

Alabama Public Service Commission

Orders

IN RE: EMERGENCY PETITIONS OF ICG TELECOM GROUP INC. AND ITC DELTACOM COMMUNICATIONS, INC. FOR A DECLARATORY RULING.

DOCKET 26619

I. INTRODUCTION AND BACKGROUND

By Order entered on August 6, 1998, this consolidated proceeding was established to consider the separate Petitions of ICG Telecom Group, Inc. (ICG) and ITC DeltaCom Communications, Inc. (ITC DeltaCom) for a Declaratory Ruling interpreting and enforcing certain terms of their respective interconnection agreements with BellSouth Telecommunications, Inc. (BellSouth). The contractual provisions which the Commission was requested to interpret address local traffic and the payment of reciprocal compensation for the exchange of such local traffic. The ICG/BellSouth interconnection agreement was executed on October 7, 1997 and approved by the Commission on November 17, 1997. The ITC DeltaCom/BellSouth interconnection agreement was entered on March 12, 1997 and approved by the Commission on May 5, 1997.

Both ICG and ITC DeltaCom argued in their Petitions for declaratory relief that BellSouth had improperly refused to pay reciprocal compensation for local calls terminating at their end user customers who are Internet Service Providers (ISPs). ICG and ITC DeltaCom both requested in their Petitions that the Commission render a determination that telephone calls originating and terminating in the same local calling area from a BellSouth provided telephone exchange service end user to the respective end users of ICG and ITC DeltaCom, including ISPs, qualify as local traffic under the terms of their respective interconnection agreements and are, therefore, subject to the payment of reciprocal compensation under the terms and conditions of those agreements.

The August 6, 1998 Order of the Commission established a September 3, 1998 hearing date for the Petitions of ICG and ITC DeltaCom. In the interest of advancing judicial economy, the Commission incorporated language into the August 6, 1998 Order which encouraged Competitive Local Exchange Carriers (CLECs) with interconnection agreement disputes with BellSouth which closely paralleled those of ICG and ITC DeltaCom to intervene and actively participate in the proceedings scheduled to commence on September 3rd. The Commission noted that absent compelling arguments to the contrary, it was the Commission's intention to liberally allow intervention by CLECs who could reasonably demonstrate that their interests would be affected by a Commission decision interpreting the ICG and/or ITC DeltaCom interconnection agreements as they related to the payment of reciprocal compensation for ISP traffic. On August 13, 1998 the Commission entered a Procedural Ruling establishing deadlines for the pre-filing of testimony and addressing other procedural matters.

On August 18, 1998 BellSouth filed Answers to the Petitions of ICG and ITC DeltaCom. In its Answers to both Petitions, BellSouth alleged that calls made to the Internet through ISPs that originate on one carrier's network do not terminate on the other carrier's network as is required for reciprocal compensation to apply. BellSouth argued that a

single Internet call thus placed may communicate with interstate, foreign and local destinations simultaneously and must, therefore, be considered jurisdictionally interstate. As such, BellSouth asserted that jurisdiction over ISP traffic was clearly vested with the Federal Communications Commission (FCC).

BellSouth also argued in its Answers to the Petitions of both ICG and ITC DeltaCom that it was axiomatic that reciprocal compensation should flow in both directions. BellSouth alleged that neither ICG nor ITC DeltaCom were entitled to the relief they sought because the ISP traffic which they based their respective claims on flowed only their way.

BellSouth urged the Commission to dismiss the Petitions of both ICG and ITC DeltaCom due to BellSouth's claim that jurisdiction over ISP traffic rests exclusively with the FCC. In the alternative, BellSouth urged the Commission to hold the Petitions of ICG and ITC DeltaCom in abeyance until the FCC renders a determination on the issues in question. BellSouth asserted that the FCC had the issue of reciprocal compensation for ISP traffic under consideration and would make a determination in the very near future.

With respect to the Petition of ITC DeltaCom, BellSouth alleged that there was no mutual agreement between BellSouth and ITC DeltaCom concerning the reciprocal compensation provisions of their interconnection agreement. BellSouth alleged that the law at the time the parties executed their agreement was such that ISP traffic was not considered to be local and, therefore, was excluded from reciprocal compensation obligations. BellSouth argued that it had no rational economic reason to agree to reciprocal compensation for ISP traffic and that local traffic has customarily been interpreted in the telecommunications industry to exclude ISP traffic.

BellSouth also filed a separate Motion to Dismiss the Petition of ICG on August 18, 1998. In support of said Motion, BellSouth raised jurisdictional arguments similar to those raised in its Answers to the Petitions of ICG and ITC DeltaCom. BellSouth did, however, further support those arguments in a detailed Memorandum of Law.

On August 31, 1998 ICG submitted its response to BellSouth's Motion to Dismiss. ICG again asserted that consumer calls to ISPs within their local service area constituted local calls and were, therefore, intrastate telecommunications within the jurisdiction of the Commission. ICG accordingly urged the Commission to deny the Motion to Dismiss filed by BellSouth.

Pursuant to the August 6, 1998 Order of the Commission, the public hearing concerning the Petitions of ICG and ITC DeltaCom was held on September 3-4, 1998. In addition to the CLEC Petitioners ICG and ITC DeltaCom, Intermedia Communications, Inc. (Intermedia); KMC Telecom, Inc. (KMC); e.spire Communications, Inc. (e.spire); Hyperion Telecommunications, Inc. (Hyperion) were allowed to intervene and participate in the proceedings. AT&T Communications of the South Central States, Inc. and TCG MidSouth, Inc. also petitioned to intervene, but did not appear to further their interventions.

At the outset of the proceedings conducted on September 3, 1998 BellSouth and ICG were permitted to orally argue BellSouth's Motion to Dismiss ICG's Petition. After hearing the arguments of both sides, the presiding Administrative Law Judge denied BellSouth's Motion.

A total of nine witnesses testified during the two day hearing. BellSouth sponsored the direct and rebuttal testimony of Mr. Jerry Hendrix and the rebuttal testimony of Mr. Albert Halprin. ICG presented the direct testimony of Mr. Thomas E. Allen, Jr. and the direct and rebuttal testimony of Mr. J. Carl Jackson, Jr. ITC DeltaCom presented the direct testimony of Mr. Foster O. McDonald and Mr. James C. Wilkerson along with the direct and rebuttal testimony of Mr. Christopher J. Rozycki. Intermedia sponsored the direct testimony of Ms. Julia Strow while KMC submitted the direct testimony of Mr. Gregory A. Oden. The CLEC Intervenors e.spire and Hyperion did not present the testimony of witnesses but did have counsel present to conduct cross-examination of BellSouth's witnesses.

At the conclusion of the proceedings of September 4, 1998 the parties to the proceedings indicated a desire to submit Post Hearing Briefs. The Commission accordingly granted the parties leave to submit simultaneous briefs no later than September 25, 1998. BellSouth, ITC DeltaCom, Intermedia and e.spire each submitted individual briefs while ICG, KMC and Hyperion submitted a joint brief. GTE South, Inc. (GTE) also submitted an *Amicus Curiae* brief in support of BellSouth.

II. STATUTORY CONSIDERATIONS

In order to promote competition in the local exchange telecommunications market, the Telecommunications Act at '251 (a) imposes a general duty on all telecommunications carriers to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. With regard to incumbent local exchange carriers (ILECs) such as BellSouth, the duty to interconnect is even more specifically defined by '251(c)(2). ILECs are also charged by '251(c)(1) with a specific duty to negotiate in good faith with regard to the fulfillment of the interconnection duties imposed by the Act.

In conjunction with the above mentioned interconnection obligations, the Act at '251(b)(5) requires all local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of telecommunications. For purposes of compliance with '251(b)(5), the Act provides at '252(d)(2)(A) that a state Commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier. Further, such terms and conditions must determine costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

It should be noted, however, that according to the provisions of '252(a)(1), ILECs may upon receiving a request for interconnection services or network elements pursuant to '251 negotiate and enter into a binding agreement with a requesting telecommunications carrier or carriers without regard to the standards set forth in Sections (b) and (c) of '251. This provision was undoubtedly implemented to provide flexibility in arms length negotiations.

