BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of WorldCom Technologies, Inc. against BellSouth Telecommunications, Inc. for breach of terms of Florida Partial Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996, and request for relief.	DOCKET NO. 971478-TP ORDER NO. PSC-98-1216-FOF-TP ISSUED: September 15, 1998
Complaint of Teleport Communications Group Inc./TCG South Florida against BellSouth Telecommunications, Inc. for breach of terms of interconnection agreement under Section 252 of the Telecommunications Act of 1996, and request for relief.	DOCKET NO. 980184-TP
Complaint of Intermedia Communications, Inc. against BellSouth Telecommunications, Inc. for breach of terms of Florida Partial Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 and request for relief.	DOCKET NO. 980495-TP
Complaint by MCI Metro Access Transmission Services, Inc. against BellSouth Telecommunications, Inc. for breach of approved interconnection agreement by failure to pay compensation for certain local traffic.	DOCKET NO. 980499-TP

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman

J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA
E. LEON JACOBS, JR.

FINAL ORDER RESOLVING COMPLAINTS

APPEARANCES:

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On behalf of the Commission Staff.

CASE BACKGROUND

MFS Communications Company, Inc. (MFS), and BellSouth Telecommunications, Inc. (BellSouth), entered into a Partial Florida Interconnection Agreement pursuant to the Telecommunications Act of 1996 (Act) on August 26, 1996. The Commission approved the Agreement in Order No. PSC-96-1508-FOF-TP, issued December 12, 1996, in Docket No. 961053-TP. The Commission approved an amendment to the Agreement in Order No. PSC-97-0772-FOF-TP, issued July 1, 1997, in Docket No. 970315-TP. On November 12, 1997, WorldCom Technologies, Inc. (WorldCom), filed a Complaint Against BellSouth and Request for Relief, alleging that BellSouth has failed to pay reciprocal compensation for local telephone exchange service traffic transported and terminated by WorldCom's affiliate, MFS, to Internet Service Providers (ISPs). The complaint was assigned Docket No. 971478-TP. BellSouth filed its Answer and Response on December 22, 1997. In Order No. PSC-98-0454-PCO-TP, issued March 31, 1998, the Commission directed that the matter be set for hearing.

Teleport Communications Group, Inc./TCG South Florida (TCG), and BellSouth entered into an Interconnection Agreement pursuant to the Act on July 15, 1996. The Commission approved the Agreement in Order No. PSC-96-1313-FOF-TP, issued October 29, 1996, in Docket No. 960862-TP. On February 4, 1998, TCG filed a Complaint for Enforcement of Section IV.C of its Interconnection Agreement with BellSouth, also alleging that BellSouth has failed to pay reciprocal compensation for local telephone exchange service traffic transported and terminated by TCG to ISPs. The complaint was assigned Docket No. 980184-TP. BellSouth filed its Answer and Response on February 25, 1998.

MCImetro Access Transmission Services, Inc. (MCIm), and BellSouth entered into an Interconnection Agreement pursuant to the Act on April 4, 1997. The Commission approved the Agreement in Order Nos. PSC-97-0723-FOF-TP, issued June 19, 1997, and PSC-97-0723A-FOF-TP, issued June 26, 1997, in Docket No. 960846-TP. On February 23, 1998, MCIm filed a Complaint against BellSouth, which was assigned Docket No. 980281-TP. Among other things, MCIm also alleged in Count 13 that BellSouth has failed to pay reciprocal compensation for local telephone exchange service traffic transported and terminated by MCIm to ISPs. On April 6, 1998, MCIm filed a separate Complaint embodying the complaint set forth in Count 13 of the first Complaint. The separate complaint was assigned Docket No. 980499-TP.

Intermedia Communications, Inc. (Intermedia), and BellSouth entered into an interconnection Agreement pursuant to the Act on July 1, 1996. The Commission approved the Agreement in Order No. PSC-96-1236-FOF-TP, issued October 7, 1996, in Docket No. 960769-TP. The Commission approved an amended Agreement in Order No. PSC-97-1617-FOF-TP, issued December 30, 1997, in Docket No. 971230-TP.

On April 6, 1998, Intermedia filed a Complaint against BellSouth alleging that BellSouth has failed to pay reciprocal compensation for local telephone exchange service traffic transported and terminated by Intermedia to ISPs. That complaint was assigned Docket No. 980495-TP.

On March 9, 1998, GTE Florida Incorporated (GTEFL) filed a petition to intervene in this proceeding. By Order No. PSC-98-0476-PCO-TP, we denied GTEFL's petition. Subsequently, on May 6, 1998, GTEFL filed a petition to be permitted to file a brief. We denied that petition at the commencement of the hearing in these complaint dockets.

By Order No. PSC-98-0561-PCO-TP, issued April 21, 1998, the four complaints were consolidated for hearing purposes. The hearing was held on June 11, 1998.

