Q. HOW HAS AMERITECH ROUTED CALLS FROM ITS TELEPHONE EXCHANGE SERVICE CUSTOMERS TO ISPs SERVED BY ICG?

A. Over the Local/IntraLATA Trunks.

Q. HAS AMERITECH INDICATED THAT IT BELIEVES THAT ROUTING LOCAL EXCHANGE TRAFFIC TO ISPs OVER SUCH TRUNK GROUPS IS INAPPROPRIATE?

A. No. Ameritech has never indicated any belief that the traffic terminated with ISPs has been incorrectly routed, and Ameritech has continued to route such traffic over those trunk groups without interruption or comment.

Q. PLEASE DESCRIBE RECIPROCAL COMPENSATION PROVISIONS OF THE AGREEMENT.

A. The following is the language in Section 5.7 dealing with Reciprocal Compensation Arrangements -- Section 251(B)(5).

> 5.7.1 Reciprocal Compensation applies for transport and termination of Local Traffic billable by Ameritech or ICG which a Telephone Exchange Service Customer originates on Ameritech's or ICG's network for termination on the other Party's network.
>
> 5.7.2 The parties shall compensate each other for transport and termination of Local Traffic at the rate provided in the Pricing Schedule.
>
> 5.7.3 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 of the applicable federal and state tariffs.

> 5.7.4 Each party shall charge the other Party its effective tariffed IntraLATA FGD switched access rates for the transport and termination of all IntraLATA Toll Traffic.
>
> 5.7.5 Compensation for transport and termination of all traffic which has been subject to performance of INP by one Party for the other Party pursuant to Section 13.0 shall be as specified in Section 13.5.

Section 1.53 states that Reciprocal Compensation is "described in the Act." Local Traffic is defined in section 1.40 of the Agreement as: local service calls as defined by the Commission.

In its Order *Re Establishment of Local Exchange Competition and Other Competitive Issues,* Case No. 950845-TP-COI (issued February 20, 1997), the Commission defined "local calling area" as the "geographic area in which an end user may originate and terminate a call without incurring a toll charge."

Q. DURING NEGOTIATION OF THE INTERCONNECTION AGREEMENT WITH AMERITECH, WERE THERE ANY DISCUSSIONS AS TO THE TYPES OF CALLS THAT SHOULD BE EXCLUDED FROM THE DEFINITION OF "LOCAL" CALLS?

A. The only discussion related to Switched Exchange Access Services.

Q. DID AMERITECH, AT ANY POINT DURING THE NEGOTIATION OF THE INTERCONNECTION AGREEMENT, SUGGEST TO ICG THAT IT WAS UNWILLING TO INCLUDE CALLS TO ISPS WITHIN THE DEFINITION OF LOCAL CALLS?

A. No.

Q. DOES THE INTERCONNECTION AGREEMENT PROVIDE FOR EXCLUSION OF RECIPROCAL COMPENSATION BASED UPON THE FACT THAT A CALL IS BEING TERMINATED TO AN ISP?

A. There is no such provision in the Agreement. The only exclusion is for Switched Exchange Access Service as set forth above in section 5.7.3. Switched Exchange Access Service is defined in section 1.58 as:

> the offering of transmission or switching services to Telecommunications Carriers for the purpose of the origination or termination of Telephone Toll Service. Switched Exchange Access Services include: Feature Group A, Feature Group B, Feature Group D, 800/888 access, and 900 access and their successors or similar Switched Exchange Access Services.

Q. IN AMERITECH'S LETTER TO ICG, THOMAS LAMB STATES THAT TRAFFIC DESTINED FOR INTERNET SERVICE PROVIDERS IS EXCHANGE ACCESS TRAFFIC AND NOT SUBJECT TO RECIPROCAL COMPENSATION. DO YOU AGREE WITH MR. LAMB?

A. No. Under the Agreement, Switched Access Exchange Traffic is not eligible for reciprocal compensation, however, telephone calls to Internet Service Providers are not by definition considered exchange access calls. The Telecommunications Act of 1996 defines "exchange access" as the "offering of access to telephone exchange services or facilities for the purpose of the origination or termination

of telephone toll services." Thus, by definition a local telephone call to an ISP does not meet the definition of exchange access. In order for a call to an ISP to be an exchange access call, the information services provided by ISPs would have to be telephone toll services.

