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CC Docket #96-98
CCB/CPD 97-30

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of<br><br>Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic | Docket No. CCB/CPD-97-30 |

**REPLY COMMENTS OF**
**BROOKS FIBER PROPERTIES, INC.**

The comments in this proceeding confirm the need for a prompt and favorable ruling on the ALTS request for clarification. The ILECs' comments add nothing to the meritless positions taken in their various letters announcing their refusal to pay reciprocal compensation for local calls to Internet service providers ("ISPs"),[1] and do not deny that the ILECs treat calls to ISPs as local for every other business and regulatory purpose. The non-ILEC comments -- all of which support the ALTS position -- demonstrate that the ILECs' refusal to pay compensation is a widespread phenomenon with a potentially devastating impact on local competition. Finally, the recent decision of the Eighth Circuit Court of Appeals in no way undermines the authority of this Commission to declare that reciprocal compensation must be paid for local calls placed to ISPs. Accordingly, Brooks Fiber Properties, Inc. ("Brooks Fiber") urges the Commission to grant the ALTS request promptly, and to declare that ILECs must pay reciprocal compensation for local calls from ILEC customers to ISPs served by CLECs.

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[1] *See, e.g.*, Attachments to Comments of Brooks Fiber Properties, Inc.

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## I. The Comments Show That The ILEC Position Is Without Merit

The comments of the ILECs merely repeat, with inconsequential variations, their claims that because ISPs connect their customers with Internet destinations that may be located in different states, local calls to ISPs are somehow transformed into interexchange traffic not subject to reciprocal compensation.[2] The arguments in favor of this position take two forms: first, the claim that the local call to the ISP is part of an end-to-end, interstate service and therefore must be treated as interexchange rather than local;[3] and second, the more specific claim that the local call to the ISP is a form of exchange access and therefore cannot be classified as a local call.[4] Both arguments are *non sequiturs* that confuse the classification of traffic as local or interexchange with the entirely separate question of distinguishing state from federal jurisdiction.

Contrary to the implication of the ILECs' comments, neither ALTS nor those commenters who support the ALTS request have denied that the use of a local service or facility in connection with an interstate service may, in a proper case, have jurisdictional significance.[5] The FCC never has found, however, that the use of a local service to complete an interstate call somehow transforms a local service into an interexchange service, or an intrastate service into an interstate service.

Unlike the ILECs, the Commission has had no difficulty recognizing that not all communications within the FCC's jurisdiction are interexchange communications. In its

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[2] Comments of the Southern New England Telephone Company ("SNET Comments") at 4-5; Ameritech Comments at 10-14; Comments of the United States Telephone Association and Member Companies ("USTA Comments") at 9-10.

[3] SNET Comments, *supra;* Ameritech Comments, *supra.*

[4] USTA Comments, *supra.*

[5] *See, e.g., National Association of Regulatory Utilities Commissioners v. Federal Communications Commission,* 746 F.2d 1492 (D.C. Cir. 1984) (*"NARUC v. FCC").*

review of the Bell companies' Open Network Architecture ("ONA") plans, for example, the Commission pointed out that although it had asserted jurisdiction for a limited purpose over call forwarding and other ONA services that are used for both interstate and intrastate calls, those services could continue to be tariffed with the states as local service.[6] Similarly, in a more recent decision the Commission pointed out that although it had limited jurisdiction over end-to-end communications that used a voice mail service to forward interstate calls to a BellSouth voice mail platform, the call forwarding service through which the interstate calls reached the voice mail platform continued to be "locally tariffed."[7]

The fact that ISPs connect end users with distant locations on the Internet, therefore, offers no guidance at all on the question raised by the ILECs' refusal to pay reciprocal compensation for calls to ISPs.[8] Stripped of obfuscation, that question is: Do seven-digit

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[6] *Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd 1, 144 (1988).

[7] *Petition for Emergency Relief and Declaratory Ruling filed by the BellSouth Corporation*, 7 FCC Rcd 1619, 1621 (1992) (*"BellSouth Voicemail Decision"*). The *BellSouth Voicemail Decision*, like the other authorities cited by the ILECs, asserts a limited federal jurisdiction over a local service without in any way altering that service's local character for tariffing, billing and other business and regulatory purposes. In *NARUC v. FCC*, 746 F.2d 1492 (D.C. Cir. 1984), for example, the Court affirmed the Commission's finding that because intrastate WATS service is used to complete interstate calls, the Commission has jurisdiction to mandate resale and shared use of intrastate WATS service. Neither the Court nor the Commission, however, suggested that this jurisdictional fact converted intrastate WATS into an interstate service that must, for example, be tariffed with the FCC rather than the states. *See also Order Designating Issues for Investigation* in CC Docket No. 88-180 (Apr. 22, 1988); *AT&T Communications Revisions to Tariff FCC No. 2 (800 ReadyLine Service)*, 2 FCC Rcd 78 (1986); *Teleconnect Company v. Bell Telephone Company of Pennsylvania*, 10 FCC Rcd 1626 (1995).

