ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
GTE Telephone Operating Companies	)	CC Docket No. 98-79
GTOC Tariff FCC No. 1	)	
GTOC Transmittal No. 1148	)	
	)	
BellSouth Telecommunications, Inc.	)	
BellSouth Tariff FCC No. 1	)	CC Docket No. 98-161
BellSouth Transmittal No. 476	)	

OPPOSITION TO DIRECT CASES

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BellSouth Transmittal No. 476	)	

OPPOSITION TO THE DIRECT CASES

ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom") and KMC Telecom Inc. ("KMC"), pursuant to Section 204 of the Communications Act and the Order Designating Issues for Hearing, hereby opposes the Direct Case of GTE, filed by GTE Service Corporation and its affiliated domestic telephone operating companies (collectively "GTE") in the above-referenced matter on September 8, 1998, and the Direct Case of BellSouth Telecommunications, Inc. ("BellSouth") filed on September 11, 1998. GTE's Direct Case fails to justify its Transmittal No. 1148, and BellSouth also fails to justify its Transmittal No. 476. For the reasons set forth below, ITC^DeltaCom and KMC respectfully submit that the Commission should reject these ADSL interstate offerings.

I. INTRODUCTION

ITC^DeltaCom and KMC are competitive local exchange carriers ("CLECs") currently providing switched local, long distance and enhanced telecommunications services.

GTE's Transmittal No. 1148 seeks to establish a new offering known as GTE DSL Solutions-ADSL Service to become effective May 30, 1998 in portions of fourteen states.[1] To ITC^DeltaCom's and KMC's knowledge, GTE has not filed an intrastate ADSL tariff in any of the fourteen states.

By BellSouth's Transmittal No. 476, it also seeks to introduce ADSL service. BellSouth states that it expects the primary customers of its ADSL service to be information service providers ("ISPs").[2]

ITC^DeltaCom and KMC support the goal of Congress and this Commission to promote the widespread deployment of advanced new communications capabilities. However, both the GTE and BellSouth (collectively referred to as the "ILECs") transmittals raise too many fundamental policy issues of general applicability that currently are being addressed, but have not yet been resolved, in other proceedings pending before the Commission. Therefore, ITC^DeltaCom and KMC oppose Commission approval of these offerings.

This Opposition presents several reasons for dismissal of the GTE and BellSouth transmittals, including: 1) The contention that the service should be classified as an interstate access service is not consistent with the Communications Act, the Commission's policies and rules; 2) The jurisdictional analysis is flawed and the service should be tariffed in the local jurisdiction; 3) Tariffing in the state jurisdiction is consistent with every state ruling on the issue.

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[1] The fourteen states are California, Florida, Hawaii, Illinois, Indiana, Kentucky, Michigan, Missouri, North Carolina, Ohio, Oregon, Texas, Virginia, and Washington.

[2] BellSouth Direct Case at 2.

II. THE SERVICE SHOULD NOT BE CLASSIFIED AS AN ACCESS SERVICE

The Commission should reject the ILEC's attempt to have the Commission classify the ADSL service as an interstate access service. The service does not fit within definitions of "access" included in both the Communication Act[3] and the Commission's access charge rules.[4] The Commission's rules clearly define "access service" as "services and facilities provided for the origination and termination of any interstate or foreign *telecommunication*" (emphasis added). The Act is more specific, defining exchange access as "the offering of telephone exchange services or facilities for the purpose of the origination and termination of *telephone toll services*" (emphasis added). When the ILEC's ADSL service terminates at the information service provider ("ISP"), the service then being provided by the ISP is an information service, not a telephone toll service or any other type of telecommunications service. Therefore, although interstate routing may occur following the connection at the ISP, the initial call cannot be characterized as "access service" because the purpose of the call is not to originate or terminate a telecommunication service.[5]

GTE's discussion[6] of the Commission's *Memory Call*[7] decision does not support categorizing ADSL as an "access service." In *Memory Call*, the Georgia Public Service Commission ("GPSC") issued an order in which it attempted to "freeze" marketing of BellSouth's voicemail service. The

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[3] 47 U.S.C. § 153 (16).