This distinction was recognized by the Michigan Public Service Commission in its decision holding in favor of the CLECs and against Ameritech Michigan on the same issue before this Commission. In its Memorandum and Order, the Michigan Commission stated "[c]ontrary to Ameritech Michigan's argument, calls placed to an ISP at a local number are not exchange access traffic because they do not relate to the origination or termination of toll service."

<u>AMERITECH ACTIONS WHICH LED ICG TO FILE ITS COMPLAINT</u>

Q. FOLLOWING EXECUTION OF THE INTERCONNECTION AGREEMENT BETWEEN ICG AND AMERITECH, AND APPROVAL OF THAT AGREEMENT BY THE COMMISSION, DID AMERITECH PAY RECIPROCAL COMPENSATION FOR CALLS TERMINATING AT ISPS SERVICED BY ICG?

A. Yes.

Q. DID AMERITECH BILL ICG RECIPROCAL COMPENSATION FOR CALLS TO ISPS SERVICED BY AMERITECH?

A. Yes.

1 **Q. WHAT ACTIONS BY AMERITECH LED ICG TO FILE ITS**
2 **COMPLAINT?**
3 A. In August 1997, ICG received correspondence from Ameritech in which it was
4 stated that Ameritech disputed the invoice for July that ICG had sent to
5 Ameritech. Ameritech requested that ICG verify its billing to Ameritech and
6 verify that it is not billing Ameritech for traffic destined to Internet Service
7 Providers. This letter was followed by a similar letter in October 1997. On
8 October 28, 1997, Ameritech wrote another letter to ICG in which Ameritech
9 stated that it estimates that "approximately 95.52% of ICG's Reciprocal
10 Compensation for Ohio's billings incorrectly include traffic destined for Internet
11 Service Providers. On a going forward basis, Ameritech will not pay that
12 percentage of ICG's bills for Reciprocal Compensation in Ohio." (Complaint,
13 Exhibit A).
14
15 At the time ICG filed its Complaint, in November 1997, Ameritech was in arrears
16 to ICG in an amount exceeding One Million Dollars ($1,000,000.00). That
17 amount has increased to more than Two Million Dollars ($2,000,000.00).
18 **Q. ARE THE FOUR LETTERS IN APPENDIX A ATTACHED TO THE**
19 **COMPLAINT TRUE AND CORRECT COPIES OF CORRESPONDENCE**
20 **FROM AMERITECH TO ICG?**
21 A. Yes.

Q. HAS AMERITECH TAKEN THIS POSITION WITH OTHER COMPETITIVE LOCAL EXCHANGE CARRIERS?

A. It is my understanding that Ameritech informed Brooks Fiber that it interprets Section 5.7.1 of the Interconnection Agreement between Brooks Fiber and Ameritech which is similar to the language in the Ameritech/ICG Agreement to not apply to ISP traffic. I am unaware whether Ameritech has actually withheld payment from any other CLECs in Ohio. I am aware that Ameritech has taken this same position in other states.

<u>CONCLUSIONS OF OTHER BODIES WITH RESPECT TO ISP TRAFFIC</u>

Q. HAS THE FCC MADE ANY DETERMINATIONS AS TO THE MAKEUP OF A CALL FROM AN END USER TO AN ISP?

A. Yes. The FCC has repeatedly stated the rights of ISPs to employ telephone exchange services, under intrastate local exchange tariffs, to connect to the public switched telecommunications network.

The FCC's recent Universal Service Order and Access Charge Reform Order again stated this fact. In the Universal Service Order, the FCC determined that Internet access consists of severable components:

> 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 service offering.

Additionally,

> We agree with the Joint Board's determination that Internet access consists of more than one component. Specifically, we recognize that Internet access includes a network transmission component, which is the connection over a LEC network from a subscriber to an Internet service provider, in addition to the underlying transmission component.

In the Access Charge Reform Order, the FCC declined to allow LECs to assess interstate access charges on ISPs. Indeed, the FCC unambiguously characterized the connection from the end user to the ISP as local traffic:

> to maximize the number of subscribers that can reach them through a *local call*, most ISPs have deployed points of presence.