[8] Neither is USTA's question-begging characterization of local calls to ISPs as "exchange access" traffic any more helpful. USTA Comments at 4. The FCC repeatedly has refused to classify enhanced service providers as interexchange carriers or to subject ESPs to the access charge regime. This refusal represents more than a policy decision to protect ESPs from expense. As the FCC pointed out in its order, *Implementation of Local Competition Provisions in theTelecommunications Act of 1996*, 11 FCC Rcd 15499 (*"Local Competition Order"*), the access charge regime was developed specifically to ensure compensation for local carriers for calls handled by two local exchange carriers on behalf of an intervening interexchange carrier. *Local Competition Order*, at 16013. This clearly is not the case where an ILEC's end user accesses the Internet through a local call to an ISP served by a CLEC. The latter scenario is a case of reciprocal transport and termination of

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calls from ILEC customers to ISPs served by CLECs require payment of reciprocal compensation under §251 of the 1996 Act? That question, in turn, is readily answered by this Commission's classification of local calls to ISPs as local rather than exchange access traffic, and the consistent treatment of those calls as local by the FCC, the state commissions and the ILECs.[9] As Brooks Fiber demonstrated in its comments, when the inquiry moves from the tortured jurisdictional arguments of the ILECs to the real world of telecommunications business and regulation, all support for the ILECs' characterization of calls to ISPs as "interexchange" evaporates.[10]

## II. The Eighth Circuit Decision Does Not Limit The Commission's Jurisdiction to Grant the Requests of ALTS and Brooks Fiber

In granting the petition of Ameritech for an extension of time in which to file reply comments in this proceeding, the Commission made specific reference to the possible impact on this proceeding of the decision entered by the U.S. Court of Appeals for the Eighth Circuit on July 18, 1997 in *Iowa Utilities Board v. FCC ("Iowa Utilities Board")*,[11] in which the Court vacated some of the FCC's rules implementing the local compeitition provisions of the Telecommunications Act of 1996.[12]

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traffic by adjacent LECs, and therefore is subject to the reciprocal compensation requirements of the 1996 Act.

[9] *See* Comments of Brooks Fiber Properties, Inc. at 5-6.

[10] *Id.*

[11] *Iowa Utilities Board v. Federal Communications Commission, et al.*, Nos. 96-3321 *et seq.*, slip op. (8th Cir., July 18, 1997).

[12] In *Iowa Utilities Board*, the Court vacated a number of the FCC's local competition rules -- including the reciprocal compensation rules -- because the subsections of §251 that those rules were intended to implement made no reference to FCC rules. *See Iowa Utilities Board*, slip op. n. 21. In the absence of such a grant of rulemaking authority, the Court took the position that the reservation to the states of the power to regulate local service, set out in §2(b) of the Communications Act, deprived the FCC of jurisdiction. The Court allowed some of the vacated rules to stand, however, to the extent those rules

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In fact, the decision in *Iowa Utilities Board* in no way limits the authority of this Commission to grant the relief requested by ALTS and Brooks Fiber. The Eighth Circuit's decision stands for the proposition that in the absence of some independent basis of jurisdiction, the Commission may only make rules implementing those local competition provisions of the 1996 Act that expressly refer to implementation in accordance with FCC rules. The relief requested by ALTS and Brooks Fiber in this proceeding, however, has a jurisdictional basis entirely independent of the local competition provisions of the 1996 Act, and therefore is unaffected by *Iowa Utilities Board*.

Notably, the Commission determined several years ago, based upon its authority over interstate communications expressed in the 1934 Act, that enhanced service providers are end users rather than interexchange carriers, and that seven digit calls to enhanced service providers are local calls rather than exchange access traffic.[13] Accordingly, the FCC does not require any new authority under §251 of the 1996 Act to confirm, as ALTS requests, its consistent determination that seven-digit calls from end users to ISPs are local.

Similarly, the Commission requires no new authority under §251 of the 1996 Act to declare that ILECs must pay mutual compensation for local calls from ILEC customers to ISPs served by CLECs. Historically, the FCC has acted forcefully to ensure that incumbent carriers do not impose competitive disabilities on providers of enhanced services.[14] Those

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involved interconnection between ILECs and Commercial Mobile Radio Service ("CMRS") providers, as to which the Congress had given the Commission rulemaking jurisdiction in earlier legislation. *Id.*

[13] *MTS and WATS Market Structure*, 97 F.C.C.2d 682, 715 (1983), *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631, 2633 (1988).