[4] 47 C.F.R. § 69.2 (b).

[5] BellSouth concedes that ADSL service does not fall within the Communications Act definition of access service, *see* BellSouth's Direct Case at 17.

[6] GTE Direct Case at 12-13.

[7] 7 FCC Rcd 1619 (1992).

FCC found that the service was capable of receiving calls from out-of-state and that such interstate usage could not be practically separated from the intrastate aspects of the service, and as a consequence, BellSouth could not comply with the intrastate aspects of the GPSC order without also affecting the interstate calling to the service. In addition, the FCC found that the GPSC order, if not preempted, could thwart achievement of federal objectives regarding BellSouth's participation in offering enhanced services.

Memory Call does not stand for the proposition that calls to an information service somehow transform the information service into an end-to-end telecommunications offering. Thus, the Commission need not even consider, for purposes of rejecting the attempted misplacement of the service in the access category, GTE's discussion regarding classifying services in the interstate jurisdiction.

The ILEC's ADSL service is terminated at the ISP. As noted above, the service provided by the ISP after the call terminates at the ISP is not *telecommunications* service at all. This Commission reported to Congress that " Internet access services are appropriately classed as *information*, rather than telecommunications services."[8] Of course, the ISP may make use telecommunications services to provide information services, but it does not provide telecommunications services.[9] If a call terminates at an end user, it terminates no matter the means by which it arrives, including by the proposed ADSL offering.

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[8] In re Federal-State Board on Universal Services, CC Docket No. 96-45, Report to Congress ¶ 73 (April 10, 1998) ("1998 Universal Service Report") (emphasis added).

[9] *See, e.g., Id.* ¶¶ 41, 57.

The ILEC's argument in support of interstate jurisdiction over its service incorrectly links its telecommunication service to the information service to presume a single uninterrupted path of intended communication. The cases cited are clearly distinguishable from the service offering proposed here. In the cited cases, each service included an intermediate step, be it an 800 switch, a voice mail service, or even a manually operated "leaky" PBX, and the facility served no function other than to transfer the call to the ultimate, intended destination at an interstate location. None of these situations is similar to ILEC's proposed service: rather, ADSL provides connection to an end user that legally and factually terminates the communication. Thus, the Commission, consistent with precedent, should decide that ADSL offered to ISPs is an intrastate service to be tariffed in the local jurisdiction.

III. ADSL IS A LOCAL TELECOMMUNICATIONS SERVICE

The ILEC's ADSL service is merely another type of local loop service and should be tariffed in its various state jurisdictions.[10] The ILECs try to confuse the jurisdictional issue in several ways. First, they would have the Commission consider the telecommunications service provided by the ILECs and the information service it connects with as a single call. This first premise is incorrect. The Commission has explained in the recent Section 706 rulemaking proceeding that end users may use telecommunications service together with information services, but in such cases the two services are treated separately.[11]

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[10] To the extent that there are legitimate interstate needs for ADSL (such as for access connections to interexchange carriers) GTE and BellSouth may file tariffs specifically tailored to provide such service.

[11] Deployment of Wireline Services Offering Advanced Telecommunications Capability, NPRM (continued...)

Clearly, these ILECs choose to ignore the Commission's current view that ISPs should remain classified as end users for purposes of excluding their use of the local network from the access charge system.[12] GTE attempts to draw several distinctions that should not make a difference. Even though ADSL uses that same type of local loops that traditionally have been used for other types of local services, it tries to describe this service as a "dedicated path"[13] or "nailed up path"[14] and then compare this service to "special access" merely because the service does not go through its circuit-switched local central office, but rather is diverted to the DSLAM and its own frame relay service on its way to the ISP.

Still ignoring the fact that the service offered by the ISP is not telecommunications service, GTE posits that by bypassing its own circuit switch it should be able to change the character of its own local loops. While it may have demonstrated that the vast connection of telecommunications services and information services that collectively are used as the "Internet" can route end users to a number of possible physical and cyberspace locations, the Commission should not be lured down this not-so dedicated "nailed-up" path.