(emphasis added)

Q. HOW HAVE OTHER STATE REGULATORY AGENCIES DEALT WITH THIS ISSUE?

A. Eleven other state regulatory agencies have reviewed the position asserted by Ameritech. Not one state regulatory agency has endorsed Ameritech's position. When U S West asserted a similar argument that traffic originated and terminated to enhanced service providers should be exempted from reciprocal compensation arrangements under Interconnection Agreements, the states of Arizona, Colorado, Minnesota, Oregon, and Washington all declined to treat traffic to enhanced service providers, including ISPs, any differently than other local traffic. Furthermore, the decision of the Washington Commision was affirmed by the

United States District Court for the Western District of Washington on January 7, 1998.

Other states have reached similar conclusions. When New York Telephone unilaterally withheld payment of reciprocal compensation for local exchange traffic delivered to ISPs served by MFS Intelenet of New York, Inc. ("MFSI-NY") and MFSI-NY filed a complaint with the New York Public Service Commission ("NYPSC"), the NYPSC ordered New York Telephone to continue to pay reciprocal compensation for such traffic. Following the filing of a similar complaint by MFS Intelenet of Maryland, and considering a very similar response by Bell Atlantic-Maryland, Inc., the Maryland Public Service Commission ruled on September 11, 1997, that local exchange traffic to ISPs is eligible for reciprocal compensation.

Also, On Sept. 17, 1997, the Connecticut Department of Public Utilities Control issued an order stating:

> There is no difference between an ISP and SNET's other local exchange customers. Traffic carried between SNET's end user customers and ISPs within the same local calling area is local in nature and, therefore, subject to the mutual compensation arrangements outlined in the Department's January 17, 1997 Decision in Docket No. 94-10-02.

On January 13, 1998, the Public Service Commission of West Virginia concluded that "Internet-bound traffic that originates, and is terminated to an ISP within a local calling area, should be considered 'local traffic' for purposes of reciprocal

compensation." Similarly, on January 28, 1998, the Michigan Public Service Commission in a decision on four consolidated cases unequivocally found that "a call using a local seven-digit telephone number to reach an ISP is local traffic subject to reciprocal compensation under the interconnection agreements for all minutes of use." The Michigan Commission ordered Ameritech to cease and desist from failing to pay reciprocal compensation in accordance with its interconnection agreements and to immediately resume reciprocal compensation payments in accordance with those interconnection agreements. The Michigan Commission also ordered Ameritech to pay the complainants' and intervenors' attorneys' fees.

Most recently, on February 5, 1998, the Public Utility Commission of Texas by a vote of 3 to 0, reversed an arbitrator's decision in two consolidated cases which concluded that calls to ISPs were not entitled to reciprocal compensation.

EFFECTS ON COMPETITION

Q. WHAT WOULD BE THE EFFECTS ON COMPETITION IF AMERITECH WERE ALLOWED TO AVOID ITS RECIPROCAL COMPENSATION OBLIGATIONS ON ISP TRAFFIC?

A. Ameritech's refusal to pay compensation has severe anticompetitive implications. Any carrier terminating calls to an ISP incurs costs in terminating such calls.

1 Since Ameritech controls most of the originating traffic within its territory, its
2 decision to withhold reciprocal compensation forces ICG and other new entrants
3 to terminate these calls without compensation. As I noted earlier, in just four
4 months Ameritech withheld over $1 million from ICG alone. The inevitable
5 result will be that no CLEC will be willing to furnish service to an ISP, since
6 providing that service will result in immense, uncompensated termination costs.
7 This situation will leave Ameritech with a de facto monopoly over ISP end users,
8 a state of affairs that clearly was not intended by Section 251 and other
9 provisions of the 1996 Act.
10 Further aggravating this anticompetitive effect, Ameritech is now offering
11 its own Internet access service to consumers. By gaining monopoly power over
12 local exchange service to ISPs and increasing their costs for network access,
13 Ameritech will be in a position to drive competing ISPs out of the local market,
14 thereby leaving Ameritech with a de facto monopoly over access to the Internet
15 as well.
16 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**
17 **A.** Yes, it does.
18
19