Any interconnection agreement negotiated must be submitted to the appropriate state Commission under '252(e). The state Commission must act to approve or reject the agreement within ninety days after its submission by the parties pursuant to '252(e)(4). According to the terms of '252(e)(2)(A), the state Commission may only reject an agreement adopted by negotiation if it finds that the agreement or a portion thereof discriminates against a telecommunications carrier not a party to the agreement, or the implementation of such an agreement or a portion thereof is not consistent with the public interest, convenience and necessity. This Commission has approved each of the interconnection agreements under review in this proceeding pursuant to the provisions discussed herein.

III. THE JURISDICTION OF THE COMMISSION

The Commission's general authority to render the Declaratory Ruling sought by the Petitioners and Intervenors is derived primarily from the broad supervisory powers granted to the Commission pursuant to the *Code of Alabama*, 1975 "37-1-32 and 37-2-3, as well as Rule 22 of the Commission's Rules of Practice. The specific authority of the Commission to interpret and enforce the terms and conditions of the interconnection agreements under review in this proceeding is a derivative of the exclusive authority granted by '252 (e) (1) of the Act to this and other state Commissions to approve or reject interconnection agreements submitted for review. That authority was explicitly recognized by the U. S. Court of Appeals for the Eighth Circuit in *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *cert. granted*, 118 S.Ct. 879 (1998) wherein the Court noted:

We also believe that state Commissions retain the primary authority to enforce the substantive terms of the agreements made pursuant to '251 and 252. Subsection 252(e)(1) of the Act explicitly requires all agreements under the Act to be submitted for state Commission approval...We believe that the state Commission's plenary authority to accept or reject these agreements necessarily carries with it the authority to enforce the provisions of agreements that the state Commissions have approved.

Although our view that state Commissions have the plenary authority to interpret and enforce the terms and conditions of interconnection agreements which have been approved by them pursuant to '252(e)(1) is consistent with that expressed by the Eighth Circuit, we are compelled to reassess our position in light of the Supreme Court's ruling in *AT&T Corp. v. Iowa Utilities Board*, No. 97-826 (and consolidated cases), 1999 WL 24568 (U.S. Jan. 25, 1999) that the Eighth Circuit reached that conclusion in ruling on an issue that was not ripe for consideration. More specifically, the Eighth Circuit concluded that state Commissions have the plenary authority to interpret and enforce interconnection agreements in ruling on challenges to the FCC's claim that '208 of the Act gives it authority to review agreements approved by state Commissions. The Supreme Court did not address the merits of the Eighth Circuit's findings

regarding the plenary authority of the states to enforce interconnection agreements approved by them, but concluded that the dispute concerning the FCC=s '208 authority was not yet ripe for review because the FCC had not actually adopted rules implementing that authority.

The reassessment of our jurisdictional authority concerning the interconnection agreements under review thus begins with an analysis of the FCC=s discussion of its '208 authority in its *First Report and Order*. Our review of the FCC=s discussion in that regard leads us to the conclusion that the FCC intended to emphasize that parties who are *aggrieved by state determinations* concerning interconnection agreements may subsequently elect to either bring an action for Federal District Court Review or file a '208 complaint against a common carrier with the FCC. The prerequisite for either avenue of review, however, seems to be a prior determination by the appropriate state Commission.

With regard to the FCC=s specific conclusion that an aggrieved party *could* file a '208 complaint alleging that a common carrier is violating the terms and conditions of a negotiated or arbitrated interconnection agreement, we find that the FCC=s use of the word *could* indicates that the filing of a '208 complaint as the result of an interpretational dispute is certainly not envisioned by the FCC to be the exclusive remedy for the resolution of such a dispute. In the case before us, ICG and ITC DeltaCom submitted petitions to this Commission seeking our review and enforcement of the terms and conditions of their respective interconnection agreements with BellSouth. It is, therefore, our position that even when the Act is construed in the broad manner which is necessary to provide the FCC with the authority it purports to have to review state approved interconnection agreements, that authority is by no stretch of the imagination exclusive. Accordingly, this Commission unequivocally has the jurisdiction to act on the Petitions submitted to us in this cause.

We now turn to a discussion of the threshold jurisdictional arguments raised by BellSouth. BellSouth argues that calls made by an end user to access the Internet or other services offered by an ISP constitute traffic that is jurisdictionally interstate. According to BellSouth, the fact that a single Internet call can simultaneously access computer databases in the same state, in other states and in other countries render such calls inseparably interstate based on the criteria of *Louisiana Public Service Commission v. FCC*, 476 US 355 (1986). Based on that assessment, BellSouth asserts that jurisdiction over ISP traffic has been, and continues to be, clearly vested with the FCC which is presently considering the precise issue raised by the Petitioners. BellSouth accordingly urges the Commission to take no action and defer to the conclusions which will ultimately be reached by the FCC.

On February 26, 1999, the FCC released its much anticipated Order clarifying the jurisdictional status of calls to ISPs. The FCC concluded therein that ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate. The FCC further concluded, however, that given the absence of a federal rule regarding the appropriate inter-carrier compensation for such traffic, parties shall be bound by their existing interconnection agreements as interpreted by state Commissions.

The FCC conceded that in many respects, it and the incumbent LECs have long treated ISP-bound traffic as though it were local. Against that backdrop, and in the absence of a contrary FCC rule, the FCC recognized that parties entering into interconnection agreements may reasonably have agreed for the purposes of determining whether reciprocal compensation should apply to ISP-bound traffic that such traffic should be treated in the same manner as local traffic. The FCC noted that when construing the parties= agreements to determine whether the parties so agreed, state Commissions had the opportunity to consider all the relevant facts including the negotiation of the agreements in the context of the FCC=s long standing policy of treating ISP-bound traffic as local and the conduct of the parties pursuant to those agreements. The FCC specifically recognized that state Commissions, not the FCC, are the arbiters of what factors are relevant in ascertaining the parties= intentions. The FCC noted that nothing in its *ISP Declaratory Ruling* should be construed to question any determination a state has made, or may make in the future, that parties have agreed to treat ISP-bound traffic as local traffic under existing interconnection agreements.

In light of the above discussion, it appears that nothing in the FCC=s *ISP Declaratory Ruling* precludes this Commission from embarking on analysis of the terms and conditions of the interconnection agreements which we have been requested in this proceeding to interpret and enforce. In fact, our actions herein appear totally consistent with the aforementioned holdings of the FCC.

In order to minimize any possible confusion regarding the conclusions we reach in this proceeding, however, we emphasize at this juncture that we are not herein determining the generic issue of the jurisdictional nature of ISP traffic.

To the contrary, we are considering the jurisdictional nature of such traffic only to the extent that it is prudent and necessary to determine the intent of the parties when they entered the interconnection agreements which we have been requested to review.

IV. THE SUBSTANTIVE ARGUMENTS OF THE PARTIES

A. The Substantive Arguments Advanced by the CLEC Petitioners and Intervenors

Although each of the CLEC Petitioners/Intervenors in this cause stand in a slightly different factual posture with BellSouth, they generally assert the same position with regard to the underlying legal issues identified in this proceeding. Accordingly, the arguments of the CLEC Petitioners/Intervenors are, for the most part, addressed herein in a collective fashion.

The primary argument advanced by the CLEC Petitioners/Intervenors is that pursuant to the plain language of the interconnection agreements under review, BellSouth is required to pay reciprocal compensation to each CLEC which is a party to such an agreement for terminating BellSouth originated traffic to ISPs served by the effected CLECs. They assert that the interconnection agreements under review uniformly specify that each party thereto will pay the other party for local traffic terminating on the other carrier=s network at agreed upon rates. The CLEC Petitioners/Intervenors contend that ISP traffic constitutes local traffic for which reciprocal compensation must be paid.