DECISION

This case is about BellSouth's refusal to pay reciprocal compensation for the transport and termination of ISP traffic under the terms of its interconnection agreements with WorldCom, Teleport, Intermedia, and MCIm. In a letter dated August 12, 1997, BellSouth notified the complainants that it would not pay compensation for the termination of ISP traffic, because "ISP traffic is jurisdictionally interstate" and "enjoys a unique status, especially [as to] call termination." The case is primarily a contract dispute between the parties, and that is the foundation of our decision below. As TCG stated in its brief, "This is a contract dispute in which the Commission must decide whose meaning is to be given to the term 'Local Traffic' in the Agreement."

Accordingly, in this decision we only address the issue of whether ISP traffic should be treated as local or interstate for purposes of reciprocal compensation as necessary to show what the parties might reasonably have intended at the time they entered into their contracts. Our decision does not address any generic questions about the ultimate nature of ISP traffic for reciprocal compensation purposes, or for any other purposes.

While there are four complainants in the consolidated case, their arguments contain many common threads. Also, BellSouth's position on each issue is the same, and its brief addresses all four together. For the sake of efficiency, we will address the main themes in our discussion of the WorldCom-BellSouth agreement. We will address the particular language of the other agreements separately.

The WorldCom-BellSouth Agreement

On August 26, 1996, MFS (now WorldCom) and BellSouth entered into a Partial Interconnection Agreement, which we approved in Order No. PSC-96-1508-FOF-TP. WorldCom witness Ball testified on the pertinent provisions of that Agreement. Section 1.40 of the Agreement defines local traffic as:

> [C]alls between two or more Telephone Exchange service users where both Telephone Exchange Services bear NPA-NXX designations associated with the same local calling area of the incumbent LEC or other authorized area [such as EAS]. Local traffic includes traffic types that have been traditionally referred to as "local calling" and as "extended area service (EAS)." All other traffic that originates and terminates between end users within the LATA is toll traffic. In no event shall the Local Traffic area for purposes of local call termination billing between the parties be decreased.

Section 5.8.1 provides that:

> Reciprocal Compensation applies for transport and termination of Local Traffic (including EAS and EAS-like traffic) billable by BellSouth or MFS which a Telephone Exchange Service Customer originates on BellSouth's or MFS's network for termination on the other Party's network.

The question presented for decision is, as it is in the other complaints, whether, under the WorldCom - BellSouth Florida Partial Interconnection Agreement, the parties are required to compensate each other for transport and termination of traffic to Internet Service Providers; and if they are, what relief should the Commission grant? The issue is whether the traffic in question, ISP traffic, is local for purposes of the agreements in question.

According to witness Ball, the language of the WorldCom-BellSouth Agreement itself makes it clear that the parties owe each other reciprocal compensation for the traffic in question. He stated that "if a BellSouth customer utilizes a BellSouth telephone exchange service that has a local NPA-NXX and they call a WorldCom customer that buys a WorldCom telephone exchange service that has a WorldCom NPA-NXX, that's local traffic." Witness Ball explained that this is what happens when a BellSouth local customer calls a WorldCom customer that happens to be an ISP. He pointed out that

there is no exclusion for any type of customer based on what business the customer happens to be in. Witness Ball noted that where exceptions were needed for certain types of traffic, they were expressly included in the Agreement. He argued that WorldCom understood ISP traffic to be local, and if BellSouth wanted to exclude ISP calls, it was BellSouth's obligation to raise the issue at the time the Agreement was negotiated.

Witness Ball stated that "the Agreement is entirely clear and unambiguous" on the treatment of ISP traffic as local; but if we determine that the Agreement is ambiguous on this point, the ambiguities should be resolved by considering:

(1) the express language of the Telecommunications Act of 1996;

(2) relevant rulings, decisions and orders of this Commission;

(3) relevant rulings, decisions and orders of the FCC interpreting the Act;

(4) rulings, decisions and orders from other, similarly situated state regulatory agencies; and

(5) the custom and usage in the industry.

BellSouth witness Hendrix agreed that the contract did not specify whether ISP traffic was included in the definition of local traffic. Witness Hendrix argued, however, that it was WorldCom's obligation to raise the issue in the negotiations. In fact, the record shows that while BellSouth and the complainants all reached a specific agreement on the definition of local traffic to be included in the contracts, none of them raised the particular question of what to do with ISP traffic.

According to BellSouth, all the complainants assumed that BellSouth agreed to include ISP traffic as local. BellSouth asserts that it cannot be forced to pay reciprocal compensation just because it did not "affirmatively except ISP traffic from the definition of 'local traffic'" in negotiating the Agreement. BellSouth argues that the existing law at the time the contracts were negotiated "reflects that it was unreasonable for the Complainants to blithely assume that BellSouth agreed with their proposed treatment of ISP traffic."

It appears to us from our review of the record, however, that BellSouth equally assumed, and implied in its brief and testimony at the hearing, that the complainants in fact knew ISP traffic was

interstate in nature. In its brief, BellSouth states that "parties to a contract are presumed to enter into their Agreement with full knowledge of the state of the existing law, which in turn is incorporated into and sheds light on the meaning of the parties' Agreement." BellSouth witness Hendrix asserted that the FCC had explicitly found that ISPs provide interstate services. Therefore, witness Hendrix argued, there was no need for BellSouth to believe ISP traffic would be subject to reciprocal compensation. The result of this misunderstanding, BellSouth asserts, was that the parties never had an express meeting of the minds on the scope of the definition of local traffic.