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Reciprocal Compensation

Ameritech's Refusal to pay Negotiated Reciprocal Compensation

Draft of ICG's post hearing brief of Ohio PUCO case number 97-1557-TP-CSS

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BEFORE THE
PUBLIC UTILITIES COMMISSION
STATE OF OHIO

IN THE MATTER OF THE COMPLAINT OF ICG TELECOM GROUP, INC. AGAINST AMERITECH OHIO REGARDING THE PAYMENT OF RECIPROCAL COMPENSATION	))))	CASE NO. 97-1557-TP-CSS

POST HEARING BRIEF OF ICG TELECOM GROUP, INC.

BOYD FERRIS
MULDOON & FERRIS
2733 WEST DUBLIN-GREENVILLE ROAD
COLUMBUS, OHIO 43235
(614) 889-4777 (TEL)
(614) 889-6515 (FAX)

RICHARD M. RINDLER
MICHAEL FLEMING
SWIDLER & BERLIN, CHARTERED
3000 K STREET, N.W.
WASHINGTON, D.C. 20007
(202) 424-7771 (TEL)
(202) 424-7645 (FAX)

ATTORNEYS FOR ICG TELECOM GROUP, INC.

BEFORE THE
PUBLIC UTILITIES COMMISSION
STATE OF OHIO

In the Matter of the Complaint of	)	
ICG Telecom Group, Inc. Against	)	Case No. 97-1557-TP-CSS
Ameritech Ohio Regarding the Payment	)	
of Reciprocal Compensation	)	

POST HEARING BRIEF OF
ICG TELECOM GROUP, INC.

ICG Telecom Group, Inc. ("ICG"), through its undersigned counsel, hereby files its Post Hearing Brief pursuant to the date set by Attorney Examiner Gretchen Petrucci on February 17, 1998.

I. PRELIMINARY STATEMENT

On November 26, 1997, ICG filed a Complaint with the Public Utilities Commission of Ohio ("Commission"), seeking enforcement of the Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996 ("Agreement") between ICG and Michigan Bell Telephone Company d/b/a Ameritech Michigan ("Ameritech"), dated June 14, 1996. In short, Ameritech has breached the Agreement by failing to pay ICG reciprocal compensation for the transport and termination of local exchange traffic from Ameritech end users to ICG local exchange end users that happen to be Internet Service Providers ("ISPs").

II. STATEMENT OF FACTS

A. Execution of the Interconnection Agreement

The material facts are undisputed in this matter. ICG is an authorized provider of local exchange service in Ohio.[1] On June 14, 1996, ICG and Ameritech executed an Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996. Acting under authority granted in Section 252(e) of the Telecommunications Act of 1996 ("Act"), this Commission approved the Agreement.[2]

Pursuant to the terms of the Agreement referenced above, ICG has interconnected its network with Ameritech, so that an end user subscribing to ICG's local exchange service can place calls to end users subscribing to Ameritech's local exchange service and vice versa.

B. Terms in the Agreement

Section 1.40 of the Agreement defines "Local Traffic" as:

> local service area calls as defined by the Commission.

The Reciprocal Compensation provision in Section 5.7.1 of the Agreement states:

> Reciprocal Compensation applies for transport and termination of Local Traffic billable by Ameritech or ICG which a Telephone Exchange Service Customer originates on Ameritech's or ICG's network for termination on the other Party's network.

Section 5.7.2 of the Agreement states:

> The Parties shall compensate each other for such transport and termination of Local Traffic at the rates provided in the Pricing Schedule.

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[1] Docket Nos. 95-814-TP-ACE and 96-1336-TP-AAC (January 16, 1997).

[2] Case No. 96-611-TP-UNC.

Section 5.7.3 of the Agreement states:

> The Reciprocal Compensation arrangements set forth in this Agreement are not applicable to Switched Exchange Access Service. All Switched Exchange Access Service and all InterLATA Toll Traffic shall continue to be governed by the terms and conditions of the applicable federal and state tariffs.