Although there are some minor distinctions in the respective interconnection agreements, the CLEC Petitioners/Intervenors assert that the agreements generally define local traffic 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 CLEC Petitioners/Intervenors maintain that the definition of local traffic in the respective interconnection agreements does not discriminate among types of end users or exclude calls from end users in the same local calling area to other end users in the same local calling area that happen to be ISPs. As such, the CLEC Petitioners/Intervenors contend that calls originated by BellSouth and transported and terminated by the CLEC Petitioners/Intervenors to their ISP customers are indeed local traffic for which BellSouth must pay reciprocal compensation pursuant to the interconnection agreements under review. Given the clarity in the aforementioned agreements, the CLEC Petitioners/Intervenors assert that the Commission need not look outside the terms of those agreements to resolve the dispute concerning the payment of reciprocal compensation for ISP traffic.

In the event the Commission concludes that there is ambiguity in the interconnection agreements concerning the definition of local traffic and the obligations of the parties to pay reciprocal compensation for calls to ISPs within the local calling area, the CLEC Petitioners/Intervenors advance numerous arguments in support of their position that a reasonable interpretation of their agreements leads to the logical conclusion that BellSouth should pay reciprocal compensation for the ISP traffic in question. The CLEC Petitioners/Intervenors support those arguments with evidence of record which is extrinsic to the interconnection agreements themselves.

The CLEC Petitioners/Intervenors assert that in determining the intent of the parties to the interconnection agreements under review, the Commission should consider the fact that, with the exception of the negotiations conducted between BellSouth and ICG, the subject of reciprocal compensation for ISP traffic was never openly discussed during any of the negotiations between BellSouth and the CLEC Petitioners/Intervenors with whom they executed those interconnection agreements. With the exception of ICG, the CLEC Petitioners/Intervenors allege that reciprocal compensation for ISP traffic was never openly discussed during negotiations due to the fact that all parties understood such traffic to be local in nature and, therefore, subject to reciprocal compensation.

In support of their position, the CLEC Petitioners/Intervenors point to the fact that ISP calls are considered local pursuant to common industry practices. Specifically, the CLEC Petitioners/Intervenors argue that BellSouth charges its own ISP customers local business line rates for local telephone exchange service that enables the ISP=s customers to connect to their service via a local call. Much like the CLEC Petitioners/Intervenors, the service provided by BellSouth to its ISP customers is generally under its local exchange tariff and calls to the ISPs are rated and billed just like any other local call placed via a seven digit local telephone number. BellSouth does not assess toll charges for these calls and in fact records the minutes associated with such calls as local for purposes of jurisdictional separations and ARMIS reporting requirements with the FCC.

The CLEC Petitioners allege further that BellSouth had knowledge of a 1989 Florida Public Service Commission decision wherein the Florida Commission determined that calls to ISPs should be viewed as jurisdictionally local. The CLEC Petitioners/Intervenors assert that BellSouth was fully aware of the Florida PSC's decision at the time it entered the interconnection agreements in question.

Given these prevalent local treatments of ISP traffic and BellSouth's knowledge of same, the CLEC Petitioners/Intervenors assert that it was incumbent upon BellSouth to raise an issue concerning such traffic during negotiations and to specifically exclude it from the definition of local traffic and/or the obligation to pay reciprocal compensation. The Petitioners allege that their argument that BellSouth never intended to exclude ISP traffic from the definition of local traffic subject to reciprocal compensation is bolstered by the fact that BellSouth never broached the subject of developing a mechanism to distinguish and separate ISP traffic from other local traffic. They contend that such a mechanism would have been an absolute necessity had BellSouth legitimately intended to exclude such traffic for purposes of paying reciprocal compensation.

The CLEC Petitioners/Intervenors rely on numerous arguments to counter the BellSouth claims that calls to ISPs, which would otherwise be local, are not such under the interconnection agreements' definition of local traffic because they do not in fact terminate at the ISP. First, the CLEC Petitioners/Intervenors alleged that the evidence persuasively shows that when a call reaches an ISP, the call is answered due to the fact that the call receives answer supervision. They contend that the call is established for billing purposes when the ISP answers the incoming call. The CLEC Petitioners/Intervenors thus argue that calls placed over the public switched telephone network to ISPs are terminated when they are delivered to the telephone exchange service premise bearing the telephone number of the ISP which is called.

In further support of their argument that calls to ISPs terminate at the ISP's point of presence, the CLEC Petitioners/Intervenors point to the FCC's definition of termination for purposes of reciprocal compensation as established in the FCC's *First Report and Order*. The CLEC Petitioners/Intervenors point specifically to the FCC language stating:

We define termination for purposes of '251(b)(5) [the reciprocal compensation provision of the 1996 Act] as the switching of traffic that is subject to '251(b)(5) [e.g. local traffic] at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called parties premises.

The CLEC Petitioners/Intervenors further point to recent rulings in the FCC's *Universal Service Order* describing Internet traffic as calls with two severable components. They maintain that pursuant to the rulings of the FCC, the first component is the local exchange telecommunications call to the ISP which is properly subject to reciprocal compensation. They allege that the second component is the information service component which is irrelevant for purposes of determining BellSouth's reciprocal compensation obligation.

The CLEC Petitioners/Intervenors further assert that the FCC recently affirmed its conclusion that the local call to the ISP is separate and distinguishable from any subsequent ISP activity in its *Advanced Telecommunications Order*. The CLEC Petitioners/Intervenors directed the Commission to the language in that Order where the FCC specifically stated that:

An end-user may utilize a telecommunications service together with an information service, as in the case of Internet access. In such a case, however, we treat the two services separately: The first is a telecommunications service (e.g., the xDSL-enabled transmission path), and the second service is an information service, in this case Internet access.

Additional FCC precedent cited by the CLEC Petitioners/Intervenors includes the FCC's *Access Charge Reform Order* wherein the FCC declined to allow local exchange carriers to assess interstate access charges on ISPs. They assert that the FCC in that Order unambiguously characterized the connection from the end user to the ISP as local traffic when it concluded that: ATo maximize the number of subscribers that can reach them through a local call, most ISPs have deployed points of presence.

The CLEC Petitioners/Intervenors also cite the FCC's *Non Accounting Safeguards Order* wherein the FCC again

determined that the local call placed to an ISP is separate from the subsequent information service provided. According to the CLEC Petitioners/Intervenors, severability of these components was key to the FCC's conclusion that if each was provided, purchased, or priced separately, the combined transmissions did not constitute a single interLATA transmission.

The CLEC Petitioners/Intervenors also note that in a recent Report to Congress concerning Universal Service matters, the FCC stated that ISPs are not telecommunications service providers and, therefore, are not subject to regulation as common carriers. Similarly, the CLEC Petitioners/Intervenors point to the conclusions recently drawn by the U.S. Court of Appeals for the Eighth Circuit in *Southwestern Bell Telephone Company v. FCC*, No. 97-2618 at 39 (8th Cir., August 19, 1998) wherein the Court declared that ISPs do not utilize LEC services and facilities in the same way or for the same purposes as other customers who are assessed per-minute interstate access charges. The court went on to note that ISPs subscribe to LEC facilities in order to receive *local* calls from customers who want to access the ISPs data, which may or may not be stored in computers outside the state in which the call was placed.

The CLEC Petitioners/Intervenors assert that the above noted conclusions of the FCC and the Eighth Circuit refute BellSouth's arguments that ISP calls do not terminate at the ISP but rather Atransit@ the CLEC network to remote Internet host computer sights which may simultaneously be interstate and international during the course of any given call. According to the CLEC Petitioners/Intervenors, BellSouth's arguments in that regard ignore the above noted dichotomy recognized by the FCC and the fact that the CLEC Petitioners/Intervenors provide the necessary telecommunications functions in a switched communications system to terminate calls to ISPs. The CLEC Petitioners/Intervenors surmise that it is abundantly clear that the FCC at this time does not consider a call that would otherwise be a local exchange call to be an interstate or international communication merely because the local exchange end user is an ISP.

In addition to the FCC precedent discussed above, the CLEC Petitioners/Intervenors cite decisions from other jurisdictions where the issue of whether ISP traffic is local and, therefore, subject to reciprocal compensation has been addressed. At the time Post Hearing Briefs were submitted by the parties, some twenty-one state Commissions had addressed the issue of reciprocal compensation as it relates to ISP traffic. The CLEC Petitioners/Intervenors assert that every state Commission which has taken final action with respect to the classification of calls placed to ISPs has ruled that such calls constitute local traffic and are, therefore, subject to the payment of reciprocal compensation.

