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January 21, 2000

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VIA HAND DELIVERY

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

Re: Arbitration Between BellSouth Telecommunications and Time Warner Telecom of the Mid-South, L.P. Pursuant to the Telecom Act of 1996

TRA Docket No. 99-00797

Dear Mr. Waddell:

Enclosed for filing, please find the original plus thirteen (13) copies of Time Warner Telecom of the Mid-South L.P.'s Brief supporting its position in the referenced docket. Copies are being served on parties of record.

If you have any questions or concerns with regard to this filing, please do not hesitate to contact me.

Very truly yours,

FARRIS, MATHEWS, BRANAN, BOBANGO & HELLEN, P.L.C.

Charles B. Welch, Jr.

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cc: Carolyn M. Marek
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FILE

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: ARBITRATION OF THE INTERCONNECTION AGREEMENT BETWEEN BELLSOUTH TELECOMMUNICATIONS, INC. AND TIME WARNER TELECOM OF THE MID-SOUTH, L.P. PURSUANT TO SECTION 252(b) OF THE TELECOMMUNICATIONS ACT OF 1996	**Docket No. 99-00797**

TIME WARNER TELECOM OF THE MID-SOUTH'S BRIEF IN SUPPORT OF DEFINING CALLS TO INTERNET SERVICE PROVIDERS AS LOCAL TRAFFIC

BACKGROUND FACTS

Until April 13, 1999, Time Warner Telecom of the Mid-South, L.P. ("Time Warner") and BellSouth Telecommunications, Inc., ("Bell South") operated under a Tennessee Regulatory Authority ("TRA") approved interconnection agreement ("Agreement"). Since November of 1998, the parties met in person and telephonically on numerous occasions to negotiate a new agreement. Due to a disagreement on one issue, the parties have not reached agreement. As required by its terms, the parties continue to operate pursuant to the Agreement until a replacement agreement is executed.

Pursuant to Section 252(b)(1) of the 1996 Telecommunications Act ("The Act"), BellSouth petitioned the Tennessee Regulatory Authority ("The Authority") to arbitrate the unresolved issue: whether for purposes of reciprocal compensation, calls to Internet Service Providers (ISPs) are to be treated as local traffic. For the reasons described below, Time Warner asserts that such calls are local, and, therefore, require compensation to be paid to Time Warner when it terminates such calls. In addition to the arguments made below, Time Warner incorporates by reference and fully supports the pertinent parts of the Briefs filed by both ITC Delta Com (Docket No. 99-00430) and ICG Telecom Group (Docket No. 99-00377).

ARGUMENT

I. THE TRA HAS THE AUTHORITY TO RULE THAT ISP CALLS ARE LOCAL TRAFFIC, AND SHOULD DO SO WITHOUT DELAY.

A. The TRA Has Jurisdiction to Address the Definition of "Local Traffic."

The TRA has jurisdiction to arbitrate and approve inter-carrier compensation for ISP-bound traffic. Sections 251-252 of the Telecommunications Act of 1996 ("the Act") do not have a prohibitive effect upon the TRA's authority over this issue. The express language of Section 252(b) of the Act supports this position because it grants states the authority to arbitrate "any open issues," a phrase whose broad reach allows state arbitrators to resolve controversies related to contract provisions governing aspects of interconnection agreements that are not specifically covered by Section 251. See 47 U.S.C. § 252(b)(5).

The Federal Communication Commission ("FCC") has also stated in a recent Declaratory Ruling that "state commission decisions to impose reciprocal compensation obligations in an arbitration proceeding. . . do not conflict with any [FCC] rule regarding ISP-bound traffic." In the Matter of Implementation of Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 and Notice of Proposed Rule making in Inter-Carrier Compensation for ISP-bound Traffic, CC Docket No. 99-68, page 18, ¶ 26 (hereinafter referred to as "Declaratory Ruling"). Since the FCC's issuance of this

Ruling, state commissions have issued decisions affirming payment of reciprocal compensation for ISP traffic. In its May 5, 1999 Entry on Rehearing in Case Nos. 97-1557-TP-CCS, 97-1723-TP-CCS and 98-308-TP-CCS, the FCC ruled that:

> The FCC Declaratory Ruling supports [subsequent commission orders ruling that] under existing interconnection agreements, ISP traffic is subject to reciprocal compensation.

Order, page 12.

