

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

AUGUST 4, 2000

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

FINAL ORDER OF ARBITRATION AWARD

This matter came before the Tennessee Regulatory Authority (the "Authority") upon the petition of BellSouth Telecommunications, Inc. ("BellSouth") for arbitration of an interconnection agreement with Time Warner Telecom of the Mid-South, L.P. ("Time Warner") pursuant to Section 252 of the Federal Telecommunications Act of 1996. This Final Order of Arbitration Award embodies the decision made by Chairman Melvin J. Malone, Director H. Lynn Greer, Jr., and Director Sara Kyle, in their capacity as Arbitrators, during the Public Arbitration Conference held Tuesday, March 14, 2000, and constitutes the valid, binding and final decision of the Arbitrators.

STATEMENT OF THE CASE

BellSouth filed its Petition for Arbitration with the Authority on October 15, 1999, requesting the Authority arbitrate one unresolved issue resulting from negotiations between the parties in an effort to enter into a voluntary interconnection agreement. On November 9, 1999, Time Warner filed its response to BellSouth's petition.

Counsel for the Authority, Gary Hotvedt, was designated as the Pre-Arbitration Officer, and a Pre-Arbitration Conference was held on December 7, 1999. The following appearances were entered:

Guy M. Hicks, Esquire, BellSouth Telecommunications, Inc., Rm. 2101, 333 Commerce Street, Nashville, Tennessee 37201, appearing on behalf of BellSouth;

Charles B. Welch, Jr., Esquire and Jon F. Minkoff, Esquire, Farris, Mathews, Branan, Bobango & Hellen, 618 Church Street, Suite 300, Nashville, Tennessee 37219, appearing on behalf of Time Warner.

The parties agreed to be bound by the Rules of Practice and Procedure Governing Proceedings under Section 252 of the Federal Telecommunications Act of 1996 (TRA Arbitration Rules 1220-5-1 through 1220-5-3).

The sole issue presented for arbitration by the parties was:

What should be the appropriate definition of local traffic for the purposes of the parties' reciprocal compensation obligations under Section 251(b)(5) of the 1996 Act?

Due to the similarity of this issue with the issues raised in two pending arbitrations¹ and for the sake of judicial economy, the parties agreed that the Arbitrators take administrative notice of the records developed in Authority Docket No. 99-00377, *Petition by ICG Telecom Group, Inc. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. pursuant to Section 252(b) of the Federal Telecommunications Act of 1996*, and Authority Docket No. 99-00430, *Petition for Arbitration of ITC^Deltacom Communications, Inc. with BellSouth Telecommunications, Inc. pursuant to the Telecommunications Act of 1996*.

¹ The issues relative to reciprocal compensation were consolidated in Docket No. 99-00430 and Docket No. 99-00377 and were essentially the same as in the present case. In Docket No. 99-00430 the issue was: "Should BellSouth be required to pay reciprocal compensation to ITC^DeltaCom for all calls that are properly routed over local trunks, including calls to information service providers." The issue in Docket No. 99-00377 was: "For the purpose of this agreement, should dial-up calls to Internet service providers ("ISPs") be treated as if they were local calls for purposes of reciprocal compensation."

POSITIONS OF THE PARTIES

Time Warner contended that calls to internet service providers ("ISPs") are local traffic for purposes of reciprocal compensation and cited three (3) reasons for its position:

1. Time Warner network facilities handle carrier-to-carrier calls to ISPs exactly the same way that they handle other local calls;
2. The FCC stated that ISP traffic should be treated as local; and
3. Numerous other state commissions examining the issue have decided that calls to ISPs should be treated as local for purposes of reciprocal compensation.

BellSouth urged the Authority to rule that calls to ISPs were not local traffic for purposes of reciprocal compensation and cited four (4) arguments in support of its position:

1. Reciprocal compensation is not the appropriate method to use to recover the costs associated with the handling of ISP traffic;
2. The payment of reciprocal compensation for ISP-bound traffic is bad public policy;
3. It is inconsistent with cost causation principals for Time Warner to recover costs associated with ISP-bound traffic from anyone other than the ISPs themselves; and
4. ISP-bound traffic is interstate in nature, and as such, should be regulated by the FCC.

DELIBERATIONS

Based upon the petition and response thereto, briefs submitted by the parties, and evidence and testimony developed in Authority Docket Nos. 99-00430 and 99-00377, the Arbitrators determined that the primary issues for consideration were whether a carrier should be compensated for carrying ISP-bound traffic and if so, what method should be used to calculate the amount of compensation.

The Arbitrators concluded that compensation should be paid for the carriage of ISP-bound traffic and that, in the absence of a federal rule governing intercarrier compensation for ISP-bound traffic, reciprocal compensation is an appropriate mechanism to effect that recovery. In response to BellSouth's contention that the Authority's ability to impose reciprocal compensation for the carriage of ISP-bound traffic is limited, the Arbitrators cited the following FCC language:

Even when parties to interconnection agreements do not voluntarily agree on an intercarrier compensation mechanism for ISP-bound traffic, state commissions nonetheless may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic. . . . While to date the commission has not adopted a specific rule governing the matter, we note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in a separate context of reciprocal compensation, suggest that such compensation is due for that traffic.