The CLEC Petitioners/Intervenors also note that on June 22, 1998 the United States District Court for the Western District of Texas issued its *nunc pro tunc* Order affirming the Texas PUC's decision that calls to ISPs are local and further affirming the Texas PUC's decision that the interconnection agreement in question provided for reciprocal compensation for the termination of calls to ISPs. Similarly the CLEC Petitioners/Intervenors point out that on July 21, 1998, the United States District Court for the Northern District of Illinois affirmed the Illinois Commerce Commission's determination that local exchange carriers are entitled to reciprocal compensation under reviewed interconnection agreements for calls terminated to ISPs. The CLEC Petitioners/Intervenors also represented that the United States District Court for the Western District of Washington found in reviewing an interconnection agreement approved by the Washington Utilities and Transportation Commission, that the state Commission had not acted arbitrarily or capriciously in Adeciding not to change the current treatment of ESP call termination from reciprocal compensation to special access fees@.

Since the time that the parties submitted their Post-Hearing Briefs, other state Commissions have entered rulings on the issue of whether ISP traffic is subject to reciprocal compensation. Those decisions were provided to the Commission and all other parties of record by counsel for ICG and ITC DeltaCom. Like the other state Commissions, each of those states held that calls terminating to ISPs are local traffic and are, therefore, subject to the payment of reciprocal compensation.

The final category of arguments raised by the CLEC Petitions/Intervenors allege that a finding by the Commission in favor of BellSouth in this instance would contravene public policy in at least two significant aspects. First, they argue that an adoption of the BellSouth position would create a class of calls for which there would be no compensation. They argue that when a BellSouth customer places a call to a CLEC customer which is an ISP, BellSouth originates the call and then hands the call off to the CLEC at their mutual point of interconnection. The CLEC transports and terminates the call to its ISP customer. BellSouth is fully compensated by its customer for arranging for the completion of its calls to ISPs from the payment of tariffed local exchange rates and subscriber line charges. By contrast, the CLEC receives no compensation from BellSouth's customer for providing termination services and is barred by FCC rules

from charging access charges to the ISP. The CLEC Petitioners/Intervenors, therefore, allege that unless BellSouth pays reciprocal compensation for the termination of calls placed to ISPs, BellSouth will be utilizing the network facilities of the CLECs at no cost and in violation of "251 and 252 of the Telecommunications Act.

As their second public policy argument, the CLEC Petitioners/Intervenors contend that if they are not compensated for the cost involved in terminating calls to ISPs, their service to ISPs will be uneconomical and they will be forced to discontinue service to that class of customers. If that occurs, the CLEC Petitioners/Intervenors assert that BellSouth will be in a position to achieve a monopoly over the provisioning of local service to ISPs. They contend that such a result is clearly contradictory to the procompetitive goals of the Telecommunications Act. They contend further that such a scenario would generally threaten the competitiveness of Internet access because BellSouth will be in a position to monopolize Internet access by forcing ISPs out of the market in favor of its own ISP.

The CLEC Petitioners/Intervenors thus assert that an adoption of BellSouth=s position would have the practical effect of precluding the CLEC Petitioners/Intervenors from soliciting ISPs as customers. They allege that it would then be more difficult for CLECs such as themselves to establish a competitive presence in Alabama because ISPs as a class of customers would be practically unavailable to them. The CLEC Petitioners/Intervenors point out that such a scenario would preclude ISPs from enjoying the benefits of local telecommunications competition.

Some of the CLEC Petitioners/Intervenors also raise the issue of whether an adoption of BellSouth=s position would preclude BellSouth from achieving '271 approval from the Commission. We will not address the merits of those arguments for purposes of this proceeding.

B. The Substantive Arguments Advanced By BellSouth

BellSouth acknowledges that the core issue raised by the CLEC Petitioners/Intervenors is whether BellSouth and those parties agreed, through their respective interconnection agreements, to treat calls through which an end user obtains access to services offered by an Internet service provider as local traffic subject to reciprocal compensation. BellSouth contends that the Petitioners bear the burden of proving that they and BellSouth mutually agreed to subject ISP traffic to the reciprocal compensation obligations of their respective agreements and that BellSouth=s refusal to pay reciprocal compensation for ISP traffic constitutes a breach of contract.

BellSouth notes that each party to the proceeding, with the exception of ICG, has admitted that the explicit topic of whether ISP traffic would be subject to reciprocal compensation never arose during contractual negotiations. BellSouth points out that each of those parties has further represented that they assumed that BellSouth agreed that ISP traffic would be encompassed by the local traffic definition in their respective agreements.

BellSouth asserts, however, that the law existing at the time that the parties negotiated the agreements in question reflects that it was unreasonable for the CLEC Petitioners/Intervenors to Ablithely@ assume that BellSouth agreed with their proposed treatment of ISP traffic. BellSouth in fact alleges that it did not view ISP traffic to Aterminate@ within the local calling area based on the laws and regulations which were effective at the time of the negotiations in question.

BellSouth represents that the CLEC Petitioners/Intervenors have not shown that BellSouth either held a contrary view, or that such a view was inherently unreasonable. Accordingly, BellSouth maintains that the CLEC Petitioners/Intervenors have failed to show that the party=s mutually agreed to an essential element of the agreements in question - the scope of the reciprocal compensation obligations of the parties. Since there was never an express meeting of the minds on that essential term of the agreements, BellSouth contends that the Commission should find that it did not breach the agreements when it later refused to pay reciprocal compensation for ISP traffic.

BellSouth maintains that the rules of contractual interpretation in Alabama dictate that the Commission must consider the FCC decisions and rules, case law, and trade usage at the time the parties negotiated and executed the agreements in question in order to determine what types of calls the parties intended to encompass within the term local traffic, and to aid and interpret the requirement that reciprocal compensation applies only to that traffic. BellSouth further emphasizes that the Commission must decide whether the interpretation of the agreements advanced by the CLEC Petitioners/Intervenors is reasonable in light of the practical effect those interpretations will have. Finally, BellSouth argues that the Petitioners have the burden of demonstrating that, at the time BellSouth negotiated the agreements in

question, it considered FCC precedent to require ISP traffic to be included within the definition of local traffic for purposes of reciprocal compensation. BellSouth asserts that the CLEC Petitioners/Intervenors have clearly not met their burden of proof because (1) The FCC has expressly found services provided by ISPs to be interstate in nature; (2) The FCC has traditionally determined the jurisdictional nature of a call by examining its end to end nature; and (3) It would have been economically irrational for BellSouth to have agreed to subject ISP traffic to the payment of reciprocal compensation.

In addressing the issue of economic irrationality, BellSouth asserts that traffic collected by non-voice ISPs will always be one-way, not two-way traffic. According to BellSouth, such traffic will originate from an end user through the ISP network and terminate on the Internet host computer. Reciprocal compensation, therefore, becomes one-way compensation to those CLECs specifically targeting large ISPs. Hence, if ISP traffic were subject to the payment of reciprocal compensation, the originating carrier in most instances would be forced to pay the interconnecting carrier more than the originating carrier receives from an end user to provide local telephone service. As Mr. Hendrix of BellSouth testified, it would have made no economic sense for BellSouth to have agreed to such an absurd result.

With regard to developments at the FCC, BellSouth emphasized that the Association for Local Telecommunications Services (ALTS), a CLEC trade association, had originally filed a letter with the FCC asking for clarification of whether ISP traffic should be included within the definition of local traffic. According to BellSouth, ALTS' decision to turn to the FCC for clarification clearly demonstrated an understanding and acknowledgment by its CLEC membership that ISP traffic is jurisdictionally interstate, not local. Although ALTS subsequently requested that its original Petition be withdrawn, the FCC opted to transfer the issues raised by ALTS into another Docket, in lieu of simply closing the matter. According to BellSouth, those actions on the part of the FCC demonstrate the FCC's unwillingness to relinquish exclusive jurisdiction of the ISP traffic issue to the states. BellSouth further notes that the FCC's decision to address the issue of the jurisdictional nature of ISP traffic in conjunction with its ruling on *GTE's DSL Tariff Filing* was also indicative of its jurisdiction concerning the issue.