Whether GTE nails its local loops to the ISP through its own frame relay service (and ITC^DeltaCom and KMC agree that it should not) or through other more unbundled means, it should not change the fact that GTE intends to allow use of this service both for local voice and a variety

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[11] (...continued)
CC Docket Nos. 98-147, et al. (rel. August 7, 1998) at 20.

[12] Access Reform, First Report and Order, 12 FCC Rcd 15982 (1997) at 16133.

[13] GTE Direct Case at 4.

[14] *Id.* at 5.

of potentially extremely intrastate uses. Even though the Internet may present potential interstate use of other underlying telecommunications facilities, such use does not change the local nature of the loops used the connect with the Internet as a information service.

GTE's continual emphasis on the decade-old special access "10 percent" jurisdictional allocation rule is particularly misplaced.[15] As some veterans may recall, the Commission adopted this rule simply to clarify the separations treatment of "mixed use" special access lines–that is, a single access line that was to be used both for intrastate and interstate traffic. At the time, lines with very little interstate traffic were being classified as interstate. The Commission adopted the 10% rule upon the recommendation of the Joint Board after some states expressed concerns that intrastate lines were being improperly assigned to the interstate jurisdiction.

Over the years, this so-called "rule" has often been misused in attempts to argue, as GTE does, that the Commission's decision in a very different context for a different reason should now form the basis of assertion of jurisdiction over local facilities. As the case law has made clearer over the years, notably in the *Iowa*[16] and *Louisiana*[17] cases, the Commission must carefully determine whether intrastate components of a service offering are technically and practically severable, and whether its regulations intrude into intrastate turf.

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[15] GTE Direct Case at 19, *citing* MTS and WATS Market Structure, Decision and Order, 4 FCC Rcd 5660 (1989).

[16] *Iowa Utilities Board v. FCC*, 120 F.3d 753, 818 (8th Cir. 1997), cert. granted sub nom, *AT&T Corp. v. Iowa Utilities Board*, 118 S. Ct. 879 (1998).

[17] *Louisiana PSC v. FCC*, 476 U.S. 355, 360, 106 S. Ct. 1890, 1894 (1986).

While it is true that the Commission has important federal goals to further in encouraging advanced services and use of the Internet, it is clear that approval of this tariff is not necessary to accomplish that goal. Indeed, many RBOCs, including BellSouth, have already filed state tariffs to implement ADSL service. Congress recognized, in enacting Section 706 of the Act, that both the Commission and the states have a regulatory role with respect to advanced services the Commission by its action here should not seek to preempt the states role.[18]

IV. STATES HAVE RULED THAT CALLS TO ISPS ARE INTRASTATE

Twenty-one state public utility commissions have already considered and decided that dial-up traffic to ISPs should be classified as intrastate calls.[19] Not a single commission has ruled that calls to ISPs are jurisdictionally anything other than local calls. Faced with this record, it is clear that GTE seeks to collaterally attack these rulings at the FCC. If the Commission should decide on some basis to treat the ILEC ADSL offerings as an interstate service, ITC^DeltaCom and KMC respectfully submit that the Commission should clearly and explicitly limit this decision to this particular ADSL service offering and not in any way jeopardize the twenty-one independent decisions that hold dial up calls to ISPs to be local. Such a ruling would be consistent with the recent "Response of the Federal Communications Commission As Amicus Curiae to Motion for Referral of Issues"[20] in a North Carolina case where the Commission, citing the *Iowa* case, did not seek referral of "any issues relating to the enforcement of interconnection agreements negotiated

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[18] 47 U.S.C. § 706 (1996).

[19] *See, e.g.*, cases attached as Exhibit A.

[20] Filed August 27, 1989 in *BellSouth Telecommunications, Inc. v. US LEC of North Carolina, L.L.C. et al.*, Civil Action No. 3:98CV170-MU, U.S.D.C. W. D. N.C., attached as Exhibit B.

pursuant to sections 251 and 252 of the Act, including whether calls are "local" calls within the meaning of the reciprocal compensation provisions in Bell South's interconnection agreement with US LEC of North Carolina."