. . . A state commission's decision to impose reciprocal compensation obligations in an arbitration proceeding, or a subsequent state commission decision, that those obligations encompass ISP-bound traffic, does not conflict with any commission rule regarding ISP bound traffic.

In the Matter of Implementation of Local Competition Provisions in the Telecommunications Act of 1996, 14 FCC Rcd. 3689, ¶¶ 25-26 (1999) (declaratory ruling in CC Doc. No. 96-98 and notice of proposed rulemaking in CC Doc. 99-68) *vacated sub nom. Bell Atlantic Tel. Cos. v. Federal Communications Comm'n.*, 206 F.3d 1, 9 (DC Cir. 2000).²

² Although the United States Court of Appeals for the District of Columbia Circuit recently vacated and remanded this FCC ruling, the Court did not disturb the FCC's holding that state commissions could require reciprocal compensation for ISP-bound traffic until the FCC completes its rule-making proceedings. *See Bell Atlantic Tel. Cos. v. Federal Communications Comm'n.*, 206 F.3d 1, 9 (DC Cir. 2000). The Court stated: "We do not reach the objections of the incumbent LECs—that §251(b)(5) preempts state commission authority to compel payments to competitor LECs; at present we have no[t] adequately explained classification of these communications, and in the interim our vacatur of the Commission's ruling leaves the incumbents free to seek relief from state-authorized compensation that they believe to be wrongfully imposed." *Id.* In addition, the United States Court of Appeals for the Fifth, Seventh and Ninth Circuits have upheld the authority of state commission's to arbitrate the recovery of ISP-bound traffic compensation. *See Southwestern Bell Tel. Co. v. Public Utility Comm'n of Texas*, 2000 WL 332062, at *6-7 (5th Cir. March 30, 2000); *Illinois Bell Tel. Co. v. Worldcom Techs., Inc.*, 179 F.3d 566, 572 (7th Cir. 1999); *US West Communications v. MFS Internet, Inc.*, 193 F.3d 1112, 1122-24 (9th Cir. 1999).

During deliberations, the Arbitrators pointed out that BellSouth failed to propose an alternative method of intercarrier compensation for ISP traffic that fully satisfies the spirit of the Telecommunications Act of 1996. In addition, BellSouth failed to substantiate its arguments in opposition to reciprocal compensation. Although BellSouth criticized the use of reciprocal compensation, claiming that reciprocal compensation would result in an over-recovery of costs because of unequal holding times, BellSouth did not offer any cost studies to prove this assertion. BellSouth argued that the cost per minute to carry each type of call is different, yet despite its claims, BellSouth did not offer substantial proof and/or data to show that the pattern of cost causation for the two types of calls is sufficiently different to require different modes of cost recovery.

Finally, the Arbitrators determined that payment of reciprocal compensation would best serve the interest of telecommunications competition in Tennessee. The payment of reciprocal compensation for ISP-bound traffic will appropriately compensate competing local exchange carriers ("CLECs") for the use of their network when they deliver the traffic of an incumbent local exchange carrier to CLEC customers. Without this cost recovery, CLECs would have to cover those additional costs through their revenue streams. This would leave less capital for CLECs to use in expanding their networks and services to more telecommunications users in Tennessee.

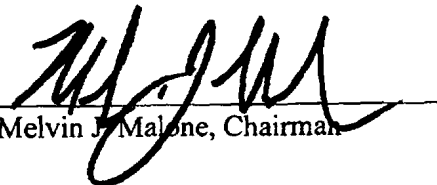
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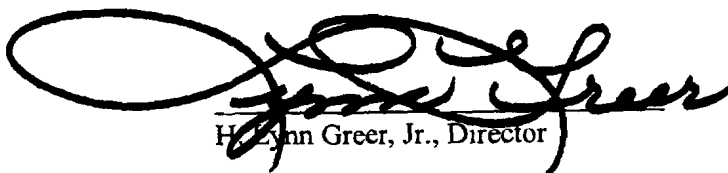
Based upon the foregoing, it is the order of the Arbitrators that reciprocal compensation is the appropriate interim method to be used to recover the costs associated with the delivery of ISP-bound traffic pending completion of the FCC's rulemaking with regard to this traffic. Any amendments to the agreement with regard to reciprocal compensation rates for ISP-bound traffic shall be submitted to the Authority for approval.

CONCLUSION

The Arbitrators stated that the decision made on March 14, 2000 is considered rendered when voted upon that day. The foregoing Final Order of Arbitration Award reflects resolution of the issue presented by the parties for arbitration. The Arbitrators concluded that the resolution of this issue complies with the provisions of the Federal Telecommunications Act of 1996 and is supported by the record in this proceeding.


TENNESSEE REGULATORY AUTHORITY,
BY ITS DIRECTORS ACTING AS ARBITRATORS


Melvin J. Malone, Chairman


H. Lynn Greer, Jr., Director


Sara Kyle, Director

ATTEST:


K. David Waddell, Executive Secretary