Discussion

Upon review of the language of the agreement, and the evidence and testimony presented at the hearing, we find that the Agreement defines local traffic in such a way that ISP traffic clearly fits the definition. Since ISP traffic is local under the terms of the Agreement, then, a priori, reciprocal compensation for termination is required under Section 5.8 of the Agreement. There is no ambiguity, and there are no specific exceptions for ISP traffic. Since there is no ambiguity in the language of the agreement, we need not consider any other evidence to determine the parties' obligations under the agreement. Even if there were an ambiguity in the language of the agreement, however, the other evidence and argument presented at the hearing leads to the same result: the parties intended to include ISP traffic as local traffic for purposes of reciprocal compensation under their agreement.

Local vs. Interstate Traffic

The first area to explore is the parties' basis for considering ISP traffic to be jurisdictionally local or interstate. BellSouth witness Hendrix contended that for reciprocal compensation to apply, "traffic must be jurisdictionally local." He argued that ISP traffic is not jurisdictionally local, because the FCC "has concluded that enhanced service providers, of which ISPs are a subset, use the local network to provide interstate services." He added that they do so just as facilities-based interexchange carriers and resellers use the local network to provide interstate services. He stated that "[t]he FCC stated in Paragraph 12 in an order dated February 14, 1992, in Docket Number 92-18, that:

> Our jurisdiction does not end at the local switch, but continues to the ultimate termination of the call. The key to jurisdiction is the nature of the communication itself, rather than the physical location of the technology

Further, according to Witness Hendrix, in its April 10, 1998, Report to Congress (CC Docket No. 96-45), "the FCC indicated that it does have jurisdiction to address whether ALECs that serve ISPs are entitled to reciprocal compensation." We will discuss that report in more detail below.

BellSouth does acknowledge in its brief that the "FCC has not held that ISP traffic is local traffic for purposes of the instant dispute before the Commission." Nor has the FCC "held that ISPs are end users for all regulatory purposes." We agree with this assessment. The FCC has not yet decided whether ISP traffic is subject to reciprocal compensation. While the FCC has determined that ISPs provide interstate services, it appears that the FCC may consider these services severable from telecommunications services, as we explain below. No FCC order delineates exactly for what purposes the FCC intends ISP traffic to be considered local. By the same token, the FCC has not said that ISP traffic cannot be considered local for all regulatory purposes. It appears that the FCC has largely been silent on the issue. This leads us to believe the FCC intended for the states to exercise jurisdiction over the local service aspects of ISP traffic, unless and until the FCC decided otherwise. Even Witness Hendrix agreed that the FCC intended ISP traffic to be treated as though local. He did not expound on what exactly that meant

BellSouth contends in its brief that there is no dispute that an Internet transmission may simultaneously be interstate, international and intrastate. BellSouth also contends that the issue should be resolved in pending proceedings before the FCC. Those proceedings include one the FCC initiated in response to a June 29, 1997, letter from the Association for Local Telecommunications Services (ALTS). ALTS requested clarification from the FCC that ISP traffic is within the FCC's exclusive jurisdiction. ALTS has also asked the FCC for a ruling on the treatment of ISP traffic as local.

Regardless of what the FCC ultimately decides, it has not decided anything yet, and we are concerned here with an existing interconnection agreement, executed by the parties in 1996. Our finding that ISP traffic should be treated as local for purposes of the subject interconnection agreement is consistent with the FCC's treatment of ISP traffic at the time the agreement was executed, all pending jurisdictional issues aside.

Termination

In its brief, BellSouth places considerable emphasis on the point of termination for a call. The basic question is whether or not ISP traffic terminates at the ALEC premises. Witness Hendrix testified that "call termination does not occur when an ALEC,

serving as a conduit, places itself between BellSouth and an ISP." "[I]f an ALEC puts itself in between BellSouth's end office and the Internet service provider, it is acting like an intermediate transport carrier or conduit, not a local exchange provider entitled to reciprocal compensation." "Thus, the 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." BellSouth states in its brief that "the jurisdictional boundaries of a communication are determined by its beginning and ending points, and the ending point of a call to an ISP is not the ISP switch, but rather is the database or information source to which the ISP provides access."

MCIm contends in its brief that BellSouth witness Hendrix' testimony that a call to an ISP terminates not at the local telephone number, but rather at a distant Internet host misunderstands the nature of an Internet call. MCIm witness Martinez contended that the ability of Internet users to visit multiple websites at any number of destinations on a single call is a clear indication that the service provided by an ISP is enhanced service, not telecommunications service. According to MCIm, this does not alter the nature of the local call. While BellSouth would have one believe that the call involved is not a local call, MCIm points out that in the case of a rural customer using an IXC to connect with an ISP, the call "is suddenly two parts again: a long distance call, for which BellSouth can charge access, followed by an enhanced service."