Appellate Courts have also upheld states' regulatory jurisdiction over ISP-bound traffic compensation issues. In recently affirming the FCC's policy of allowing ISPs to purchase connections to the network via state-tariffed local business lines, the Eighth Circuit held that the FCC may allow state regulators to set rates for the recovery of interstate costs related to ISP-bound traffic. Southwestern Bell Tel. v. FCC, 153 F.3d 523, 541-544 (8th Cir. 1998). Similarly, the Seventh Circuit ruled that a state did not violate federal law by requiring an ILEC to pay reciprocal compensation for calls to ISPs. Illinois Bell Tel. Co. v.. Worldcom Techs, 1999 U.S. App. LEXIS 20828. "The FCC could not have made clearer [in its Declaratory Ruling]," stated the Court, "that in the absence of a rule, a state agency's interpretation of an agreement so as to require payment of reciprocal compensation does not necessarily violate federal law." Id. at *18.

Moreover, there is no question that states have the authority to regulate a jurisdictionally-mixed service where the interstate and intrastate components are inseverable, and where neither Congress nor the FCC has preempted state regulation. States have always been permitted to regulate such cases. For instance, states permissibly regulated mixed-use telecommunications terminal equipment prior to the establishment of federal regulations governing that equipment. See North Carolina Utils.

Comm-m v. FCC, 552 F.2d 1036, 1050 (4th Cir. 1977). Current federal law also delegates to the states the authority to regulate certain mixed-use special access lines. See MTS and WATS Market Structure, Decision and Order, 4 FCC Rcd 5660 (1989). The requirement of mutual and reciprocal compensation for ISP-bound calls is clearly consistent with this well established principle.

B. The Commission Should Not Delay in Acting on Compensation for ISP-Bound Traffic.

BellSouth believes that because the FCC's Declaratory Ruling is subject to court challenge, states could find that they do not have the authority to create even an interim compensation arrangement. However, as Cindy Schonhaut testified for ICG in Docket No. 99-00377, BellSouth's position is unsupportable. "Under [BellSouth's expert] Mr. Varner's approach, the existence of any legal uncertainty is cause for competitive paralysis. Mr. Varner preaches inaction and offers no prescription to break the current regulatory gridlock." (Schonhaut Rebuttal Testimony, pp. 1-2.) Ms. Schonhaut testified that:

> Mr. Varner concedes that the present state of the law is such that this Authority has the requisite authority to order reciprocal compensation for calls to ISPs. Only a court can remove this authority, but no court has thus far given any indication that it will change the existing situation before the FCC adopts a rule.

(Id. at 4.)

The TRA should take immediate action, moreover, because the FCC has clearly indicated that even if a future ruling is at odds with that of a state agency, such a ruling would only have a prospective effect. (Declaratory Ruling at 3707, ¶ 28.) If the TRA fails to take action, Time Warner and numerous other CLECs serving ISP customers will be deprived of compensation for the calls delivered to ISPs during the interim period between the approval of the parties' interconnection agreement and the time the FCC adopts a rule. To complicate this economic impact, "the interim period could stretch for several months or even a year," for it took the FCC "almost two years to respond to the June 1997 request for clarification that led to the Declaratory Ruling." (Schonhaut Rebuttal Testimony, p.3.) Because there is no reason to believe that the FCC will decide the issue at hand any faster, a final rule could be a year or more away.

II. THE TRA SHOULD RULE THAT ISP TRAFFIC IS LOCAL TRAFFIC

A. Time Warner's Network Facilities Handle Carrier-to-Carrier Calls to ISPs In the Exact Same Manner as They Handle All Other Local Calls.

Regardless of whether an originating caller dials either a Time Warner non-ISP customer or a Time Warner ISP customer, both calls are identical. The calls travel from the originating customer's premises to the BellSouth central office switch, which then routes the call to the BellSouth Time Warner interconnection point, and ultimately to the Time Warner switch. From the Time Warner switch, the call is then transported to either the non-ISP customer or the ISP customer depending upon the number dialed by the caller. Both calls use the same path and exactly the same equipment to reach their destinations. Most importantly, the costs to determine the calls made to the non-ISP customer and the ISP customer are identical. As such, the rates associated with recovering those costs should be identical.

As explained by Michael Starkey's testimony in the ICG Telecom Group Arbitration,

> [T]he ten minute call originated on the BST network and directed to the ICG network travels exactly the same path, requires the use of exactly the same facilities and generates

> exactly the same level of costs regardless of whether that call is dialed to an ICG local residential customer or to an ISP provider.

(Direct Testimony of Michael Starkey, p. 6.) Starkey observed that BellSouth admitted in it's arbitration with DeltaCom that "when a BellSouth customer places or originates a call and uses the CLEC's network to complete that call, the CLEC incurs costs." (Id.)

