

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AMERICAN COMMUNICATIONS SERVICES OF)	
LOUISVILLE, INC. D/B/A e.spire COMMUNICATIONS, INC.,)	
AMERICAN COMMUNICATIONS SERVICES OF)	
LEXINGTON, INC. D/B/A e.spire COMMUNICATIONS, INC.,)	
ALEC, INC., AND HYPERION COMMUNICATIONS OF)	
LOUISVILLE, INC. F/K/A LOUISVILLE LIGHTWAVE)	
)	CASE NO.
COMPLAINANTS)	98-212
)	
v.)	
)	
BELLSOUTH TELECOMMUNICATIONS, INC.)	
)	
DEFENDANT)	

O R D E R

This case, involving contract interpretation and inter-company compensation, was initiated by a complaint filed by Hyperion Telecommunications, Inc. ("Hyperion") against BellSouth Telecommunications, Inc. ("BellSouth"). American Communications Services of Louisville, Inc. d/b/a e.spire Communications, Inc. and American Communications Services of Lexington, Inc. d/b/a e.spire Communications, Inc. (hereinafter "e.spire") and ALEC, Inc. ("ALEC") have also filed complaints against BellSouth regarding the same issues. On February 18, 2000, e.spire notified the Commission by letter that it had in principle settled its claim against BellSouth. A public

hearing was held February 22, 2000. Subsequently, the parties filed post-hearing briefs.

On April 20, 2000, and April 3, 2000, respectively, e.spire and ALEC notified the Commission that they had executed settlement agreements with BellSouth. Only Hyperion's complaint remains outstanding.

Hyperion seeks Commission enforcement of its reciprocal compensation provision and "most favored nation" provision of the agreement approved by this Commission May 16, 1997, in Case No. 97-211,¹ between BellSouth and Louisville Lightwave L. P., the predecessor in interest to Hyperion. Competing local exchange carriers ("CLECs"), under the rules of both this Commission and the Federal Communications Commission, are entitled to adopt portions of other approved interconnection agreements between CLECs and the incumbent local exchange carrier ("ILEC"). The "most favored nation" provision of Hyperion's agreement with BellSouth permits Hyperion to exchange portions of its existing contract for more favorable contractual provisions subsequently negotiated between BellSouth and other carriers.

The compensation arrangement upon which Hyperion bases its complaint is contained in Section IV.C. of its 1997 agreement with BellSouth. Section IV.C provides for a "bill and keep arrangement" which remains in effect until

the difference in minutes of use for terminating local traffic exceeds three million (3,000,000) minutes per state on a monthly basis. . . . [then] Hyperion may elect the terms of any compensation arrangement for local interconnection then in effect between BellSouth and any other telecommunications carrier, or in the absence of such an election, the

¹ In the Matter of the Interconnection Agreement Negotiated by BellSouth Telecommunications, Inc. and Hyperion Communications of Kentucky, Inc. Pursuant to Sections 251, 252, and 271 of the Telecommunications Act of 1996, Case No. 97-211.

parties will negotiate the specifics of a traffic exchange agreement which will apply on a going-forward basis.

Hyperion asserts that BellSouth has violated Section IV.C. Hyperion also asserts that it has been prevented by BellSouth from exercising its right pursuant to Section XIX.B of its contract:

In the event that BellSouth, either before or after the effective date of this Agreement, enters into an agreement with any other telecommunications carrier . . . which provides for any of the arrangements covered by this Agreement upon rates, terms or conditions that differ in any material respect from the rates, terms and conditions for such arrangements set forth in this Agreement (“Other Terms”), *then BellSouth shall be deemed thereby to have offered such arrangements to Hyperion upon such Other Terms , which Hyperion may accept as provided in Section XIX.E. . . .* In the event that Hyperion accepts such offer more than sixty (60) days after the Commission approves such Other Interconnection Agreement . . . such Other Terms shall be effective between BellSouth and Hyperion as of the date on which Hyperion accepts such offer. (Emphasis added.)

Other portions of Section XIX specify in detail conditions for adoption of contract terms from other agreements. Hyperion has sought to adopt the agreement which BellSouth has with KMC Telecom, Inc. (“KMC Agreement”) as it relates to the payment of reciprocal compensation. Under the KMC Agreement, there is no minimum threshold of minutes as a prerequisite for reciprocal compensation.

The first issue to be resolved by the Commission is whether, as a matter of contract interpretation, calls made by BellSouth’s customers to an Internet service provider (“ISP”) that is served by Hyperion are “local traffic” calls such that they should be included within the reciprocal compensation provisions of the contract. The contract defines “local traffic” in Section I.SS as:

any telephone call that originates in one exchange and terminates in either the same exchange, or an associated 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.

Hyperion and BellSouth agree that this contract does not specifically exempt those calls which terminate to ISPs from the definition of local calls. In fact, the agreement is silent as to the traffic in question.

The KMC Agreement with BellSouth, which Hyperion argues it has adopted, provides for reciprocal compensation in Section 5.8 “for transport and termination of local traffic.”