BellSouth argues in its brief that "in interpreting the language of a contract, words referring to a particular trade will be interpreted by the courts according to their widely accepted trade meaning." We agree, but it appears to us that BellSouth then chooses to ignore the industry standard definition of the word "termination." The other parties provided several examples of industry definitions on this point

WorldCom witness Ball stated that "[s]tandard industry practice is that a call is terminated essentially when it's answered; when the customer that is buying the telephone exchange service that has the NPA-NXX answers the call by--whether it's a voice grade phone, if it's a fax machine, an answering machine or, in the case of an ISP, a modem."

TCG witness Kouroupas testified that the standard industry definition of "service termination point" is:

> Proceeding from a network toward a user terminal, the last point of service rendered by a commercial carrier under applicable

> tariffs.... In a switched communications system, the point at which common carrier service ends and user-provided service begins, i.e. the interface point between the communications systems equipment and the user terminal equipment, under applicable tariffs.

Witness Kouroupas further explained that "A call placed over the public switched telecommunications network is considered 'terminated' when it is delivered to the telephone exchange bearing the called telephone number." Call termination occurs when a connection is established between the caller and the telephone exchange service to which the dialed telephone number is assigned, answer supervision is returned, and a call record is generated. This is the case whether the call is received by a voice grade phone, a fax machine, an answering machine, or in the case of an ISP, a modem. Witness Kouroupas contended that this is a widely accepted industry definition.

MCIm argues in its brief that:

> a "telephone call" placed over the public switched telephone network is "terminated" when it is delivered to the telephone exchange service premise bearing the called telephone number... specifically, in its Local Competition Order (Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, FCC 96-325 (rel. Aug. 8, 1996), ¶1040), the FCC defined terminations "for purposes of section 251(b)(5), as the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises." MCIm terminates telephone calls to Internet Service Providers on its network. As a communications service, a call is completed at that point, regardless of the identity or status of the called party

Witness Martinez testified that "[w]hen a BellSouth customer originates a telephone call by dialing that number, the telephone call terminates at the ISP premises, just as any other telephone call terminates when it reaches the premises with the phone number that the end user dialed."

Severability

Recent FCC documents have described Internet traffic as calls with two severable parts: a telecommunications service part, and an enhanced service part. In the May 1997 Universal Service Order at ¶789, the FCC stated:

> When a subscriber obtains a connection to an Internet service provider via voice grade access to the public switched network, that connection is a telecommunications service and is distinguishable from the Internet service provider's offering.

In that Report, the FCC also stated that ISPs "generally do not provide telecommunications." (¶¶ 15, 55) WorldCom argues in its brief that:

> The FCC's determination that ISPs do not provide telecommunications was mandated by the 1996 Act's express distinction between telecommunications and information services. "Telecommunications" is "The transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. Section 153(48). By contrast, "information services" is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. Sec. 153(20)

WorldCom adds that:

> [t]he FCC recognized that the 1996 Act's distinction between telecommunications and information services is crucial. The FCC noted that "Congress intended 'telecommunications service' and 'information service' to refer to separate categories of services" <u>despite the appearance from the end user's perspective</u> that it is a single service because it may involve telecommunications components. (<u>Report to Congress</u>, ¶¶56, 58) [Emphasis supplied by WorldCom]

BellSouth argues that the complainants misinterpret the FCC's decision. BellSouth points out that this passage is only discussing whether or not ISPs should make universal service contributions. That is true; but the passage is nevertheless as significant an indication of how the FCC may view ISP traffic as the passages BellSouth has cited.

In its brief, BellSouth claims that the FCC "specifically repudiated" the two-part theory. BellSouth cites the FCC's Report to Congress, CC Docket No., 96-45, April 10, 1998, ¶220. There the FCC stated:

> We make no determination here on the question of whether competitive LECs that serve Internet service providers (or Internet service providers that have voluntarily become competitive LECs) are entitled to reciprocal compensation for terminating Internet traffic. That issue, which is now before the [FCC], does not turn on the status of the Internet service provider as a telecommunications carrier or information service provider. [emphasis supplied by BellSouth]

BellSouth claims that this means the FCC believes the distinction is "meaningless in the context of the FCC's pending reciprocal compensation decision." The other parties point out, however, that it is not at all clear what the FCC means in this passage. It appears to us that the FCC is talking here about the status of the provider, not about the severability of the telecommunications service from the information service. Indeed, in the same report, the FCC brought up the severability notion, as discussed above.

BellSouth also argues that the severability theory is contradicted by the FCC's description of Internet service in its Non-Accounting Safeguards Order (Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-149 (released Dec. 24, 1996), note 291), where the FCC states:

> The Internet is an interconnected global network of thousands of interoperable packet-switched networks that use a standard protocol...to enable information exchange. An end user may obtain access to the Internet from an Internet service provider, by using dial-up or dedicated access to connect to the Internet service provider's processor. The

> Internet service provider, in turn, connects the end user to an Internet backbone provider that carries traffic to and from other Internet host sites.

BellSouth claims that the significance of this is that calls to ISPs only transit through the ISP's local point of presence. Thus, the call does not terminate there. In support of this conclusion, BellSouth mentions several other services, such as Asynchronous Transfer Mode (ATM) technology, that use packet switching. BellSouth makes the point that the jurisdictional nature of a call is not changed through the conversion from circuit switching to packet switching.