BellSouth also vehemently challenges the severability or Atwo-call@ theory regarding ISP traffic which was espoused by the CLEC Petitioners/Intervenors. BellSouth contends that calls from end users to ISPs only transit through the ISP's local point of presence to the Internet and does not terminate there. According to BellSouth, there is no interruption of the continuous transmission of signals that would justify treating the ISP as anything other than another link in the chain of transmission between the end user and the Internet host computer.

In fact, BellSouth contends that the CLEC Petitioners/Intervenors' contention that a call from an end user to an ISP is nothing more than a local call separate and distinguishable from the ISP's subsequent routing of the call to the Internet is inconsistent with the FCC's description of Internet service in its *Non-Accounting Safeguards Order*. BellSouth asserts that in actuality, ISPs take calls and, as part of the information service they offer to the public, transmit those calls to and from the communications networks of other telecommunications carriers. According to BellSouth, those calls are ultimately delivered to Internet host computers which are in all likelihood not in the local serving area of the ISP. BellSouth contends that the fact that ISPs reformat information received from users via circuit-switched connections into packets does not demonstrate that the calls to the ISPs terminate at the ISP location.

BellSouth maintains that the fact that ILECs deliver ISP traffic to CLECs over local interconnection trunks, use signaling associated with local calling, and send answer supervision when a call is received has no jurisdictional significance. BellSouth alleges that the 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 the facilities used, but by the nature of the traffic that flows over those facilities. BellSouth, therefore, represents that it is irrelevant that the originating end user and the ISP's point of presence are in the same local calling area, or that the local interconnection trunks are used to transmit those calls, because the ISP's point of presence is not the terminating point of such ISP traffic. BellSouth emphasizes that what is dispositive from a jurisdictional perspective is the relationship between where the call begins and where it ends. They allege that the Petitioners' severability or Atwo call@ theory completely ignores the end to end nature of an Internet call and has been rejected by the FCC in a number of contexts.

The first FCC decision cited by BellSouth in support of its position that the FCC has rejected the severability or Atwo call@ theory is the FCC's decision in *The Memory Call Case*. In *The Memory Call Case*, the FCC was urged to find that when a voice mail service is accessed from out of state, two jurisdictional transactions take place: One from the caller to the telephone company switch that routes the call to the intended recipient's location, which is interstate, and another from the switch forwarding the call to the voice mail apparatus and service, which is purely intrastate.

According to BellSouth, the FCC employed an end to end analysis to determine the jurisdictional nature of such calls, and concluded that the entire communication was interstate even though the Asecond call@ (the actual accessing of the customers voice mail box) occurred within a piece of equipment that was purely in the State of Georgia.

BellSouth also pointed out that the FCC asserted its jurisdictional authority over local calls used to provide interstate service in its *Foreign Exchange Decision*. Said decision involved a challenge of an intrastate New York Telephone tariff imposing a charge on the local exchange service used by out of state customers of FX and common control switching arrangement (CCSA) services. Notwithstanding the fact that the originating caller utilized FX service by dialing a local number and paying local charges, and despite the fact that the FX customer had to purchase local exchange service from New York Telephone, the FCC concluded that this service as a whole was interstate and thus subject to FCC jurisdiction.

BellSouth asserts that the holding in the *Foreign Exchange Decision* is directly relevant to the instant dispute because in both cases, an interstate call is completed in part through the use of intrastate local exchange services. Further, originating end users of Foreign Exchange Services and ISP service make calls by dialing a local number and paying local service charges. Just as in the *Foreign Exchange Decision*, BellSouth asserts that the FCC declines to treat such calls as the sum of their jurisdictionally separable components. Instead, the FCC considers the service as a whole to be interstate. According to BellSouth, calls bound for the Internet through an ISP switch can only be characterized as interstate exchange access traffic, not local traffic because such calls terminate not at the ISP=s equipment, but rather at the Internet host computer containing the data that the originating end user seeks to access.

BellSouth recognizes that the FCC has for some time exempted ISPs from paying switched access charges to the LECs for originating traffic to them. ISPs are instead permitted to receive calls over local exchange service lines purchased from the LEC. BellSouth asserts, however, that the FCC=s decision to exempt ISPs from paying access charges for policy and political reasons in no way alters the fact that the traffic they collect is access traffic, not local traffic. BellSouth contends that if the FCC had indeed concluded that traffic received by ISPs was local, there would be no need for it to exempt that traffic from the access charge regime.

BellSouth similarly discounts the conclusions reached by the FCC in its *Universal Service Order* wherein it declared that 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. According to BellSouth, the fact that Internet service itself may not be a telecommunication service -- the actual issue before the FCC in the Universal Service proceeding -- is relevant only to the issue of whether ISPs must contribute to the Universal Service Fund and is not relevant to the jurisdictional classification of traffic received by ISPs. With Internet traffic, BellSouth maintains that it is the beginning and ending point of communication, not the application of Universal Service rules to the components of the transmission, which dictates its jurisdictional status.

In sum, BellSouth concludes that nothing in any of the FCC decisions cited by the CLEC Petitioner/Intervenors compels the conclusion that ISPs must be viewed as end users at whose premises Internet calls terminate. BellSouth asserts that the FCC precedent it cites clearly evidences the FCC=s recognition of the interstate nature of calls carried by ISPs.

With respect to the numerous state and federal court decisions on the issue of ISP traffic cited by the CLEC Petitioners/Intervenors, BellSouth urges the Commission to consider that many state Commissions that have examined the issue have recognized that the matter is currently before the FCC and have indicated that their determinations may be subject to change once the FCC issues a ruling on the jurisdictional nature of ISP traffic. BellSouth asserts that it would be incorrect to construe the decisions of these other state Commissions regarding the application of reciprocal compensation to ISP traffic as definitive determinations that ISP traffic is local traffic subject to reciprocal compensation under the Act. In an effort to provide the Commission with a better understanding as to the impact of the other state Commission decisions cited, BellSouth attached to its Post-Hearing Brief a copy of an analysis of the various state Commission decisions on the ISP issue prepared by SBC Telecommunications, Inc. and filed with the FCC on August 14, 1998 in *SBC Telecommunications, Inc., ex parte Jurisdictional Nature of Calls to Internet Service Providers*: CCB/CPD 97-30. BellSouth requested that the Commission take administrative notice of that Docket. BellSouth=s request in that regard is hereby granted.

BellSouth lastly challenges the contention of the CLEC Petitioners/Intervenors that the Commission will impede

competition in the State of Alabama if it determines that ISP traffic is not local traffic subject to reciprocal compensation. BellSouth asserts that the CLEC Petitioners/Intervenors have offered no evidence to support their position and in fact contends that the inclusion of ISP traffic in the definition of local traffic will yield catastrophic results in Alabama=s local residential market. BellSouth asserts that it is apparent that the Petitioners have no intention of competing in Alabama=s local residential market and intend to rely upon BellSouth=s mandated role as the ILEC Acarrier of last resort@ to provide service to the less profitable residential market. BellSouth asserts that the CLEC Petitioners/Intervenors= demands will serve only to improperly increase BellSouth=s cost of providing service to the citizens of Alabama and will thus exclusively benefit the CLEC Petitioners/Intervenors.

V. DISCUSSION AND CONCLUSIONS

Despite the somewhat complex arguments advanced by the parties in this cause, the bottom line issue in this proceeding is relatively straight forward. The Commission must determine whether the parties to the interconnection agreements under review intended, at the time those agreements were entered, to treat telephone calls originating and terminating in the same local calling area from a BellSouth provided telephone exchange service end user to the respective ISP end users of the effected CLEC Petitioners/Intervenors as local traffic subject to the payment of reciprocal compensation.

The Commission must first focus on the actual language of the five interconnection agreements under review. The agreements which ITC DeltaCom, KMC, e.spire and Intermedia executed with BellSouth do not specifically reference ISP traffic. Each of those agreements do, however, have similar definitions of local traffic and similarly define the reciprocal compensation obligations of the parties.