BellSouth's position to prohibit ISP calls from the compensation that all other calls receive simply ignores the economic reality that both calls generate equal costs and must be covered by the reciprocal compensation rate. In its Declaratory Ruling, the FCC recognized this principal, stating that its policy of "treating ISP-bound traffic as local for purpose of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that compensation is due for that traffic." (Declaratory Ruling, ¶ 25)

BellSouth's position contradicts the economic axiom that costs of delivering traffic are incurred by the cost-causer, i.e. the carrier whose subscriber initiates the call. The Act requires, and the parties have agreed, that they will pay one another reciprocal compensation for local calls. Yet, BellSouth would have functionally identical calls to ISPs go completely uncompensated. This position is diametrically opposed to the elementary economic principal: the costs to deliver calls made to non-ISP customers and to ISP customers are identical, and therefore, the rates associated with recovering those costs should be identical.

B. The FCC has Stated that ISP Traffic Should Be Treated as Local.

The FCC's declaratory ruling strongly suggests that states should require reciprocal compensation for ISP-bound traffic. The Ruling recognized that since 1983, the FCC's policy has been to exempt ISPs and other enhanced service providers (ESPs) from the payment of access charges. ISPs "are permitted to purchase their links to the public switched telephone network ("PSTN") through intrastate business tariffs rather than through interstate access tariffs." Declaratory Ruling at 3692, ¶5. Thus, the FCC discharges its interstate regulatory obligations by treating ISP-bound traffic as though it were local, notwithstanding the ruling that jurisdictionally ISP-bound calls are largely interstate. Declaratory Ruling at 3693, ¶5.

The FCC emphasized that in deciding whether to require reciprocal compensation for ISP-bound traffic, state public service commissions should be guided by the FCC's policy of treating ISP-bound traffic as functionally local:

> The passage in the 1996 Act raised the novel issue of the applicability of its local competition provisions to the issue of inter-carrier compensation for ISP-bound traffic. Section 252 imposes upon state commissions the statutory duty to approve voluntarily negotiated interconnection 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." Thus, the mere fact that ISP-bound traffic is largely interstate does not necessarily remove it from the Section 251\252 negotiation and arbitration process. However, any such arbitration must be consistent with governing federal law. *While to date the commission has not adopted a specific rule regarding the matter, we note that our policy of treating ISP-bound traffic as local for purposes of interstate access would if applied in the separate context of reciprocal compensation, suggests that such compensation is due for that traffic.* (emphasis added)

Declaratory Ruling, ¶25. An Order in this arbitration requiring the parties to pay one another reciprocal compensation on this issue would be consistent with the FCC's regulatory framework.

C. Numerous Other States Examining This Exact Issue Have Decided to Treat ISP Calls as Local Traffic.

At least twenty state commissions have addressed the issue of reciprocal compensation to ISP-bound traffic. Of the commissions that have reached the merits of the issue, all but two have ruled in favor of defining ISP-bound calls as local traffic.[1] Almost every state commission that has considered the issue since the Declaratory Ruling has held that reciprocal compensation is owed for ISP-bound traffic and has rejected the argument that the declaratory ruling relieves BellSouth of its obligation to pay reciprocal compensation for local traffic to ISPs. Among the state agencies that have rejected BellSouth argument are as follows: Alabama, California, Colorado, Delaware, Florida, Hawaii, Indiana, Maryland, Minnesota, Missouri, Nevada, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island and Washington.

At least two states have expressly relied upon the FCC's directive in its Declaratory Ruling: Maryland and Minnesota. The Maryland Public Service Commission's recent order articulates that directive. It concluded that the Declaratory Ruling not only permits the state commissions to act to provide compensation for ISP-bound calls, but it compels them to do so:

> We are very concerned that [denying reciprocal compensation for ISP-bound traffic] will result in CLECs receiving no compensation for terminating ISP bound traffic. Such an effort will be detrimental to our efforts to encourage competition in Maryland. . . Thus, under the [FCC's] Declaratory Ruling it is

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[1] The only two commissions that have decided against reciprocal compensation for ISP traffic have been Louisiana and South Carolina. The Louisiana case involved an enforcement action of specific contract provisions. Considering the comments of the commissioners, it appears that the case was decided in a very contract specific context, and, as such, offers no guidance to the Authority as it considers the issue in this arbitration processing.

> incumbent upon this commission to determine an interim cost recovery methodoly which may be used until the FCC completes its rule-making on this issue and adopts a federal rule governing inter-carrier compensation arrangements. In fact, according to the FCC, state commissions are free to require reciprocal compensation for ISP-bound calls, or not require reciprocal compensation and adopt another compensation mechanism, bearing in mind that ISPs\ESPs are exempt from paying access charges. This does not leave us with the option of providing for no compensation for ISP-bound traffic calls. The state commissioners must either require reciprocal compensation or develop another compensation mechanism.

In the matter of the complaint of MFS Intelnet of Maryland, Inc. against Bell Atlantic, Inc., for breach of interconnection terms and request for immediate relief, Case No. 8731, Order No. 75280, Released June 11, 1999, at 16-17.