BellSouth also discussed an example where an end user made a long-distance call to access voice mail. In that case the call was an interstate call, and the FCC found that it did not lose that interstate character upon being forwarded to voice mail. Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation, 7 FCC Rcd 1619 (1992), aff'd, Georgia Public Service Commission v. FCC, 5 F.3d 1499 (11th Cir. 1993). We do not comprehend BellSouth's point. By that logic, if a local call is used to access an information service, it follows that the entire transmission would be local. In yet another case cited by BellSouth, the FCC found that interstate foreign exchange service was interstate service, and thus came under the FCC's jurisdiction. New York Telephone Co.--Exchange System Access Line Terminal Charge for FX and CCSA Service, Memorandum Opinion and Order, 76 FCC 2d 349 (1980). Once again, it is difficult to discern BellSouth's point. We do not find this line of argument at all persuasive.

BellSouth further argues that "[t]he FCC has long held that the jurisdiction of a call is determined not by the physical location of the communications facilities or the type of facilities used, but by the nature of the traffic that flows over those facilities." This, too, is a perplexing argument in light of BellSouth's claims that the distant location of the host accessed over the Internet makes ISP traffic interstate, and that the nature of ISP traffic as either telecommunications or information service is irrelevant.

As mentioned above, witness Hendrix did admit that "the FCC intended for ISP traffic to be 'treated' as local, regardless of jurisdiction." He emphasized the word treated, and explained that the FCC "did not say that the traffic was local but that the traffic would be treated as local."

FPSC Treatment

BellSouth dismisses Commission Order No. 21815, issued September 5, 1989, in Docket No. 880423-TP, Investigation into the Statewide Offering of Access to the Local Network for the Purpose of Providing Information Services, as an interim order. In that order, the Commission found that end user access to information service providers, which include Internet service providers, is by local service. In the proceeding, BellSouth's own witness testified that:

> [C]onnections to the local exchange network for the purpose of providing an information service should be treated like any other local exchange service. (Order 21815, p. 25)

The Commission agreed with BellSouth's witness. The Commission also found that calls to ISPs should be viewed as jurisdictionally intrastate local exchange calls terminating at an ISP's location in Florida. BellSouth's position, as stated in the Order, was that:

> calls should continue to be viewed as local exchange traffic terminating at the ESP's [Enhanced Service Provider's] location. Connectivity to a point out of state through an ESP should not contaminate the local exchange. (Order, p. 24) (ISPs are a subset of ESPs.)

In this case, Witness Hendrix claimed that Order 21815 was only an interim order that has now been overruled. He could not identify any Commission order establishing a different policy; nor could he specify the FCC order that supposedly overrules the Florida Commission order. Further, and most importantly, BellSouth admitted that this definition had not been changed at the time it entered into its Agreements.

It is clear that the treatment of ISP traffic was an issue long before the parties' Agreement was executed. We found, in Order No. 21815, as discussed above, that such traffic should be treated as local. Both WorldCom and BellSouth clearly were aware of this decision, and we presume that they considered it when they entered into their Agreement.

Intent of Parties

In determining what was the parties' intent when they executed their contract, we may consider circumstances that existed at the time the contract was entered into, and the subsequent actions of the parties. As WorldCom argues in its brief, "the intent of the parties is revealed not just by what is said, but by an analysis of all the facts and circumstances surrounding the disputed issue."

In James v. Gulf Life Insur. Co., 66 So.2d 62, 63 (Fla. 1953) the Florida Supreme Court cited with favor Contracts, 12 Am.Jur. § 250, pages 791-93, as a general proposition concerning contract construction in pertinent part as follows:

> Agreements must receive a reasonable interpretation, according to the intention of the parties at the time of executing them, if that intention can be ascertained from their language ... Where the language of an agreement is contradictory, obscure, or ambiguous, or where its meaning is doubtful, so that it is susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes a rational and probable agreement must be preferred ... An interpretation which is just to both parties will be preferred to one which is unjust.

In the construction of a contract, the circumstances in existence at the time the contract was made should be considered in ascertaining the parties' intention. Triple E Development Co. v. Floridagold Citrus Corp., 51 So.2d 435, 438, rhg. den. (Fla. 1951). What a party did or omitted to do after the contract was made may be properly considered. Vans Agnew v. Fort Myers Drainage Dist., 69 F.2d 244, 246, rhg. den., (5th Cir.). Courts may look to the subsequent action of the parties to determine the interpretation that they themselves place on the contractual language. Brown v. Financial Service Corp., Intl., 489 F.2d 144, 151 (5th Cir.) citing LaLow v. Codomo, 101 So.2d 390 (Fla. 1958).