The interconnection agreement executed between ICG and BellSouth has significant variations from the aforementioned agreements. In particular, the ICG/BellSouth agreement contains a provision excluding ISP calls from the payment of reciprocal compensation except in certain circumstances.

We begin our assessment of the individual agreements with a review of the provisions of the ITC DeltaCom agreement with BellSouth which address local traffic and define the reciprocal compensation obligations of the parties. We follow that assessment with a review of the terms and conditions of the agreements executed between BellSouth and KMC, Intermedia and e.spire which address local traffic and the reciprocal compensation obligations of the parties.

The terms and conditions of the ITC DeltaCom/BellSouth agreement which define local traffic are found at Attachment B to the original agreement executed between ITC DeltaCom and BellSouth on March 12, 1997. Said Attachment, at Item 49, defines local traffic as follows:

ALocal traffic@ means any telephone call that originates in one exchange or LATA and terminates in either the same exchange or LATA or a corresponding Extended Area Service (AEAS@) exchange. The terms Exchange and EAS exchanges are defined and specified in Section A.3 of BellSouth=s General Subscriber Service tariff.

Also under review in the ITC DeltaCom agreement are the provisions defining the obligations of the parties with regard to reciprocal compensation. Item 3 of the August 22, 1997 Fourth Amendment to the ITC DeltaCom/BellSouth agreement reflects the mutual agreement of the parties to substitute a new Section VI (B) to the agreement which addresses those obligations. That substitute section reads in pertinent part as follows:

With the exception of the local traffic specifically identified in subsection (C) hereafter, each party agrees to terminate local traffic originated and routed to it by the other party. Each party will pay the other for terminating its local traffic on the others network the local interconnection rate of \$.009 per minute of use in all states...

The interconnection agreement between KMC and BellSouth which was approved by the Commission on May 5, 1997 defines local traffic at Section 1.41 as follows:

ALocal traffic@ refers to calls 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 (e.g. Extended Area Service Zones in adjacent local calling areas). Local traffic includes the traffic types that have been traditionally referred to as Alocal calling@ and as AExtended Area Service (EAS).@ All other traffic that originates and terminates between the 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.

At Section 1.59, the KMC/BellSouth agreement defines the reciprocal compensation obligation of the parties as follows:

AReciprocal compensation@ is as described in the Act and refers to the payment arrangements that recover costs incurred for the transport and termination of telecommunications traffic originating on one party=s network and terminating on the other party=s network.

The KMC/BellSouth agreement addresses the reciprocal compensation obligations of the parties with even more specificity at Sections 5.8.2 and 5.8.3:

5.8.2 The parties shall compensate each other for transport and termination of local traffic (local call termination) at a single identical reciprocal and equal rate as set forth in Exhibit 8.

5.8.3 The reciprocal compensation arrangements set forth in this agreement are not applicable to switched exchange access service. All switched exchange access service and all intraLATA toll traffic shall continue to be governed by the terms and conditions at the applicable federal and state tariffs.

The interconnection agreement between Intermedia and BellSouth was originally approved by the Commission on November 22, 1996. Said agreement defines local traffic at Section 1.D as follows:

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 Service (AEAS@) exchange. The terms Exchange and EAS exchanges are defined and specified in Section A.3 of BellSouth=s General Subscriber Service tariff.

With regard to the Intermedia/BellSouth agreement=s treatment of the reciprocal compensation obligations of the parties, the agreement states in pertinent part at Section 4.B that:

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

The interconnection agreement between e.spire and BellSouth was approved by the Commission on October 28, 1996. Said agreement defines local traffic at Attachment B, Item 48 as follows:

Local traffic is defined as any telephone calls that originate in one exchange and terminate in either the same exchange or a corresponding Extended Area Service (AEAS@) exchange.

The e.spire/BellSouth agreement addresses the exchange of traffic at Section 7.A. The agreement specifies therein that:

The parties agree...that local interconnection is defined as the delivery of local traffic to be terminated on each party=s local network so that customers of either party have the ability to reach customers of the other party without the use of access codes or delay in the processing of the call. The parties further agree that the exchange of traffic on BellSouth=s Extended Area Service (EAS) shall be considered local traffic and compensation for the termination of such traffic shall be pursuant to the terms of this section.

It is also significant to note that each of the aforementioned interconnection agreements have AEntirety@ or AMerger@ Clauses which are substantially similar. Those provisions specify that the agreements in question, along with specified attachments thereto, set forth the entire understanding and agreement of the parties. The AEntirety Clauses@ also generally specify that subsequent or contemporaneous writings are not binding unless signed by a duly authorized officer or representative of the party to be bound.

Recapping the arguments of the parties in summary fashion, ITC DeltaCom, KMC, Intermedia and e.spire assert that pursuant to the plain language of their respective interconnection agreements with BellSouth, calls to ISPs are included within the definition of local traffic. They, therefore, maintain that calls to ISP are clearly subject to the reciprocal compensation obligations of their respective agreements. Even if the Commission determines that their agreements are ambiguous and considers extrinsic evidence in order to determine the intent of the parties, the aforementioned CLEC Petitioners/Intervenors maintain that the extrinsic evidence they have cited leads to the logical conclusion that BellSouth never intended to exclude ISP traffic from the reciprocal compensation obligations of their respective interconnection agreements. ICG readily concedes that it has different contractual language than the remaining CLEC Petitioners/Intervenors, but nonetheless maintains that the payment of reciprocal compensation by BellSouth to the other CLEC Petitioners/Intervenors will require BellSouth to pay ICG reciprocal compensation for ISP traffic pursuant to an amendment agreed to by BellSouth.

BellSouth asserts that the CLEC Petitioners/Intervenors bear the burden of proving that they and BellSouth mutually agreed to subject ISP traffic to the reciprocal compensation obligations of the respective interconnection agreements, and that BellSouth's refusal to pay reciprocal compensation for ISP traffic constitutes a breach of those contracts. BellSouth alleges that its agreement with ICG clearly excludes ISP traffic from the reciprocal compensation obligations.

With regard to the Petitioner ITC DeltaCom and the CLEC Intervenors KMC, e.spire and Intermedia, BellSouth asserts that the explicit topic of whether ISP traffic would be subject to reciprocal compensation never arose during their contractual negotiations. As noted previously, BellSouth contends that it was unreasonable for those parties to assume that because the topic never came up, BellSouth agreed with their proposed treatment of ISP traffic. In fact, BellSouth asserts that based on the law which existed at the time the interconnection agreements in question were negotiated, BellSouth did not view ISP traffic to terminate within the local calling area.

BellSouth alleges that none of the parties have shown that BellSouth held a contrary view or that such a view was inherently unreasonable. BellSouth accordingly concludes that the aforementioned CLEC Petitioners/Intervenors have failed to show that the parties mutually agreed to their respective reciprocal compensation obligations which is an essential element of their agreements. BellSouth, therefore, maintains that the CLEC Petitioners/Intervenors cannot show that BellSouth has breached the interconnection agreements in question by refusing to pay reciprocal compensation for ISP traffic. BellSouth contends that it is appropriate for the Commission to consider the extensive extrinsic evidence which BellSouth has submitted in support of its position.

The rules of contractual interpretation in Alabama dictate that the Commission must first conclude whether the interconnection agreements under review contain any ambiguity. Specifically, the Commission must determine whether the agreements in question are susceptible to more than one reasonable interpretation. *Reynolds v. Alabama Department of Transportation*, 926 F. Supp. 1077 (M.D. Ala. 1996). The mere fact that BellSouth, as a party to the aforementioned agreements, alleges that they have a different construction of those agreements than do the CLEC Petitioners/Intervenors does not conclusively establish that the agreements are indeed ambiguous. *American Farm Bureau Federation v. Alabama Farmers Federation*, 935 F. Supp. 1533 (M.D. Ala. 1996), *aff=d.* 121 F.3d 723 (11th Cir. 1997). An ambiguity is held to exist only when the Commission finds that the agreements in question are reasonably subject to more than one interpretation. *U. S. for Use and Benefit of Capps v. Fidelity and Deposit Company of Maryland*, 875 F. Supp. 803 (M.D. Ala. 1995) and *Reynolds v. Alabama Department of Transportation, supra.*

Although the interconnection agreements that ITC DeltaCom, KMC, Intermedia and e.spire each executed with BellSouth seem rather straight forward with regard to the definition of local traffic and the reciprocal compensation obligations of the parties, none of those agreements address with specificity ISP traffic or the meaning of the word "terminates" as used in each agreement's definition of local traffic. The silence of the agreements on these important matters does give rise to some reasonable ambiguity concerning the interpretation of the agreements.

