods that must be considered. The first is April 1997, when the parties executed their Interconnection Agreement. There can be no serious dispute that BellSouth and Hyperion did not mutually agree to pay reciprocal compensation for ISP-bound traffic when they executed the Agreement, since the Agreement does not contemplate the payment of reciprocal compensation for any traffic, let alone ISP-bound traffic. Indeed, the parties expressly agreed that "there will be no cash compensation for local interconnection minutes of use exchanged by the parties during the term of this agreement ...." unless certain conditions were satisfied. Exh. 1 (Joint Stipulation) ¶1.

The second critical time period is March 1998, when Hyperion first sought to amend the Interconnection Agreement to adopt the reciprocal compensation provision from another interconnection agreement. Even assuming that Hyperion was entitled to amend the Agreement (which BellSouth submits is not the case), BellSouth and Hyperion did not mutually agree to pay reciprocal compensation for ISP-bound traffic at that time either. The absence of such mutual agreement is evident from BellSouth's August 1997 letter which stated plainly that ISP-bound traffic is

"jurisdictionally interstate," not local, and thus is not "subject ... to reciprocal compensation agreements." Exhibit 6.

This statement of BellSouth's intent that reciprocal compensation would not be paid for ISP-bound traffic was made *seven months before Hyperion sought to amend the Interconnection Agreement*. Thus, while the August 1997 letter may not have been "dispositive" of "BellSouth's intent on the date the agreement in question was executed," as the Hearing Officer noted, Initial Order at 19, the letter certainly is dispositive of BellSouth's intent in March 1998, when Hyperion sought to amend the Interconnection Agreement. It is equally noteworthy that Hyperion sought to adopt the reciprocal compensation provision from an interconnection agreement which the Louisiana Public Service Commission has held did not obligate BellSouth to pay reciprocal compensation for ISP-bound traffic -- an issue the Initial Order does not discuss. Thus, whether or not Hyperion was entitled to amend the Agreement, there was no mutual agreement by Hyperion and BellSouth to pay reciprocal compensation for ISP-bound traffic, and the Initial Order should be set aside on this basis alone.

The lack of mutual agreement on the part of BellSouth and Hyperion to pay reciprocal compensation for ISP-bound traffic is underscored by the circumstances surrounding the execution of the Interconnection Agreement in April 1997. First, the payment of reciprocal compensation for any traffic, let alone for ISP-bound traffic, was never even raised during negotiations. How could the parties reasonably have intended to do something that they never even discussed? Second, Hyperion had no plans to serve ISPs, and ISP-bound traffic did not represent much of Hyperion's

business at the time. Exhibit 3 at 6; Martin Tr. at 38 & 50. How could Hyperion reasonably have intended for BellSouth to pay reciprocal compensation for traffic to customers Hyperion had no plans on serving? Third, why would Hyperion have agreed to a bill and keep arrangement, which would make no economic sense for Hyperion if Hyperion reasonably understood that ISP-bound traffic constituted "local traffic" under the Interconnection Agreement? Although not addressed in the Initial Order, the answers to these questions should be obvious and belie any notion that the parties intended to pay reciprocal compensation for ISP-bound traffic.

While the "regulatory environmental factors" discussed in the Initial Order are important (although not for the reasons cited by the Hearing Officer), the Initial Order overlooks compelling evidence bearing directly on the parties' intent. Here, it is undisputed that Hyperion, like most CLECs, was concerned that more traffic would be "terminated" to BellSouth, presumably because BellSouth had more customers. To avoid this possibility and the corresponding reciprocal compensation payments to BellSouth that would result, Hyperion adopted a bill and keep arrangement, at least on an interim basis. The Initial Order does not explain how Hyperion's concern about an imbalance of traffic in BellSouth's favor and its decision to agree to a bill and keep arrangement can reasonably be explained if ISP-bound traffic fell within the "local traffic" definition. Because ISPs receive calls and do not make them, any imbalance in traffic would be in Hyperion's favor if Hyperion expected to provide service to ISPs.