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

Hyperion asserts that it is due compensation from BellSouth for all calls placed over the public switched telecommunications network, including calls placed to ISPs, which are terminated within an exchange. Moreover, according to Hyperion, a call is terminated when it is delivered to the local exchange service bearing the called telephone number. There is no distinction in the agreement for classifying calls based on the type of end-user to which they are terminated.

BellSouth denies that it has breached its contract with Hyperion. BellSouth argues that reciprocal compensation is not due for traffic bound to ISPs because such traffic is not “local.” BellSouth also asserts that the threshold of minutes for requiring compensation for termination of local traffic has not been met and that it appropriately has refused to recognize Hyperion’s election of the KMC Agreement. The provisions for the transport and termination of local traffic had not been met, BellSouth claims; therefore, no election could occur.

According to Hyperion, ISP-bound calls are considered terminated at the ISP for regulatory purposes when a BellSouth customer places a call using the Hyperion network, the call is delivered to the telephone exchange telephone service of the ISP, the call is answered by the ISP, and answer supervision is returned. According to Hyperion, this sequence of events constitutes the termination of a call by longstanding industry practice. Since it is the industry practice, Hyperion asserts it formed the understanding of the parties as they contracted the definition of local traffic. In support of its view that the traffic bound to ISPs is considered local even by BellSouth, Hyperion notes that BellSouth customers access their ISPs by dialing a 7-digit local number. BellSouth charges its own ISP customers local rates pursuant to its tariff. BellSouth provides service to ISP customers pursuant to the local exchange tariff. When a BellSouth local exchange customer places a call to an ISP in the same exchange as the caller's, BellSouth rates and bills such customer for a local call. Moreover, BellSouth treats the revenues and expenses associated with the local exchange traffic to its ISP customers as local for purpose of separations and ARMIS reports. Hyperion points out that the agreement between BellSouth and Hyperion neither specifically excludes ISP-bound traffic nor requires the parties to separate the traffic from local billing records.

BellSouth alleges that it never formed contractual intent to include ISP-bound traffic as local traffic subject to reciprocal compensation. BellSouth also argues that the "most favored nation" section is a "general section" of its contract and that the specific language of the three million minute threshold must control the general provision. Thus, Hyperion is not entitled to elect the KMC Agreement until the three million minute threshold has been met.

In reaching its determinations, the Commission has been guided by rules of statutory interpretation. Each provision of the contract has been construed in light of the other provisions, giving meaning to each in light of the whole. Louisa v. Newland, 705 S.W.2d 916, 919 (Ky. 1986). Also, specific terms of the agreement have been given greater weight than general terms. L. K. Comstock & Co. v. Becon Constr. Co., 932 F. Supp. 948 (E.D. Ky. 1994). Terms in the contract must be given their usual and ordinary meaning. Board of Regents of Ky. State Univ. v. Gale, 898 S.W.2d 517 (Ky. App. 1995).

The Commission finds that ISP-bound traffic is local traffic which is subject to reciprocal compensation under the agreement between the parties. The Commission also finds that Hyperion was entitled to exercise its “most favored nation” term to adopt the desired portion of the KMC Agreement. The agreement itself makes it clear that the parties intended for reciprocal compensation to occur after the three million minute mark was met, and that *all* calls that terminated locally applied toward the three million minute threshold. The ordinary definition of “terminate” requires us to conclude that a call is “terminated” locally if it is not toll billed and if answer supervision occurs. Moreover, given the ordinary understanding of the definition of the terms “local traffic” and “termination,” the parties could have excluded ISP calls from the common definition only if they had had a specific meeting of the minds on the issue. The contract demonstrates that no such meeting of the minds occurred.

The Commission also finds that Hyperion has correctly construed the “most favored nation” term in its contract. By its very definition, such an option, when exercised, negates or alters an existing term of the contract. BellSouth may not deprive

Hyperion of this contractual benefit by merely stating that the term sought to be elected is more "general" than a specific term appearing elsewhere in the existing contract.

After the hearing held in this proceeding, BellSouth filed a motion to strike certain evidence from the record or, in the alternative, to provide for confidential treatment of the evidence. The evidence in question, an interconnection agreement award between BellSouth and one of Hyperion's affiliates, has been given due weight by this Commission and thus will not be stricken from the record. Moreover, it was produced in this proceeding pursuant to a lawful process of a court or governmental body and, thus, was appropriately disclosed by Hyperion in accordance with its affiliate's agreement with BellSouth. Confidential treatment will not be granted.

The Commission, having considered the complaint of Hyperion and the answer of BellSouth and all other pertinent evidence, HEREBY ORDERS that:

1. BellSouth shall comply with its agreement with Hyperion and provide reciprocal compensation for ISP-bound traffic as of the date it was notified of Hyperion's election of the KMC Agreement.
2. BellSouth's motion to strike is denied.

Done at Frankfort, Kentucky, this 16th day of May, 2000.

By the Commission

ATTEST:

Executive Director