Having concluded that the agreements in question are reasonably subject to ambiguity, the determination of the true meaning of the agreements and the intent of the parties becomes a question for the Commission. *Bain v. Gartrell*, 666 So.2d 523, 524 (Ala. Civ. App. 1995). In rendering determinations regarding the meaning of ambiguous agreements and the intent of the parties with regard to same, the Commission may look to extrinsic evidence. *Terry Cove North v. Baldwin County Sewer*, 480 So.2d 1171,1173 (Ala. 1985). The Commission must, however, strive to accord the contracts a reasonable interpretation to the extent permitted by the language of the contracts. *American Farm Bureau Federation v. Alabama Farmers Federation, supra.* It is the duty of the Commission to presume that the parties

intended to make a reasonable contract rather than an unreasonable one. *Ex parte Agee*, 669 So.2d 102, 105, *rehearing denied on remand Agee v. Moore*, 669 So.2d 106 (Ala. 1995).

In particular, we note that at the time the interconnection agreements in question were entered, ISP traffic was treated as local in virtually every respect by all industry participants including the F.C.C. Like the CLEC Petitioners/Intervenors, BellSouth was fully aware of the industry=s prevailingly local treatment of ISP traffic at the time that it entered the interconnection agreements in question. In fact, BellSouth itself afforded ISP traffic prevailingly local treatment in the same respects that the CLECs did at that time.

Even today, both BellSouth and the CLEC Petitioners/Intervenors charge their ISP customers local business line rates for local telephone exchange service that enables the ISPs= customers to access their service via a local call. The service provided to ISP customers by BellSouth and the CLEC Petitioners/Intervenors falls under their local exchange tariffs and calls to ISPs are rated and billed just as any other local call placed via a seven digit local telephone number. Neither BellSouth nor the CLEC Petitioners/Intervenors assess toll charges for those calls. BellSouth specifically advises consumers subscribing to its Internet service provider that access to the BellSouth ISP is achieved via a local call.

As further indication of the prevailingly local treatment afforded to ISP traffic, BellSouth records the minutes of use associated with such calls as local for ARMIS reporting requirements with the FCC. Further, BellSouth characterizes expenses and revenues associated with ISP-bound traffic as intrastate for jurisdictional separations purposes.

Even the FCC noted in its *ISP Declaratory Ruling* that it has since 1983 treated enhanced service providers, of which ISPs are a subset, as end users under the access charge regime and permitted them to purchase their links to the public switched telephone network through intrastate local business tariffs rather than through interstate access tariffs. The FCC specifically recognized that it has, by its actions in that regard, discharged its interstate regulatory obligations through the application of local business tariffs and has thus treated ISP-bound traffic as though it were local.

We again emphasize that the prevailingly local treatments of ISP traffic detailed above were also in place at the time the interconnection agreements under review herein were entered. We thus conclude that the industry custom and usage at that time dictated that ISP traffic be treated as local and, therefore, subject to reciprocal compensation. We find that the treatment of ISP traffic as local was in fact so prevalent in the industry at that time that BellSouth, if it so intended, had an obligation to negate such local treatment in the interconnection agreements it entered by specifically delineating that ISP traffic was not to be treated as local traffic subject to the payment of reciprocal compensation. *See Loeb & Co., Inc. v. Martin*, 327 So.2d. 711 (Ala. 1976).

Also persuasive is the evidence of record demonstrating BellSouth=s awareness of the 1989 decision of the Florida Public Service Commission wherein the Florida Commission held that calls to ISPs should be viewed as jurisdictionally intrastate local exchange calls. BellSouth=s knowledge of the *Florida Information Services Order* is particularly enlightening given the fact that BellSouth generally negotiates interconnection agreements on a region-wide basis. The existence of that decision strongly suggests that BellSouth was fully aware of the prevailingly local treatment afforded ISP traffic by industry usage and custom long before the interconnection agreements under review were negotiated and executed. If there was indeed no intention to encompass ISP traffic within the meaning of local traffic as BellSouth claims, it is reasonable to assume that BellSouth would have taken steps to specifically excluded ISP traffic from the definition of local traffic in light of the *Florida Information Services Order*.

Perhaps the most persuasive evidence that BellSouth did not intend to exclude calls to ISPs from the definition of local traffic when it entered the agreements under review is gleaned from the conspicuous absence of a mechanism to track, separate and exclude ISP traffic from the local billing records of the CLEC Petitioners/Intervenors. BellSouth was certainly in a position to know that such a mechanism would be necessary to segregate ISP traffic from local calls, yet no attempt was ever made to develop and incorporate such a mechanism. Ms. Strow of Intermedia pointed out that ISP calls are recorded as local calls and the CLECs are the only entities who can, with certainty, identify such traffic. That claim is validated by the difficulty BellSouth has experienced in its recent efforts to unilaterally identify ISP traffic for purposes of withholding reciprocal compensation for such disputed traffic.

Given the comprehensive nature of the interconnection agreements under review and the specificity with which they address virtually all interconnection issues, we find it difficult to fathom that BellSouth would not insist on a specific,

itemized exception excluding ISP traffic from the definition of local traffic had that been its intention. The prevailing local treatment afforded to ISP traffic by industry participants at the time the agreements under review were entered, and BellSouth's knowledge of that industry custom and usage, made it imperative that BellSouth specifically exclude calls to ISPs from the definition of local traffic subject to the payment of reciprocal compensation. Given the circumstances then existing, we find the absence of such a specific exclusion or exception to be persuasive of the fact that BellSouth did not intend to exclude ISP traffic from the definition of local traffic when it entered the agreements in question.

In conclusion, we find that with regard to the interconnection agreements BellSouth entered with ITC DeltaCom, KMC, Intermedia and e.spire, telephone calls originating and terminating in the same local calling area from a BellSouth provided telephone service end user to the respective ISP end users of the effected CLEC Petitioners/Intervenors qualifies as local traffic which is subject to reciprocal compensation. Based on the discussion above, we find that BellSouth was clearly in a position to know that the exclusion of such traffic from the definition of local traffic for purposes of the payment of reciprocal compensation was a necessity. BellSouth did not, however, incorporate such an exclusion and is, therefore, in breach of the interconnection agreements with ITC DeltaCom, KMC, Intermedia and e.spire under which it has withheld reciprocal compensation for ISP traffic. Certainly, BellSouth's August 12, 1997 memorandum to all CLECs declaring BellSouth's position that ISP traffic was jurisdictionally interstate did nothing to incorporate an exception for ISP traffic into the interconnection agreements of ITC DeltaCom, KMC, Intermedia and e.spire. The Entirety Clauses contained in each of those agreements precludes such unilateral action.

We accordingly find that BellSouth must, within 20 days of the effective date of this order, pay all reciprocal compensation amounts withheld for ISP traffic under their interconnection agreements with ITC DeltaCom, KMC and Intermedia. BellSouth must also continue to pay such amounts for the duration of those interconnection agreements. Our conclusions in this regard would also apply to the interconnection agreement executed between BellSouth and e.spire but for the fact that those parties have submitted their reciprocal compensation disputes to arbitration.

We now turn to an analysis of the interconnection agreement between ICG and BellSouth which was approved by the Commission on November 17, 1997. As noted previously, that agreement has terms and conditions which notably deviate from those contained in the interconnection agreements of the remaining CLEC Petitioners/Intervenors. Although the definition of local traffic in that agreement as set forth at Part B of the General Terms and Conditions Section is substantially similar to the definition of local traffic in the agreements discussed above, the provisions of the ICG/BellSouth agreement which discuss the obligations of the parties with regard to reciprocal compensation are radically different. More particularly, the ICG/BellSouth interconnection agreement at Sections 8.1 and 8.2 of Attachment 3 provide as follows:

8.1 BellSouth shall provide for the mutual and reciprocal recovery of the costs of transporting and terminating local calls on its and ICG's network. The parties agree that charges for transporting and termination of calls on its respective networks are set forth in Attachment 11.