The remaining state agencies that have upheld reciprocal compensation for ISP-bound traffic have done so because their decisions are supported by a number of sound public policy and economic reasons. For one, as discussed above, calls directed to ISPs are functionally identical to local voice calls for which BellSouth agrees to pay termination charges. Applying different termination rates or, even worse, compensating a carrier for one type of call and not for the other, will generate inaccurate economic signals in the marketplace; driving firms away from serving ISPs. This result could have a dire impact on the growing electronic communication and commerce markets.

Secondly, state agencies sharing similar regulatory responsibilities as the TRA's have routinely recognized in their decisions that ISPs are an important market segment for CLECs, and eliminating a CLECs ability to recover its costs associated with serving them is likely to distort one of the only local exchange market segments that appears to be well on its way toward effective competition. ISPs have been drawn to CLECs like Time

Warner because these CLECs, unlike incumbent carriers, have been willing to meet their unique service needs. Allowing ILECs to direct calls to the ISPs by using the CLEC network without compensating them for its use penalizes the CLEC for attracting customers via innovative and customer service focused products.

Thirdly, it has been accepted by numerous state public service commissions that requiring carriers to pay reciprocal compensation rates for the termination of ISP-bound traffic is economically efficient. Because termination rates are based on their underlying costs, BellSouth should be economically indifferent as to whether it incurs the cost to terminate the call on its own network or whether it incurs that cost through a reciprocal compensation rate paid to Time Warner. The fact that BellSouth is not economically indifferent can only stem from its incentive to impede Time Warner's entry into the market place, rather than to be as efficient as possible in terminating its traffic.

Lastly, most states have accepted that because BellSouth is required to pay, as well as receive, symmetrical compensation for local exchange traffic based upon its own reported costs, its payment to other carriers in this regard are an important check on BellSouth's cost studies used to establish rates for the termination of traffic. Unless BellSouth is required to pay the costs that it itself has established via its own cost studies, it has every incentive to over estimate those costs for purposes of raising barriers to competitive entry. By removing large traffic volume, categories such as ISP-bound traffic from BellSouth's obligation to pay terminating costs, the Authority would be removing an important disciplining factor associated with insuring that BellSouth's reported termination costs are reasonable.

By upholding reciprocal compensation for ISP-bound traffic like so many other state agencies have, the TRA will insure further robust development of competition for local exchange service in Tennessee. The interconnection of networks means that all local exchange carriers will at times be incurring the costs of completing a call originating by a customer of another carrier. The means of mutual and reciprocal compensation, as defined in Section 252(d)(1)(2) of the Act and implemented through interconnection agreements entered into between carriers, is intended to insure that each carrier is compensated for the costs associated with completing these calls.

The importance of a mutual and reciprocal compensation mechanism to the development of an effectively competitive exchange market is illustrated by the frequency with which this issue has been extensively negotiated and ultimately arbitrated pursuant to Section 252 of the Act. The willingness of new market entrants to commit the resources necessary to pursue the process of lengthy negotiations and arbitrations, and their willingness to delay their entry into the local exchange markets until the arbitration process is completed, is a clear indication of the importance of these interconnection-related rates to the success of these carriers.

Clearly, the carrier that can avoid paying compensation to the other carriers for the completion of local calls originated by its end user customers will have a distinct competitive advantage. The fact that the carrier avoiding payment of compensation is an ILEC, compounds the anti-competitive impact. The incumbent carrier benefits from disputes regarding the terms of interconnection agreements. While the dispute awaits resolution, the CLEC completes calls originated by BellSouth end user customers without compensation. These funds could have been invested in efforts to further expand the CLEC's market share for local exchange services. Over time, the uncertainty and logistical difficulties created by this and similar disputes can have a detrimental affect on the efforts of Time Warner and other CLECs to enter the market and expand.

Finally, the costs incurred by Time Warner and other CLECs to engage in the litigation necessary to resolve this type of dispute artificially inflates the cost of competitive entry and creates unnecessary delay. Not only does this type of dispute have obvious detrimental effects on CLECs (and ultimately Tennessee customers of local exchange services), it is clearly beneficial to an incumbent carrier such as BellSouth. Because of these stakes, it is extremely important that the TRA consider this dispute within this context.

CONCLUSION

For the foregoing reasons, the Authority should rule in this arbitration that for purpose of reciprocal compensation, calls to ISPs are to be treated as local traffic.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Time Warner Telecom of the Mid-South's Brief in Support of Defining Calls to Internet Service Providers as Local Traffic has been served via U.S. First Class Mail on the parties of record on this the 21st day of January, 2000.

Charles B. Welch, Jr.

Charles B. Welch, Jr.