Section 5.7.4 of the Agreement states:

> Each Party shall charge the other Party its effective tariffed intraLATA FGD switched access rates for the transport and termination of all IntraLATA Toll Traffic.

Section 5.7.5 of the Agreement states:

> Compensation for transport and termination of all traffic which has been subject to performance of INP by one Party for the other Party pursuant to Section 13.0 shall be as specified in Section 13.5.

C. The Dispute

The calls in dispute in this case involve calls by an Ameritech telephone exchange service end user to an ICG end user that happens to be an ISP. ICG, as part of its local exchange service, assigns telephone numbers to its ISP end users. With respect to the calls in dispute those numbers are associated with the local service area of the Ameritech end user. For purposes of this case, this type of call will be referred to as "disputed calls."

For some period of time prior to August 1997, ICG billed and Ameritech paid ICG reciprocal compensation for calls by Ameritech end users to ISPs which are ICG local exchange end users where the ISPs' telephone numbers are associated with the same local service area as that of the Ameritech end user.[3]

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[3] ICG Complaint, Appendix A.

On October 28. 1997. Ameritech sent ICG a letter in which Ameritech stated that it would stop paying reciprocal compensation for the disputed calls. Ameritech estimated that those calls constituted 95.52% of the local exchange traffic terminated by ICG and billed to Ameritech. Ameritech further stated that it would refuse to pay ICG for 95.52 % of future ICG reciprocal compensation billings based on its estimate of the percentage of reciprocal compensation attributable to the disputed calls.[4]

ICG notified Ameritech of its disagreement with Ameritech's changed position and demanded immediate payment of all reciprocal compensation owed to ICG by Ameritech for local exchange traffic that was originated by Ameritech's customers and terminated with ICG's customers. including ICG' ISP customers.[5]

As a result of Ameritech's actions, Ameritech is now in arrears to ICG in an amount exceeding Two Million Dollars.[6]

D. Facts Related to the Disputed Calls

A call placed over the public switched telecommunications network is considered to be "terminated" when it is delivered to the Telephone Exchange Service bearing the called telephone number, not when the caller hangs up.[7] Thus, a call placed to an ISP for the purpose of gaining information from the Internet terminates when the call from the end user to the ISP is answered by the ISP.[8]

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[4] *Id.*

[5] Pursuant to the dispute resolution provision of the Agreement, ICG notified Ameritech that all payments being withheld should be deposited in an interest bearing escrow account. ICG Complaint at 3.

[6] Testimony of Cindy Z. Schonhaut ("Schonhaut Testimony") at p.15, lines 15-17.

[7] Schonhaut Testimony at p. 6, line 17 to p. 7, line 8.

[8] *Id.* at p. 9, line 17 to p. 10, line 2.

A telephone call between an end user to an ISP's local exchange number is a circuit switch call. The Internet by contrast operates as a packet-switch network.[9]

Ameritech has always and continues to provide local exchange service to its ISP customers pursuant to its local exchange tariff. When an Ameritech customer places a call to a telephone number used by an ISP within the Ameritech customer's local calling area, Ameritech rates and bills its customer for a local call pursuant to the terms of Ameritech's local exchange tariff regardless of which carrier provides the service to the ISP.[10]

Ameritech has treated traffic to its customers which are ISPs with telephone numbers in the local calling area as local for purposes of booking revenues, separations, and ARMIS reporting.[11] When an ISP answers an incoming call placed to a local number assigned to it, an answer supervision signal is returned that triggers Ameritech's timing and billing functions.[12]

III. CONTRACTUAL TERMS DEMONSTRATE THAT RECIPROCAL COMPENSATION IS OWED FOR THE DISPUTED CALLS

The only issue in this case is one of interpretation of the Interconnection Agreement to determine if reciprocal compensation for the disputed calls is due under the Agreement.[13] The plain

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[9] *In the Matter of Access Charge Reform, First Report and Order*, CC Docket No. 96-262 (rel. May 17, 1997) (*"Access Charge Reform Order"*), para. 348.

[10] Ameritech Responses to Discovery Requests of ICG, Admissions 2 and 3; Transcript of Proceeding ("Tr.") at p. 130, lines 3-7.