V. CONCLUSION

ITC^DeltaCom and KMC respectfully request this Commission to reject GTE's Tariff Transmittal No. 1148 and BellSouth's Transmittal No. 476. The ILEC's proposed service offering is not access, and should be tariffed in the local jurisdiction. To the extent the Commission believes that interstate tariffing is appropriate, it should make clear that such decision will not affect intrastate decisions holding that dial-up traffic to ISPs should be classified as local traffic.

Respectfully submitted,

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EXHIBIT A

STATE COMMISSION DECISIONS AND APPEALS REGARDING RECIPROCAL COMPENSATION FOR LOCAL TRAFFIC TO INTERNET SERVICE PROVIDERS

4. **ARIZONA:** *Petition of MFS Communications Company, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions with US WEST Communications, Inc., Pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996,* Opinion and Order, Decision No. 59872, Docket No. U-2752-96-362 *et al.* (Az. C.C. Oct. 29, 1996).

5. **COLORADO:** Petition of MFS Communications Company, Inc., for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions with US WEST Communications, Inc., Decision Regarding Petition for Arbitration, Docket No. 96A-287T (Co. PUC Nov. 5, 1996) on appeal to U.S.D.C.

6. **COLORADO:** *The Investigation and Suspension of Tariff Sheets Filed by U S West Communications, Inc. With Advice Letter No. 2617, Regarding Tariffs for Interconnection, Local Termination, Unbundling and Resale of Services,* Docket No. 96A-331T, Commission Order (Co. PUC July 16, 1997).

7. **WASHINGTON:** *Petition for Arbitration of an Interconnection Agreement Between MFS Communications Company, Inc. and US WEST Communications, Inc., Pursuant to 47 USC § 252,* Arbitrator's Report and Decision, Docket No. UT-960323 (Wash. Utils. and Transp. Comm. Nov. 8, 1996).

8. **WASHINGTON:** *U S West Communications, Inc. v. MFS Intelenet, Inc. et al.*, Order, No. C97-222WD (U.S.W.D. Wash. January 7, 1998) on appeal to Ninth Circuit Court of Appeals.

9. **MINNESOTA:** *Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCImetro Access Transmission Services, Inc., and MFS Communications Company for Arbitration with US WEST Communications, Inc., Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996,* Order Resolving Arbitration Issues, Docket Nos. P-442, 421/M-96-855, P-5321, 421/M-96-909, P-3167, 421/M-96-729 (Minn. PUC Dec. 2, 1996) on appeal to U.S.D.C.

10. **OREGON:** *Petition of MFS Communications Company, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to 47 U.S.C. Sec. 252(b) of the Telecommunications Act of 1996,* Commission Decision, Order No. 96-324 (Ore. PUC Dec. 9, 1996) on appeal to U.S.D.C.

11. **NEW YORK:** *Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic,* Case 97-C-1275, Order Denying Petition and Instituting Proceeding (N.Y. PSC. July 17, 1997).

12. **NEW YORK:** *Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic*, Case 97-C-1275, Order Closing Proceeding (N.Y. PSC. March 19, 1998).

13. **MARYLAND:** Letter dated September 11, 1997 from Daniel P. Gahagan, Executive Secretary, Maryland Public Service Commission, to David K. Hall, Esq., Bell Atlantic-Maryland, Inc. Bell Atlantic appealed the decision to the Circuit Court for Montgomery County (CA No. 178260); on March 26, 1998 the Circuit Court upheld the Commission decision. A written decision is not available.

14. **CONNECTICUT:** *Petition of the Southern New England Telephone Company For a Declaratory Ruling Concerning Internet Service Provider Traffic*, Docket No. 97-05-22 (Conn. DPUC Oct. 10, 1997).

15. **VIRGINIA:** *Petition of Cox Virginia Telcom, Inc. for Enforcement of interconnection agreement with Bell Atlantic-Virginia, Inc. and arbitration award for reciprocal compensation for the termination of local calls to Internet service providers*, Final Order, Case No. PUC970069 (Va. S.C.C. Oct. 24, 1997), notice of appeal withdrawn.

16. **TEXAS:** *Complaint and Request for Expedited Ruling of Time Warner Communications*, Order, PUC Docket 18082 (TX PUC, February 27, 1998).