8.2 Interconnection with Enhanced Service Providers (ESPs). BellSouth will exempt traffic originated to and terminated by ESPs from the reciprocal compensation arrangements of this agreement. The parties acknowledge that the issue of compensation for ESP traffic is being addressed by the FCC. The parties agree to implement the final order addressing compensation or lack thereof for this traffic from the date this agreement is executed.

Section 8.2 above was, however, amended pursuant to the mutual agreement of ICG and BellSouth. The May 11, 1998 amendment modifying the language Section 8.2 of Attachment 3 states:

Until the state Public Service Commission or the FCC determines, in a final and non-appealable order, as referenced in Section 16.4, whether enhanced service provider and information service provider traffic is within the definition of Local Traffic, this traffic will be held for payment until the jurisdiction of such traffic is determined, except as noted below. The Parties will adjust, if necessary, their mutual compensation billing for local traffic termination to reflect the FCC's or Commission's decision. The period of adjustment shall be from the effective date of the original agreement dated October 7, 1997, to the date the order of the FCC or Commission becomes final and non-appealable, as referenced in Section

16.4. BellSouth and ICG will, in the Interim, pay for local non-ISP/ESP traffic as specified in Attachment 3. Both parties agree to provide for fair and equitable treatment under this agreement, and BellSouth will not knowingly discriminate against ICG for the payment of reciprocal compensation for all local traffic. In particular, if BellSouth knowingly pays any CLEC for ISP/ESP traffic prior to a final and non-appealable order, then BellSouth shall pay ICG for such traffic within ten days regardless of whether there is a final and non-appealable order.

Clearly, the agreement between BellSouth and ICG excludes ISP traffic from the reciprocal compensation obligations set forth in the document absent the occurrence of the conditions described in the amendment delineated above. With regard to the condition that payment of reciprocal compensation for enhanced service provider and information service provider traffic will be held for payment until the jurisdiction of such traffic is determined to be local in a final non-appealable order from this Commission or the FCC, we note that we are not herein issuing a policy determination that ISP traffic is jurisdictionally local. Such a generic policy determination appears to be necessary to trigger the condition of payment in the ICG/BellSouth amendment given the agreement between ICG and BellSouth to exclude ISP traffic from the reciprocal compensation obligations of the parties pending such a jurisdictional determination. Unlike the scenario with the other agreements under review, ICG and BellSouth specifically discussed the treatment of ISP traffic and agreed to exclude it from the payment of reciprocal compensation absent a determination that such traffic is jurisdictionally local.

We further note that the FCC's *ISP Declaratory Ruling* does establish as a matter of policy that ISP-bound traffic is jurisdictionally interstate. That finding by the FCC also appears to preclude the payment of reciprocal compensation for ISP traffic under the ICG/BellSouth agreement.

The other condition of payment delineated in the ICG/BellSouth amendment set forth above is triggered by BellSouth's knowing payment to any CLEC for ISP/ESP traffic *prior to a final and non-appealable order*. Clearly, if BellSouth knowingly pays reciprocal compensation to the other CLEC Petitioners/Intervenors for ISP traffic *prior to a final non-appealable order* from this Commission or the FCC, BellSouth must also pay ICG reciprocal compensation for such traffic.

IT IS, THEREFORE, ORDERED BY THE COMMISSION, That BellSouth Telecommunications, Inc. shall within 20 days of the effective date of this order, remit to ITC DeltaCom, Communications, Inc., KMC Telecommunications, Inc. and Intermedia Communications, Inc. any and all reciprocal compensation amounts withheld for ISP traffic. Reciprocal compensation for such traffic shall also be paid on a going forward basis so long as the interconnection agreements interpreted herein remain in effect. It is the Commission's understanding that e.spire Communications, Inc.'s reciprocal compensation claims against BellSouth are being addressed through independent arbitration proceedings.

IT IS FURTHER ORDERED BY THE COMMISSION, That with regard to the interconnection agreement between ICG Telecom Group, Inc. and BellSouth Telecommunications, Inc., ISP traffic is clearly excluded from the reciprocal compensation obligations of the parties. However, in the event that BellSouth knowingly pays any CLEC for Internet service provider or enhanced service provider traffic prior to a final and non-appealable order of this Commission or the Federal Communications Commission, BellSouth shall within ten (10) days pay ICG for such traffic regardless of whether there is a final and non-appealable order.

IT IS FURTHER ORDERED, That jurisdiction in this cause is hereby retained for the issuance of any further orders as may appear just and reasonable in the premises.

IT IS FURTHER ORDERED, That this Order shall be effective as of the date hereof.

DONE at Montgomery, Alabama, this 4th day of March, 1999.

ALABAMA PUBLIC SERVICE COMMISSION

Jim Sullivan, President

Jan Cook, Commissioner

George C. Wallace, Jr., Commissioner

ATTEST: A True Copy

Walter L. Thomas, Jr., Secretary

APPENDIX AA@

In the Matter of the Complaint of ICG Telecom Group, Inc. v. Ameritech Ohio Regarding the Payment of Reciprocal Compensation, Opinion and Order, Case No. 97-1557-TP-CSS (Ohio P.U.C., Aug. 27, 1998).

In re: Petition of Brooks Fiber to Enforce Interconnection Agreement and for Emergency Relief, Docket No. 98-00118, Order Affirming the Initial Order of Hearing Officer, (Tennessee Regulatory Authority, Aug. 17, 1998).

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 (first of four consolidated cases) (Florida P.S.C., Aug. 4, 1998).

Teleport Communications Group, Inc. v. Illinois Bell Telephone Company (Ameritech Illinois) (first titled of four consolidated cases), Order, Case No. 97-0404 (Illinois Commerce Commission, March 11, 1998).

Complaint and Request for Expedited Ruling of Time Warner Communications, Order, PUC Docket No. 18082 (Texas P.U.C., March 2, 1998).

Contractual Dispute About the Terms of an Interconnection Agreement Between Ameritech Wisconsin and Time Warner Communications of Milwaukee, L.P., Letter Order, Docket Nos. 5912-TD-100, 6720-TD-100 (Wisconsin P.S.C. June 17, 1998);

Contractual Dispute About Terms of an Interconnection Agreement Between Ameritech Wisconsin and TCG Milwaukee, Inc., Letter Order, Docket Nos. 5837-TD-100, 6720-TD-100 (Wisconsin P.S.C., May 13, 1998);

Contractual Dispute About the Terms of an Interconnection Agreement Between Ameritech Wisconsin and Time Warner Communications of Milwaukee, L.P., Letter Order, Docket Nos. 5912-TD-100, 6720-TD-100 (Wisconsin P.S.C., May 5, 1998);

Contractual Dispute About the Terms of an Interconnection Agreement Between Ameritech Wisconsin and TCG Milwaukee, Inc., Letter Order, Docket Nos. 5837-TD-100, 6720-TD-100 (Wisconsin P.S.C., March 31, 1998).

Petition for Declaratory Order of TCG Delaware Valley, Inc. for clarification of Section 5.7.2 of its Interconnection Agreement with Bell Atlantic-Pennsylvania, Inc. Opinion and Order, Case No. P-00971256 (Pennsylvania Utilities Commission, June 16, 1998).

In the Matter of the Application of Brooks Fiber Communications of Oklahoma, Inc. and Brooks Fiber Communications of Tulsa, Inc. for an Order Concerning Traffic Terminating To Internet Service Providers

and Enforcing Compensation Provisions of the Interconnection Agreement with Southwestern Bell Telephone Company, Final Order, Cause No. PUD 970000548, Order No. 423626 (Oklahoma Corp. Commission, June 3, 1998).

In the Matter of the Petition of Birch Telecom of Missouri, Inc. for Arbitration of the Rates, Terms, Conditions and Related Arrangements for

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Interconnection With Southwestern Bell Telephone Company, Arbitration Order, Case No. TO-98-278 (Missouri P.S.C., April 23, 1998).

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