As noted above, Section 1.40 of the Agreement defines local traffic. The definition appears to be carefully drawn. Local traffic is said to be calls between two or more service users bearing NPA-NXX designations within the local calling area of the incumbent LEC. It is explained that local traffic includes traffic traditionally referred to as "local calling" and as "EAS." No mention is made of ISP traffic. Therefore, nothing in Section 1.40 sets ISP traffic apart from local traffic. It is further explained that all other traffic that originates and terminates between end users within the LATA is toll traffic

As evidence of its intent, BellSouth argues that the interpretation of a contract must be one consistent with reason, probability, and the practical aspect of the transaction between the parties. BellSouth contends that it was "economically

irrational for it to have agreed to subject ISP traffic to payment of reciprocal compensation." BellSouth claims it "had no rational economic reason to have agreed to pay reciprocal compensation for the ISP traffic, because...such assent would have likely guaranteed that BellSouth would lose money on every customer it serves who subscribed to an ISP served by a complainant."

In an example provided by BellSouth, a BellSouth residential customer subscribes to an ISP that is served by an ALEC. The customer uses the Internet for two hours per day. This usage would generate a reciprocal compensation payment to the ALEC of $36.00 per month, assuming a 1 cent per minute reciprocal compensation rate. A Miami BellSouth customer pays $10.65 per month for residential service. Thus, BellSouth would pay $25.35 per month more to the ALEC than it receives from its customer. BellSouth claims that this unreasonable result is proof that it never intended to include ISP traffic as local for reciprocal compensation purposes.

Not all parties receive reciprocal compensation of 1 cent per minute. The MCIm Agreement specifies a rate of $0.002 per minute, not $0.01. In this case, using BellSouth's example, the total reciprocal compensation would be $7.20. MCIm points out in its brief that the contract containing the $0.01 rate is one to which BellSouth agreed. They argue that "[w]hether BellSouth agreed to this rate because they mistakenly thought that a rate five times higher than cost would give it some competitive advantage, or whether BellSouth agreed to it without thinking at all, it is not the Commission's role to protect BellSouth from itself."

In support of its position that ISP traffic was intended to be treated as local in the Agreement, WorldCom points out that BellSouth charges its own ISP customers local business line rates for local telephone exchange service that enables the ISP's customers within the local calling area to connect with the ISP by means of a local call. Such calls are rated and billed as local, not toll.

MCIm also points out that BellSouth treats calls to ISPs that are its customers as local calls. BellSouth also offers its own ISP customers service out of its local exchange tariffs. MCIm asserts that while it treats its own customers one way, BellSouth would have ISP customers of the ALECs treated differently.

Besides BellSouth's treatment of its own ISP customers' traffic, there is nothing in the parties' agreements that addresses the practical aspect of how to measure the traffic. As TCG points out in its brief, BellSouth failed to take any steps to develop a tracking system to separately account for ISP traffic. The TCG contract was entered into in July 1996, but BellSouth did not

attempt to identify ISP traffic until May or June of 1997. If the agreement did in fact exclude ISP traffic from the definition of local traffic, and thus the reciprocal compensation provisions of the agreement, it would be necessary to develop a tracking system. The evidence indicates that the tracking system currently used by BellSouth is based on identifying the seven-digit number associated with an ISP. Absent that, as BellSouth witness Hendrix conceded, BellSouth must rely on estimates.

Intermedia also points out in its brief that:

> If ISP traffic is not local as BellSouth contends, it would have been imperative for the parties to develop a system to identify and measure ISP traffic, because there is no ready mechanism in place for tracking local calls to ISPs. The calls at issue are commingled with all other local traffic and are indistinguishable from other local calls. If BellSouth intended to exclude traffic terminated to ISPs from other local traffic, it would have needed to develop a way to measure traffic that distinguishes such calls from all other types of local calls with long holding times, such as calls to airlines and hotel reservations, and banks. In fact, there is no such agreed-upon system in place today.

This is perhaps the most telling aspect of the case. BellSouth made no effort to separate out ISP traffic from its own bills until the May-June 1997 time frame. WorldCom argues in its brief that BellSouth's "lack of action is especially glaring given Mr. Hendrix's acknowledgment that there are transport and termination costs associated with calls terminating at an ISP." Prior to that time, BellSouth may have paid some reciprocal compensation for ISP traffic. Witness Hendrix admitted, "We may have paid some, I will not sit here and say that we did not pay any." The other parties made no effort to separate out ISP traffic, and based on their position that the traffic should be treated as local, this is as one would expect. In some cases the contracts were entered into more than a year before this time period.

It appears from the record that there was little, if any, billing of reciprocal compensation by the ALECs until just before BellSouth began to investigate the matter. It was the receipt of the bills for considerable amounts of reciprocal compensation that triggered BellSouth's investigation of the matter, and its decision to begin removing ISP traffic from its own bills. If these large bills were never received, would BellSouth have continued to bill

the ALECs for reciprocal compensation on ISP traffic? There would have been no reason for BellSouth to investigate, and therefore no reason for them to start separating their own traffic. Under the circumstances, we have difficulty concluding that the parties all knew that ISP traffic was interstate, and should be separated out before billing for reciprocal compensation on local traffic, as BellSouth contends.