17. **TEXAS:** *Southwestern Bell Telephone Company v. Public Utility Commission of Texas, et al*, MO-98-CA-43 (U.S.D.C. W.D. Texas) (June 16, 1998).

18. **WEST VIRGINIA:** *Petition For Arbitration of Unresolved Issues For the Interconnection Negotiations Between MCI and Bell Atlantic - West Virginia, Inc.*, Order, Case No. 97-1210-T-PC (W.Va. PSC Jan. 13, 1998).

19. **MICHIGAN:** *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) on appeal to U.S.D.C. and state court.

20. **NORTH CAROLINA:** *In the Matter of Interconnection Agreement Between BellSouth Telecommunications, Inc. and US LEC of North Carolina, LLC*, Order Concerning Reciprocal Compensation for ISP Traffic, Docket No. P-55, Sub 1027 (N.C. Util. Comm. Feb. 26, 1998) on appeal to U.S.D.C. BellSouth has requested referral to FCC.

21. **ILLINOIS:** *Teleport Communications Group, Inc. v. Illinois Bell Telephone Company, Ameritech Illinois, et al.*, Docket Nos. 97-0404, 97-0519, 97-0525 (Consol.), Order, (Ill. C.C. Mar. 11, 1998).

22. **ILLINOIS:** *Illinois Bell Telephone Company d/b/a Ameritech Illinois v. WorldCom Technologies, Inc., et al.*, No. 98-C-1925 (U.S.D.C. N.D. Illinois) (July 21, 1998).

23. **MISSOURI:** *In the Matter of the Petition of Birch Telecom of Missouri, Inc. For Arbitration of the Rates, Terms, Conditions, and Related Arrangements for Interconnection with Southwestern Bell Telephone Company* Arbitration Order, Case No. TO-98-278 (Mo. P.S.C. Apr. 23, 1998).

24. **WISCONSIN:** *Re: Contractual Dispute About the Terms of an Interconnection Agreement Between Ameritech Wisconsin and TCG-Milwaukee, Inc.* Letter from Lynda L. Dorr, Secretary to the Commission, Public Service Commission of Wisconsin, to Rhonda Johnson and Mike Paulson, dated May 13, 1998 on appeal to U.S.D.C.

25. **OKLAHOMA:** *In the Matter of Brooks Fiber Communications of Oklahoma, Inc. et al. For An Order Concerning Traffic Terminating To Internet Service Providers and Enforcing Provisions of the Interconnection Agreement With Southwestern Bell Telephone Company,* Case No. PUD 970000548, Order No. 423626 (June 3, 1998) on appeal to U.S.D.C. and Oklahoma Supreme Court.

26. **PENNSYLVANIA:** *Petition for Declaratory Order of TCG Delaware Valley, Inc.*, Docket No. P-00971256 (June 16, 1998).

27. **TENNESSEE:** *Petition of Brooks Fiber to Enforce Interconnection Agreement and for Emergency Relief*, Docket No. 98-00118, voted to affirm Hearing Officer, June 2, 1998.

25. **FLORIDA:** *Complaint of WorldCom Technologies, Inc. Against BellSouth Telecommunications, Inc. for Breach of Terms of Florida Partial Interconnection Agreement*, No. 971478-TP, September 15, 1998.

26. **OHIO:** *In the Matter of the Complaint of ICG Telecom Group Inc. v. Ameritech Ohio Regarding the Payment of Reciprocal Compensation*, Case No. 97-1557-TP-CSS, August 27, 1998.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

BellSouth Telecommunications, Inc. Plaintiff,	)	
v.	)	Civil Action No. 3:98CV170-MU
US LEC of North Carolina, L.L.C., and The North Carolina Utilities Commission, Defendants.	)	