[11] Schonhaut Testimony at p. 6, lines 3-10; Tr. at p. 30, line 21 to p. 31, line 10; p. 156, lines 11-20.

[12] Schonhaut Testimony at p. 6, line 17 to p. 7, line 2; Tr. at 155, lines 16-19.

[13] Both Ameritech and ICG agree that the issue of calls to ISPs was not discussed in the negotiations. See Schonhaut Testimony at p. 12, lines 17-21; Testimony of H. Edward Wynn ("Wynn Testimony") at p. 6, lines 1-4 and Tr. at 32, lines 11-15.

language of the Agreement requires that reciprocal compensation be paid for the disputed calls.

Section 5.7.1 of the Agreement requires Ameritech and ICG to pay compensation to each other for Local Traffic billable by Ameritech or ICG which a Telephone Exchange Service customer originates on one company's network and terminates on the other's network. More specifically, the Agreement requires the party on whose network Local Traffic originates to pay reciprocal compensation to the party on whose network such traffic terminates. Under Section 5.7.1, reciprocal compensation is due when a call is placed to a local exchange number associated with the same local service area as that of the called party.

Because this case must be resolved by interpretation of the Agreement, this case can be decided quickly and simply without resort to philosophical musings proffered by Ameritech regarding what constitutes a "local" call for "jurisdictional" purposes. In this case, the language in the Agreement leaves no room for debate. The Agreement requires reciprocal compensation for "Local Traffic." Local Traffic is defined as local service area calls as defined by the Commission. The carrier terminating telecommunications traffic which meets the definition of "Local Traffic" is entitled to reciprocal compensation regardless of the identity of the end user. The inquiry is very straight forward under the terms of the Agreement. By its specific terms, the disputed calls are subject to reciprocal compensation.

Ignoring the language of the Agreement, Ameritech argues that the Agreement specifically excludes exchange access from the obligation to pay reciprocal compensation and, therefore, no compensation is owed. Ameritech is correct as to the Agreement's treatment of exchange access, but its reliance on that provision of the Agreement is particularly misplaced. While it is clear that

Switched Exchange Access Service is not covered by reciprocal compensation. Ameritech ignores the fact that Section 1.58 of the Agreement defines Switched Exchange Access service as:

> the offering of transmission or switching services *to Telecommunications Carriers for the purpose of the origination or termination of Telephone Toll Service.* Switched Exchange Access Services include: Feature Group A, Feature Group B, Feature Group D, 800/888 access, and 900 access and their successors or similar Switched Exchange Access Services. (emphasis added)

Even Ameritech has not yet had the affrontery to argue that ISPs are Telecommunications Carriers, or that the information services provided by ISPs are Telephone Toll Services.[14] Ameritech's reliance on the "Switched Exchange Access Service" exception from reciprocal compensation, therefore, is, at best, ill founded.

Finding itself without support in the Agreement, Ameritech finally argues that it was "reasonable" for it to "assume" that the disputed calls would not be subject to reciprocal compensation.[15] Even if there were no evidence that Ameritech was in fact aware of the fact that new entrant carriers ("NECs") considered the disputed calls to be local calls.[16] the fact that Ameritech itself recognized the disputed calls as local calls in its own treatment of the calls for every other purpose totally undermines the "reasonableness" of Ameritech's assumption.

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[14] Tr. at 55, lines 1-4.

[15] Wynn Testimony at p. 4, lines 13-16.

[16] Tr. at p. 64, lines 4-14; Tr. p. 65, lines 23 to p. 67, line 9; Tr. at p. 83, line 25 to p. 84, line 9.

IV. A CALL FROM ONE END USER TO THE TELEPHONE EXCHANGE NUMBER OF ANOTHER END USER ASSOCIATED WITH THE SAME LOCAL SERVICE AREA IS UNDENIABLY LOCAL

Ameritech cannot and does not dispute the fact that the issue it raises involves an ISP customer who has purchased local exchange service from ICG. It cannot dispute the fact that as part of the local exchange service ICG assigns the ISP telephone numbers. Nor can it dispute the fact that the calls at issue here are calls from an NPA-NXX of an Ameritech customer to an NPA-NXX of an ICG customer both of which numbers are associated with the same local service area as defined by the Commission.[17] The call goes from an Ameritech end user through an Ameritech switch to a point of interconnection agreed to between Ameritech and ICG. The call is then transported by ICG to its switch and is routed, transported and terminated to the ICG customer by ICG. Both Ameritech's and ICG's customers have purchased local exchange service from their chosen local exchange provider from the provider's local exchange tariff. It is clear, beyond dispute, that the functions performed in terminating a local call to an ISP are no different than terminating any other local call between an end user of Ameritech and an end user of ICG.