Impact on Competition

The potential impact of BellSouth's actions on local competition is perhaps the most egregious aspect of the case. As witness Hendrix testified, The Telecommunications Act of 1996 "established a reciprocal compensation mechanism to encourage local competition." He argued that "The payment of reciprocal compensation for ISP traffic would impede local competition." We are more concerned with the adverse effect that BellSouth's refusal to pay reciprocal compensation could have on competition. We agree with this assessment by TCG witness Kouroupas:

> As competition grows, the smaller, leaner ALECs may well win other market segments from ILECs. If each time this occurs the ILEC, with its greater resources overall, is able to fabricate a dispute with ALECs out of whole cloth and thus invoke costly regulatory processes, local competition could be stymied for many years.

Conclusion

We think the question of whether ISP traffic is local or interstate can be argued both ways. While it appears that the FCC may believe Internet usage is an interstate service, it also appears that it believes that it is not a telecommunications service. The FCC itself seems to be leaning toward the notion of severability of the information service portion of an Internet call from the telecommunications portion, which is often a local call. Further, the FCC has allowed ISPs to purchase local service for provision of Internet services, without ever ruling on the extent to which the "local" characterization should apply. Indeed, as recently as April, 1998, the FCC itself indicated that a decision has not been made as to whether or not reciprocal compensation should apply. Thus, while there is some room for interpretation, we believe the current law weighs in favor of treating the traffic as local, regardless of jurisdiction, for purposes of the Interconnection Agreement. We also believe that the language of the Agreement itself supports this view. We therefore conclude on the basis of the plain language of the Agreement and of the effective law at the the time the Agreement was executed, that the

parties intended that calls originated by an end user of one and terminated to an ISP of the other would be rated and billed as local calls; else one would expect the definition of local calls in the Agreement to set out an explicit exception.

Even if we assume for the sake of discussion that the parties' agreements concerning reciprocal compensation can be said to be ambiguous or susceptible of different meanings, the parties' conduct at the time of, and subsequent to, the execution of the Agreement indicates that they intended to treat ISP traffic as local traffic. None of the parties singled ISP traffic out for special treatment during their negotiations. BellSouth concedes that it rates the traffic of its own ISP customers as local traffic. It would hardly be just for BellSouth to conduct itself in this way while treating WorldCom differently. Moreover, BellSouth made no attempt to separate out ISP traffic from its bills to the ALECs until it decided it did not want to pay reciprocal compensation for ISP traffic to the ALECS. BellSouth's conduct subsequent to the Agreement was for a long time consistent with the interpretation of Section 1.40 urged by WorldCom. A party to a contract cannot be permitted to impose unilaterally a different meaning than the one shared by the parties at the time of execution when it later becomes enlightened or discovers an unintended consequence.

BellSouth states in its brief that "the Commission must consider the extant FCC orders, case law, and trade usage at the time the parties negotiated and executed the Agreements." We have. By its own standards, BellSouth is found wanting. The preponderance of the evidence shows that BellSouth is required to pay WorldCom reciprocal compensation for the transport and termination of telephone exchange service local traffic that is handed off by BellSouth to WorldCom for termination with telephone exchange service end users that are Internet Service Providers or Enhanced Service Providers under the terms of the WorldCom and BellSouth Florida Partial Interconnection Agreement. Traffic that is terminated on a local dialed basis to Internet Service Providers or Enhanced Service Providers should not be treated differently from other local dialed traffic. We find that BellSouth must compensate WorldCom according to the parties' interconnection agreement, including interest, for the entire period the balance owed is outstanding.

The Teleport/TCG South Florida-BellSouth Agreement

Local traffic is defined in Section 1.D. of the Agreement between BellSouth and TCG as:

> any telephone call that originates and terminates in the same LATA and is billed by

> the originating party as a local call, including any call terminating in an exchange outside of BellSouth's service area with respect to which BellSouth has a local interconnection arrangement with an independent LEC, with which TCG is not directly interconnected.

This Agreement was entered into by the parties on July 15, 1996, and was subsequently approved by the Commission in Docket No. 960862-TP. Under TCG's prior Agreement with BellSouth, ISP traffic was treated as local.

The TCG Agreement states in Section IV.B and part of I.C:

> The delivery of local traffic between parties shall be reciprocal and compensation will be mutual according to the provisions of this Agreement.
>
> Each party will pay the other for terminating its local traffic on the other's network the local interconnection rates as set forth in Attachment B-1, incorporated herein by this reference.

No exceptions have been made to the definition of local traffic to exclude ISP traffic. The facts surrounding this Agreement, and the arguments made by the parties, are essentially the same as the WorldCom Agreement, and we will not reiterate them here. Our decision is the same. The preponderance of the evidence shows that BellSouth is required to pay TCG reciprocal compensation for the transport and termination of telephone exchange service local traffic that is handed off by BellSouth to TCP for termination with telephone exchange service end users that are Internet Service Providers or Enhanced Service Providers under the terms of the TCG and BellSouth Florida Partial Interconnection Agreement. Traffic that is terminated on a local dialed basis to Internet Service Providers or Enhanced Service Providers should not be treated differently from other local dialed traffic. We find that BellSouth must compensate TCG according to the parties' interconnection agreement, including interest, for the entire period the balance owed is outstanding.