However, at the time Hyperion executed the Interconnection Agreement in April 1997, it was not targeting ISPs as customers and had no publicly announced plans to

do so. Thus, it is logical to conclude that Hyperion never understood that ISP-bound traffic would be subject to the payment of reciprocal compensation, since otherwise Hyperion's actions make no economic sense. After executing the Interconnection Agreement, however, Hyperion changed its marketing strategy, becoming an Internet Service Provider itself and targeting ISPs as customers. Exhibit 4 at 2-3; Martin Tr. at 39-41. This explains why Hyperion sought to amend the Interconnection Agreement to obtain the payment of reciprocal compensation for ISP-bound traffic coincident with its new marketing strategy. While Hyperion's desire to obtain such payment is understandable, when Hyperion sought to amend the Interconnection Agreement in March 1998, BellSouth's position that ISP-bound traffic was interstate in nature and not subject to reciprocal compensation was well-established.

In short, the record is devoid of any evidence of a mutual agreement by BellSouth and Hyperion to pay reciprocal compensation for ISP-bound traffic, which would be required in order to grant the relief Hyperion requested. Accordingly, the Authority should not adopt the Initial Order.

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

1. Section IV.C

The Initial Order concludes that Hyperion is entitled to amend the Interconnection Agreement under Section IV.C because "ISP-bound traffic must be considered in determining whether the three million minute threshold has been met." Initial Order at 24. The Initial Order reaches this conclusion by finding that the parties

intended at the time the Interconnection Agreement was executed "that ISP-bound traffic be treated as local traffic." *Id.* This finding ignores the plain language of the parties' Agreement as well as federal law.

Although it is the primary focus of the Initial Order, whether ISP-bound traffic should be treated "as if it were local traffic" is not the issue before the Authority. The Agreement does not define local traffic as traffic "treated" as local. Rather, the Agreement defines local traffic as traffic that both "originates and terminates" in the same local calling exchange. In this respect, the language of the Agreement is substantively identical to the language of the FCC's controlling understanding of the scope of the federal reciprocal compensation obligation. In fact, months before the April 1997 agreement was executed, the FCC concluded that the reciprocal compensation obligations set forth in the 1996 Act extend only to traffic that "originates and terminates within a local calling area." First Report and Order, *In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd, 15499, 16013 ¶1034 (Aug. 8, 1996) (emphasis added) (*"First Report and Order"), vacated in part Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd in part, aff'd in part sub. nom. AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721 (1999). Furthermore, according to the FCC, those reciprocal compensation obligations "do not apply to the transport or termination of interstate or intrastate interexchange traffic." *Id.*

The language in the Agreement defining "local traffic" is indistinguishable from the relevant FCC order for these purposes. Given that the FCC has now squarely

concluded that its rules do not require reciprocal compensation for ISP-bound traffic because such traffic does not terminate locally, the conclusion is inescapable that the local traffic definition in the April 1997 Agreement does not include ISP-bound traffic either. *See* Declaratory Ruling in CC Docket No. 96-98 in Notice of Proposed Rulemaking in CC Docket No. 96-68, *In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-bound Traffic*, 14 FCC rcd 3689, 3697 ¶ 12 (1999) (*"Declaratory Ruling"*), *rev'd Bell Atlantic Telephone Companies v. FCC*, Nos. 99-1094 et al. 2000 WL 273383 (D.C. Cir. March 24, 2000).[2]

The Initial Order is noticeably silent on the "termination" issue. By focusing on the "treatment" of ISP traffic as local, the Initial Order never expressly addresses how ISP-bound traffic terminates locally so as to fit within the definition of local traffic under the parties' Interconnection Agreement. This is not surprising, since there is

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[2] That the FCC's *Declaratory Ruling* has been reversed does not affect the outcome of this case. First, the D.C. Circuit did not establish any principle of law, but rather -- as the Court itself said over and over -- simply determined that the FCC had failed to provide a sufficient explanation for its conclusions in the *Declaratory Ruling*. *See* 2000 WL 273383 at *9 (vacating and remanding "[b]ecause the Commission has not provided a satisfactory explanation"). Second, the Chief of the FCC's Common Carrier Bureau has stated publicly that he believes that the FCC can and will provide the requested clarification and reach the same conclusion that it has previously -- that is, that ISP-bound calls do not terminate locally. *See* TR Daily, Strickling Believes FCC Can Justify Recip. Comp. Ruling In Face Of Remand, March 24, 2000 (stating that the Chief of the FCC's Common Carrier Bureau "still believes calls to ISPs are interstate in nature and that some fine tuning and further explanation should satisfy the court that the agency's view is correct"). Third, the FCC has made clear in other orders that ISP-bound traffic does not terminate locally, which are unaffected by the D.C.'s Circuit's ruling. *See* Order on Remand, *Deployment of Wireline Services*

not a comprehensible theory to support such a conclusion. The only way ISP-bound traffic could be understood to "terminate" locally is if it is divided into two parts: (1) a local call from the end user that allegedly "terminates" at the ISPs' promises; and (2) a separate call from the ISP to the internet site or sites that the end-user wants to access. However, this is nothing more than the two-call theory previously relied upon Hyperion, which the FCC has since repudiated. *Compare* Hyperion Complaint ¶ 28 and Exhibit 5 at 16 ("a local call terminated to an ISP as a local call regardless of where or how the ISP provides its information service"), *with* Declaratory Ruling ¶¶ 12 & 13.