RESPONSE OF FEDERAL COMMUNICATIONS COMMISSION AS AMICUS CURIAE TO MOTION FOR REFERRAL OF ISSUE

The Federal Communications Commission respectfully submits this response as amicus curiae to the "Memorandum of Plaintiff BellSouth Telecommunications, Inc. in Support of Primary Jurisdiction Referral," filed with the Court on August 4, 1998. In its Memorandum, BellSouth asks this Court to refer to the FCC, under the doctrine of primary jurisdiction, two issues in this case: the proper jurisdictional treatment of calls made to the Internet through Internet service providers (ISPs), and whether such calls are subject to the reciprocal compensation requirements of section 251(b)(5) of the Communications Act of 1934 ("Act"), as amended by the Telecommunications Act of 1996. 47 U.S.C. § 251(b)(5). Without taking a position on BellSouth's request for referral of the jurisdictional issue, the FCC notes that the question whether calls to ISPs are subject to FCC jurisdiction already is before the FCC in ongoing proceedings and will be addressed by the agency promptly in those proceedings. In addition, the FCC does not seek referral of any issues relating to the enforcement of interconnection agreements negotiated or arbitrated pursuant to sections 251 and 252 of the Act, including whether calls to ISPs are "local" calls within the meaning of the reciprocal

compensation provisions in BellSouth's interconnection agreement with US LEC of North Carolina. See Iowa Utils. Bd. v. FCC, 120 F.3d 753, 804 (8th Cir. 1997) (holding that, except in limited circumstances, the FCC lacks jurisdiction to enforce the terms of interconnection agreements negotiated or arbitrated pursuant to sections 251 and 252), cert. granted, 118 S. Ct. 879 (1998).[1]

A. BACKGROUND.

Although the 1984 breakup of the Bell System helped spur the growth of competition in the long distance telephone market, the incumbent local exchange carriers ("LECs") retained monopoly control of local telephone markets. In almost every city or town in the United States, a single incumbent LEC, by virtue of its ownership of the local exchange network, controls local exchange service. Because that network also is the gateway to long distance service, the same incumbent LEC also has control over access by callers to that competitive market.

Congress addressed the competitive structure of telecommunications markets in the Telecommunications Act of 1996.[2] Congress sought to end the incumbent LECs' monopoly control over local and long distance access service markets, creating instead a "pro-competitive, de-regulatory national policy framework" with the goal of "opening all telecommunications markets to competition." S. Conf. Rep. No. 104-230, 104th Cong., 2d

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[1] The Commission and other parties petitioned the Supreme Court for a writ of *certiorari* to review the *Iowa* decision, and the Supreme Court granted those petitions. 118 S. Ct. 879 (1998). Argument before the Supreme Court will be held on October 13, 1998.

[2] P.L. 104-104, 110 Stat. 56, enacted February 8, 1996. The 1996 Act amends the Communications Act of 1934, which is codified at 47 U.S.C. § 151, et seq.

Sess. 1 (1996). As part of this framework, Congress required incumbent LECs to permit their competitors (competitive LECs, or "CLECs") to interconnect with the local network, to have the use of "unbundled" elements of the network, and to buy local service at wholesale rates for resale to end users. 47 U.S.C. § 251(c)(2)-(4). The CLECs were expected to compete with the ILECs for local as well as local exchange access business.

The 1996 Act also required all LECs (incumbents as well as CLECs) to establish "reciprocal compensation arrangements [with other LECs] for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). The FCC has interpreted this provision to apply only to the transport and termination of "local telecommunications traffic."[3] Although the United States Court of Appeals for the Eighth Circuit vacated in part the FCC's reciprocal compensation rules, see Iowa Utils. Bd. v. FCC, 120 F.3d 753, a number of state public utility commissions also have interpreted section 251(b)(5) to apply only to local telecommunications traffic. As required by the statute, carriers across the country (such as the parties to this

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[3] E.g., 47 C.F.R. § 51.701(e)(emphasis added):

> [A] reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network facilities of the other carrier.

See also 47 C.F.R. § 51.703(a). The FCC defined "local telecommunications traffic" for this purpose as "[t]elecommunications traffic between a LEC and a telecommunications carrier ... that originates and terminates within a local service area established by a state commission ...." 47 C.F.R. § 51.701(b). Although these rules were among those vacated by the Eighth Circuit, they were not disturbed to the extent that they apply to Commercial Mobile Radio Service providers. 120 F.3d at 819 n.39.

case) have included provisions in their interconnection agreements providing for reciprocal compensation for local telecommunications traffic. See, e.g., BellSouth Memorandum at 2 (quoting BellSouth-US LEC Interconnection Agreement § IV.B)("[e]ach party will pay the other for terminating its local traffic on the other's network") (emphasis added).