The MCI-BellSouth Agreement

The Agreement between MCI and BellSouth defines local traffic in Attachment IV, Subsection 2.2.1. That subsection reads as follows:

> The parties shall bill each other reciprocal compensation at the rates set forth for Local Interconnection in this Agreement and the Order of the FPSC. Local Traffic is defined as any telephone call that originates in one exchange and terminates in either the same exchange, or a corresponding Extended Area (EAS) exchange. The terms Exchange and EAS exchanges are defined and specified in Section A3 of BellSouth's General Subscriber Service Tariff.

MCI witness Martinez testified that no exception to the definition of local traffic was suggested by BellSouth. MCI argues in its brief that "[i]f BellSouth wanted a particular exception to the general definition of local traffic, it had an obligation to raise it."

The facts surrounding this Agreement, and the arguments made by the parties, are essentially the same as the WorldCom Agreement, and we will not reiterate them here. Our decision is the same. The preponderance of the evidence shows that BellSouth is required to pay MCI reciprocal compensation for the transport and termination of telephone exchange service local traffic that is handed off by BellSouth to MCI for termination with telephone exchange service end users that are Internet Service Providers or Enhanced Service Providers under the terms of the MCI and BellSouth Florida Partial Interconnection Agreement. Traffic that is terminated on a local dialed basis to Internet Service Providers or Enhanced Service Providers should not be treated differently from other local dialed traffic. We find that BellSouth must compensate MCI according to the parties' interconnection agreement, including interest, for the entire period the balance owed is outstanding.

The Intermedia-BellSouth Agreement

The Agreement with Intermedia defines Local Traffic in Section 1(D) as:

> any telephone call that originates in one exchange and terminates in either the same exchange, or a corresponding Extended Area Service (EAS) exchange. The terms Exchange, and EAS exchanges are defined and specified in Section A3 of BellSouth's General Subscriber Service Tariff. (TR 142-143)

The portion regarding reciprocal compensation, Section IV(A) states:

> The delivery of local traffic between the parties shall be reciprocal and compensation will be mutual according to the provisions of this Agreement. (TR 143)

Section IV(B) states:

> Each party will pay the other party for terminating its local traffic on the other's network the local interconnection rates as set forth in Attachment B-1, by this reference incorporated herein.

The evidence shows that no exceptions were made to the definition of local traffic to exclude ISP traffic in the Intermedia-BellSouth Agreement. The facts surrounding this Agreement, and the arguments made by the parties, are essentially the same as the WorldCom Agreement, and we will not reiterate them here. Our decision is the same. The preponderance of the evidence shows that BellSouth is required to pay Intermedia reciprocal compensation for the transport and termination of telephone exchange service local traffic that is handed off by BellSouth to Intermedia for termination with telephone exchange service end users that are Internet Service Providers or Enhanced Service Providers under the terms of the Intermedia and BellSouth Florida Partial Interconnection Agreement. Traffic that is terminated on a local dialed basis to Internet Service Providers or Enhanced Service Providers should not be treated differently from other local dialed traffic. We find that BellSouth must compensate Intermdia according to the parties' interconnection agreement, including interest, for the entire period the balance owed is outstanding.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that under the terms of the parties' Interconnection Agreements, BellSouth Telecommunications, Inc. is required to pay Worldcom Technologies, Inc., Teleport Communications Group Inc./TCG South Florida, Intermedia Communications, Inc., and MCI Metro Access Transmission Services, Inc., reciprocal compensation for the transport and termination of telephone exchange service that is terminated with end users that are Internet Service Providers or Enhanced Service Providers. BellSouth Telecommunications, Inc. must compensate the complainants according to the interconnection agreements, including interest, for the entire period the balance owed is outstanding. It is further

ORDERED that these dockets shall be closed.

By ORDER of the Florida Public Service Commission this 15th Day of September, 1998.

/s/ Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

This is a facsimile copy. A signed copy of the order may be obtained by calling 1-850-413-6770.

(S E A L)
MCB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

EXHIBIT 4

Illinois Bell Tel. Co. v. WorldCom Techs., Inc., etc., et al.
No. 98 C 1925 (Jul. 21, 1998)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS,	)	
Plaintiff,	)	No. 98 C 1925
v.	)	JUDGE DAVID H. COAR
WORLDCOM TECHNOLOGIES, INC. as a successor in interest to MFS INTELENET OF ILLINOIS, INC., TELEPORT COMMUNICATIONS GROUP INC., MCI TELECOMMUNICATIONS CORPORATION and MCIMETRO ACCESS TRANSMISSION SERVICES, INC., AT&T COMMUNICATIONS OF ILLINOIS, INC., and FOCAL COMMUNICATIONS CORPORATION	)	
and	)	
DAN MILLER, RICHARD KOLHAUSER, RUTH KRETSCHMER, KARL MCDERMOTT, and BRENT BOHLEN, Commissioners of the Illinois Commerce Commission (In Their Official Capacities and not as Individuals),	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Illinois Bell Telephone Co. d/b/a/ Ameritech Illinois ("Ameritech") has filed the instant suit challenging the Illinois Commerce Commission's ("ICC" or "the Commission")