In an argument nowhere advanced by Hyperion, the Initial Order attempts to fit the concept of call "completion" from BellSouth's tariffs into the "termination" of a call under the parties' Interconnection Agreement. This attempt is unconvincing. First, the Interconnection Agreement does not use the term call "completion," but rather speaks solely in terms of call "termination." Second, it has never been industry practice that a call is "terminated" when the call reaches the ISP and answer supervision is returned. Initial Order at 21 (quoting Rebuttal Testimony of David Martin). Rather, for decades, a call has been considered "terminated" when it reaches the end point of the communication. *See Declaratory Ruling* at ¶ 10. Over fifty years ago, a court explained: "That the Communications Act contemplates the regulation of interstate wire communication from its inception to its completion is confirmed by the language of the statute and by judicial decisions." *United States v.*

Offering Advanced Telecommunications Capability, CC Docket Nos. 98-147 et al.,

AT&T, 57 F. Supp. 451, 454 (7th Dist. of NY 1944) (emphasis added) aff'd sub nom *Hotel Astor v. United States*, 325 US 837 (1945). That same principle has been reiterated by both the courts and the FCC many times in the intervening decades. *See, e.g., Order Requiring Common Carriers to File Tariffs With Commission for Local Distribution Channels Furnished for Use in CATV Systems*, 4 FCC 2d 257 (1966), aff'd *General Telephone Co. v. FCC*, 413 F.2d 390, 401 (DC Cir.), cert. denied 396 US 888 (1969).[3]

Accepting the conclusion in the Initial Order that "ISP-bound traffic quite simply equals local traffic" would lead to absurd results. For example, under this reasoning, if an end user wants to access the State of Tennessee website, the communication would be "terminated" as soon as the end user "completes" the call to the ISP, whether or not the end user ever reaches the State's website. Furthermore, under the reasoning of the Initial Order, long distance voice services over the Internet -- services indistinguishable from those provided by AT&T or MCI -- also would be local, since such a call would be "terminated" once the end user reaches his or her ISP.

The Initial Order also appears to rely upon a purported distinction between the termination of an ISP-bound traffic for "reciprocal compensation" as opposed to jurisdictional purposes -- a distinction Hyperion did not "discover" until long after it filed its Complaint. Initial Order at 16-17. However, the FCC has recently made clear

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FCC 99-413, at 16 (Dec. 23, 1999) (*"Advanced Services Remand Order"*).

[3] The Hearing Officer appeared to give considerable weight to Mr. Martin's testimony concerning answer supervision because it "went unchallenged ...." Initial Order at 21. However, the Hearing Officer apparently overlooked the fact that Mr.

that no such distinction exists. In explaining why transporting ISP-bound traffic is not a "local exchange service" under the 1996 Act, the FCC stated that it "has determined that such traffic does not terminate at the ISP's local server, but instead terminates at interstate websites that are often located in other exchanges, states, or even foreign countries. Consistent with this determination, we conclude that typically ISP-bound traffic does not originate and terminate within an exchange and therefore, does not constitute telephone exchange service within the meaning of the Act." *Advanced Services Order*, ¶ 16 (footnotes omitted). This recent FCC order is fatal to the distinction the Initial Order purports to draw.

The FCC's *Advanced Services Order* also is dispositive of the Initial Order's belief "that ISP end-user status could conceivably be construed as revealing the local nature of ISP-bound traffic...." Initial Order at 17. In its *Advanced Services Order*, the FCC reiterated its "long standing characterization of the service that [local exchange carriers] offered to enhanced services providers (which include ISPs) as exchange access." *Id.* at ¶ 43. This long-standing characterization was based on orders, almost all of which predate the April 1997 Interconnection Agreement. Thus, the fact that the FCC decided to treat ISPs as "end-users for access charge purposes" does not mean that such interstate exchange access traffic is suddenly and magically transformed into "local traffic."