Despite these facts Ameritech contends that calls to ISPs do not "terminate" at the ISP's equipment, but rather that the ISP location serves as a routing point to forward the call to the Internet, a world-wide packet-switched data network of interconnected computers, and the data bases and web sites reached on the Internet. In fact, as Ameritech admits there is no way of knowing exactly how or where the ISP will obtain the information requested by its customers,[18] nor does it

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[17] In all cases, the same analysis applies to a call from an ICG customer to an Ameritech end user ISP.

[18] Tr. p. 109, line 6 to p. 110, line 16.

really matter. As the term is commonly employed in the telecommunications industry, a call placed over the public switched telecommunications network is considered to be "terminated" when it is delivered to the Telephone Exchange Service number that has been called.[19] The call is terminated at that point, regardless of the identity or status of the called party.[20] Nothing in the Agreement or applicable law or regulations create a distinction pertaining to calls placed to local exchange service customers that happen to be ISPs. The *information service* provided by the ISP is wholly separate from the local exchange *telecommunications service* provided by ICG that is at the heart of this dispute.[21] Whatever the ISP does to obtain its information service product *after* it answers the incoming local exchange telephone call is irrelevant to the present inquiry of whether reciprocal compensation is owed for the transport and termination of the local exchange call to the ISP.[22]

This straight forward analysis is borne out by existing law and regulations. For example, the Commission in its local competition proceeding proposed to distinguish local calls from toll calls for purposes of determining reciprocal compensation as follows:

> An ILEC's local calling area, as of the date a NEC is actually operating within an individual ILEC's local calling area, shall constitute the demarcation for differentiating local and toll call types

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[19] Schonhaut Testimony at p. 6, line 17 to p. 7, line 2.

[20] Feature Group A service is *not* an exception to this convention. Feature Group A is an Exchange Access Service, which is legally distinguishable from Telephone Exchange Services. ISPs, unlike interexchange carriers, are as a matter of law specifically allowed to employ Telephone Exchange Services.

[21] *Compare* 47 U.S.C. § 153(20) (definition of information service) *with* 47 U.S.C. § 153(46) (definition of telecommunications service).

[22] Even Ameritech admits that the ISP separately arranges for any communication service it uses in providing its information service after the local call has terminated. Tr. at p. 107, line 16 to p. 108, line 16.

> for the purpose of traffic termination compensation. Any end user call originating and terminating within the boundary of such local calling area, regardless of the LEC at the originating or terminating end, shall be treated as a local call. . .[23]

In designating which calls should be treated as local calls, the Commission identified "any end user call originating and terminating within the boundary of such local calling area." The Commission did not create any exceptions applicable to enhanced services traffic.

The Commission's Local Compensation Rules, as finally adopted by Entry dated February 20, 1997, provide:

> IV. COMPENSATION FOR THE TRANSPORT AND TERMINATION OF TRAFFIC
>
> A. Compensation Principles . . .
>
> 2. Reciprocal Compensation
>
> All LECs shall have the duty to establish reciprocal compensation arrangements for the transport and termination of traffic.
>
> 3. . . .
>
> B. . . .
>
> C. Local and Toll Traffic Determination
>
> As NECs establish operations within individual ILEC local calling areas, the perimeter of each such local calling area, as revised to reflect EAS, shall constitute the demarcation for differentiating local and toll call types for the purpose of traffic termination compensation. Any end user call

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[23] *Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues*, Case No. 95-845-TP-COI, Order dated June 12, 1996.

> originating and terminating within the boundary of such local calling area, regardless of the LEC at the originating or terminating end, shall be treated as a local call. . .

Again, no exceptions were created for enhanced services traffic.