[14] *See, e.g., Amendment of §64.702 of the Commission's Rules and Regulations*, CC Docket No. 85-229, Phase I, 104 F.C.C.2d 958 (1986), *(Phase I Order), modified on recon.*, 2 FCC Rcd 3035 (1987) *(Phase I Reconsideration Order), further modified on recon.*, 3 FCC Rcd 1135 (1988) *(Phase I Further Reconsideration Order), second further recon.*, 4

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actions were based on the Title II obligations of the incumbents, and the Communications Act's general mandate to the FCC to regulate so as to ensure "to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . ."[15] These bases of jurisdiction are in no way affected by the 1996 Act or the decision in *Iowa Utilities Board*, and are strengthened, in their application to ISP services, by the express congressional policy "to promote the continued development of the Internet and other interactive computer services and other interactive media."[16]

As the comments in this proceeding show, the refusal of ILECs to include local ISP traffic in their reciprocal compensation obligations threatens the development, and perhaps even the survival, of an independent ISP industry.[17] The refusal of ILECs to pay reciprocal

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FCC Rcd 5927 (1989) *(Phase I Second Further Reconsideration), Phase I Order and Phase I Reconsideration Order vacated, California v. FCC,* 905 F.2d 1217 (9th Cir. 1990) *(California I); Phase II,* 2 FCC Rcd 3072 (1987) *(Phase II Order), recon.,* 3 FCC Rcd 1150 (1988) *(Phase II Reconsideration Order), further recon.,* 4 FCC Rcd 5927 (1989)*(Phase II Further Reconsideration Order), Phase II Order vacated, California I,* 905 F.2d. 1217 (9th Cir. 1990); *Computer III Remand Proceedings,* 5 FCC Rcd 7719 (1990) *(ONA Remand Order), recon.,* 7 FCC Rcd 909, *petitions for review denied, California v. FCC,* 4 F.3d 1505 (9th Cir. 1993) *(California II); Computer III Remand Proceeding: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards,* 6 FCC Rcd 7571 (1991) *(BOC Safeguards Order), recon. dismissed in part,* Order, CC Docket Nos. 90-623 and 92-256, FCC 96-222 (Rel. May 17, 1996); *BOC Safeguards Order vacated in part and remanded, California v. FCC,* 39 F.3d 919 (9th Cir. 1994) *(California III), cert. denied,* 115 S.Ct. 1427 (1995).

[15] 47 U.S.C. §151.

[16] 47 U.S.C. §230(b)(1).

[17] *See* Comments of America Online, Inc. at 15-16; Comments of the Commercial Internet Exchange Association at 2; Comments of WorldCom, Inc. at 12-13; Comments of American Communications Services, Inc. at 5; Comments of US Xchange, L.L.C. at 9-10; Comments of Dobson Wireless, Inc. at 9; Comments of Cox Communications, Inc. at 5-8; Comments of ACC Corp. at 6-7; Comments of Teleport Communications Group, Inc. at 9-10; Comments of AT&T Corp. at 4-5; Comments of American Communications Services, Inc. at 5; Comments of Adelphia Communications Corporation, *et al.* at 6-11.

compensation for ISP traffic poses a threat that the ILECs will monopolize the market for local service to ISPs, and perhaps the market for ISP services themselves. In order to carry out its mandate under the Communications Act, therefore, the Commission must confirm that local traffic to ISPs is subject to reciprocal compensation, and that the ILECs may not withhold payment of reciprocal compensation for such traffic.

**Conclusion**

As the Telecommunications Act of 1996 and the recent decision of the Eighth Circuit Court of Appeals make clear, the authority to enforce interconnection agreements between ILECs and CLECs rests primarily with the states. This Commission can aid in that process, however, by clarifying that its regulatory framework for enhanced services has not changed since the passage of the 1996 Act.

The Commission also should confirm that the ILECs may not refuse to pay reciprocal compensation to the CLECs for local calls from ILEC customers to ISPs served by CLECs. The ILECs have failed to demonstrate any basis for their refusal to pay reciprocal compensation for local traffic terminating at ISPs served by CLECs. Those refusals jeopardize interconnection agreements negotiated under §252 of the 1996 Act and will delay the advance of local competition unless this Commission acts promptly to clarify its rules, direct the ILECs to pay all reciprocal compensation amounts withheld and direct the ILECs to meet their reciprocal compensation obligations in the future. Brooks Fiber

also renews its request that the Commission impose the maximum available sanctions against the ILECs for their discriminatory and anticompetitive conduct.

Respectfully submitted,

By: _____

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Date: July 31, 1997

## CERTIFICATE OF SERVICE

I, Kimberly E. Thomas, do hereby certify that the foregoing **REPLY COMMENTS OF BROOKS FIBER PROPERTIES, INC.** was hand delivered on this 31th day of July, 1997, to the following:

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