Under the circumstances, it is irrelevant whether the FCC had a "long-standing policy of treating ISP-bound traffic as local at the time the Agreement was

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Martin's testimony on answer supervision was offered during rebuttal to which

negotiated" or whether the parties were aware of such a policy. Initial Order at 22. What is relevant to the outcome of this case is that the FCC has never stated that ISP-bound traffic is local and has never concluded that ISP-bound traffic terminates locally at an ISP, which undermines the analysis in the Initial Order. Accordingly, the conclusion that ISP-bound traffic falls within the definition of local traffic under the parties' Interconnection Agreement must be set aside.[4]

2. Section XIX

The Initial Order also concludes that Hyperion is entitled to amend the Interconnection Agreement under Section XIX, which is commonly referred to as the "Most Favorite Nations" provision. In the process, the Initial Order ignores basic principles of Tennessee contract law.

First, whether or not the rule concerning the interplay between special and general provisions in a contract applies in this case, the law in Tennessee is clear that all words used in a contract are presumed to have meaning. *See Associated Press v. WGNS, Inc.*, 48 Tn. App. 407, 348 S.W.2d 507, 512 (1961). However, under the

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BellSouth was not permitted to respond.

[4] The Hearing Officer also appeared to be persuaded that ISP-bound traffic fell within the definition of local traffic under the Interconnection Agreement because the Agreement contains "no other provision, mechanism, or scheme providing for payment of the carriage of inter-carrier ISP traffic." Initial Order at 22-23. The absence of such provision is not particularly surprising since the Agreement involves the parties' duties with respect to local interconnection. Since ISP traffic is interstate and since ISPs use exchange access services, there was no need for the Agreement to address the inter-carrier compensation subject, just as the Agreement does not address access charges or other compensation for exchange access services. Furthermore, it is reasonable to believe that BellSouth understood that Hyperion would recover the cost of "carriage of inter-carrier ISP traffic" the same way

Hearing Officer's interpretation, the words establishing the three million minute threshold in Section IV.C is rendered completely superfluous. If, as the Initial Order has concluded, Hyperion could have amended the Agreement at any time without regard to the three million minute threshold, this provision has absolutely no meaning. Hyperion witness Martin admitted as much, Martin, Tr. at 31, which conflicts with the Initial Order's view that Section IV.C and XIX "may operate harmoniously." Initial Order at 29. Under the Initial Order, Section IV.C does not operate at all.

Second, BellSouth agrees "that the plain language of the Agreement squarely resolves this issue," Initial Order at 28, but not in the manner reached by the Initial Order. Notwithstanding the Initial Order's conclusion to the contrary, there is "express language" which limits "Section XIX to items and issues other than the transportation and termination (exchange) of local traffic...." Initial Order at 30. Such express language appears in Attachment B-1 of the Agreement outlining the rates and charges for local interconnection. Attachment B-1 provides that the rates and charges for local interconnection would be *"No cash compensation initially; see Section IV.C."*

This plain language, which the Initial Order does not address, is an express indication that the parties did not intend to pay reciprocal compensation to one another unless the three million minute threshold in Section IV.C was satisfied. If the parties had intended otherwise, mention would have been made of Section XIX, which is not the case. Thus, contrary to the Initial Order's conclusion, the language

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BellSouth does, which is from the ISP itself, particularly since Hyperion never gave a

in Attachment B-1, which makes clear that no cash compensation would be paid unless the three million minute threshold in Section IV.C was satisfied, constitutes a "persuasive indication in the Agreement that the parties agreed to amend 'only' upon one party exceeding the threshold." Initial Order at 30, n.69. Thus, the Initial Order cannot be reconciled with the plain language of the Agreement, which requires that the Initial Order be set aside.[5]

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contrary indication.

[5] Although the Initial Order seemed concerned about Hyperion's waiver of its rights under Section 252(i), Initial Order at 31-32, this concern apparently was not shared by Hyperion, which never raised the waiver issue. Furthermore, such waiver is plain from the language of Attachment B-1, which sets forth the only circumstance under which BellSouth and Hyperion agreed to pay reciprocal compensation for the transport and termination of local traffic -- if the three million minute threshold in Section IV.C was met. It is unclear what additional language would be required to satisfy the Initial Order that Hyperion made an "express" and "knowing" decision to limit the circumstances under which reciprocal compensation would be paid.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2000, a copy of the foregoing document was served on the parties of record via facsimile, overnight, or US Mail, postage prepaid:

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