Not only did Ameritech fail to urge the inclusion of any exception applicable to calls placed to enhanced service providers, it also failed even to suggest, at any time prior to the October letter, the existence of any exception to the Commission's rules regarding the definition of local traffic.

In addition to this Commission's definition of local traffic, the FCC's treatment of these calls demonstrates that the FCC considers these calls to be local calls severable from the information services provided by the ISP. The FCC has repeatedly affirmed the rights of ISPs to employ Telephone Exchange Services, under *intrastate* tariffs, to connect to the public switched telecommunications network.[24] The mere fact that an ISP may enable a caller to obtain information from services available over the Internet does not alter the legal status of the connection between the customer and the ISP as being a local call. The local call to the local exchange service number of an ISP is a separate and distinguishable transmission from any subsequent Internet transmission initiated by the ISP.

The FCC's recent *Universal Service Order* [25] and *Access Charge Reform Order* affirm this fact. In the *Universal Service Order,* the FCC determined that Internet access consists of severable components:

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[24] *Amendments to Part 69 of the Commission's Rules Relating to Enhanced Service Providers,* 3 FCC Rcd 2631, para. 2 n.8 (1988). *Access Charge Reform Order*, paras. 344-348.

[25] *In the Matter of Federal-State Joint Board on Universal Service,* Report and Order, CC Docket No. 96-45 (rel. May 8, 1997) ("*Universal Service Order*").

> 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 service offering.*[26]

In other words, the first component is a simple local exchange telephone call eligible for reciprocal compensation. As a result, while all providers of interstate telecommunications services must contribute to the Universal Service Fund, the FCC explicitly excludes ISPs from the obligation.[27]

In the *Access Charge Reform Order,* the FCC declined to allow LECs to assess interstate access charges on ISPs.[28] Indeed, the FCC unambiguously characterized the connection from the end user to the ISP as local traffic: "To maximize the number of subscribers that can reach them *through a local call,* most ISPs have deployed points of presence."[29]

In the FCC's *Non-Accounting Safeguards Order*, the FCC also determined that the local call placed to an ISP was separate from the subsequent information service provided.[30] The severability

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[26] *Id.*, para. 789 (emphasis added). *See also, id.*, para. 83:

> We agree with the Joint Board's determination that Internet access consists of more than one component. Specifically, we recognize that Internet access includes a network transmission component, which is the connection over a LEC network from a subscriber to an Internet service provider, in addition to the underlying information service.

(Citation omitted).

[27] *Id.*, paras. 787-788.

[28] *Access Charge Reform Order,* paras. 344-348.

[29] *Id.*, n.502 (emphasis added).

[30] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended,* First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-149 (rel. Dec. 24, 1996), para. 120.

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.[31] As these three post 1996 Telecommunication Act decisions make clear, there can be no doubt that at this time the FCC does not consider a call that would otherwise be a local exchange call to somehow be transmuted into an interstate or international communication merely because the local exchange end user is an ISP.

The fundamentally flawed position asserted by Ameritech has already been soundly rejected by at least fourteen other state regulatory agencies.[32] In Ameritech's own region, the Michigan Public Service Commission recently concluded that Ameritech's unilateral refusal to pay reciprocal compensation for the disputed call in Michigan violated its interconnection agreements.[33] The Commission held that FCC precedent, the interconnection agreements "on their face," and

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[31] *Id.*

[32] Attached as Exhibit A are copies of the decisions or relevant portions thereof cited *infra* at footnotes 33-47.

[33] *Consolidated Petitions of Brooks Fiber Communications of Michigan, Inc., TCG Detroit, MFS Intelenet of Michigan, Inc, and Brooks Fiber Communications of Michigan, Inc. against Michigan Bell Telephone Company, d/b/a Ameritech Michigan and Request for Immediate Relief,* Order, Case Nos. U-11178, U-11502, U-11522, U-11553 (Mich. PSC Jan. 28, 1998) at 1 (appeal filed, *Michigan Bell Telephone Company d/b/a Ameritech Michigan v. MFS Intelenet of Michigan Inc.*, Case No. 5:98-CV-18 (W.D. Mich. Feb. 6, 1998)).