This case arises out of a dispute between BellSouth and US LEC over the application of the reciprocal compensation provision in their agreement in North Carolina. That agreement requires each party to pay "reciprocal compensation" to the other "for terminating its local traffic on the other's network." Interconnection Agreement, § IV.B. BellSouth and US LEC disagree about whether calls made from a customer of one of the carriers to the Internet through an Internet Service Provider ("ISP") that is served by the other carrier are local calls subject to reciprocal compensation. The North Carolina Utilities Commission ("NCUC"), acting in an enforcement action brought by US LEC to obtain payment from BellSouth for these calls, ruled that calls to ISPs are local calls and that US LEC is entitled to reciprocal compensation for that traffic under the agreement. See Order Concerning Reciprocal Compensation for ISP Traffic, Docket P-55, Sub. 1027, at 6-7 (N.C. Util. Comm'n, Feb. 26, 1998). BellSouth filed a petition for review of the NCUC ruling in this Court. It later filed a motion to stay the proceeding "to permit referral of the controlling legal issue" to the FCC under the doctrine of primary jurisdiction.

B. PENDING FCC PROCEEDINGS.

Although the FCC has not yet expressly addressed the question whether calls to the Internet through ISPs are "local" calls, questions regarding the proper jurisdictional treatment of calls to the Internet have been raised in a number of proceedings currently pending before

the FCC. On May 15, 1998, GTE filed an interstate access tariff with the FCC to establish a new digital subscriber line (DSL) service offering that provides a high speed access connection between an end user subscriber and an ISP.[4] The Common Carrier Bureau has issued an order designating for investigation the threshold issue whether GTE's DSL service is properly tariffed at the federal level.[5] The FCC will issue an order concluding this investigation no later than October 30, 1998.[6] Also pending before the agency are requests filed by MFS Communications Company, Inc. ("MFS"), a CLEC, and the Association for Local Telecommunications Services ("ALTS"), a trade association that represents CLECs, that the FCC clarify whether the reciprocal compensation obligations of section 251(b)(5) of the Act apply to calls made to CLEC subscribers that are ISPs, in response to which the FCC must resolve the threshold question whether calls to ISPs are subject to FCC jurisdiction.[7]

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[4] In re GTE Telephone Operations, GTOC Tariff No. 1, GTOC Transmittal No. 1148 (filed May 15, 1998, to become effective May 30, 1998).

[5] In re GTE Telephone Operations, GTOC Tariff No. 1, GTOC Transmittal No. 1148, CC Docket No. 98-79, Order Designating Issues for Investigation, DA 98-1667(released August 20, 1998).

[6] See 47 U.S.C. § 204(a)(2)(A) (five-month statutory deadline for orders concluding tariff investigations).

[7] See Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings, 61 Fed. Reg. 53,922 (1996); Pleading Cycle Established for Comments on Request by ALTS for Clarification, Public Notice, FCC Common Carrier Bureau/CPD 97-30, 12 FCC Rcd 9715 (released July 2, 1997). Although ALTS recently filed a letter with the Common Carrier Bureau seeking to withdraw its request for clarification, the issue ALTS raised remains pending before the Commission pursuant to the MFS petition and the agency's authority on its own motion to "issue a declaratory ruling terminating a controversy or removing uncertainty." 47 C.F.R. § 1.2. See also 5 U.S.C. § 554(e).

C. APPROPRIATE ACTION IN THIS CASE.

Several proceedings now pending before the agency pose the question whether calls to the Internet through ISPs are subject to FCC jurisdiction. The Commission will address this issue in the context of GTE's DSL tariff no later than October 30, 1998. It is unclear whether, or the extent to which, the FCC's resolution of the jurisdictional issue in the GTE tariff proceeding will be relevant to the proper treatment of ISP traffic under the terms of the interconnection agreement between BellSouth and US LEC. The FCC notes that the jurisdictional issue before it in the tariff proceeding does not involve application of the reciprocal compensation provisions of section 251(b)(5) or interpretation of the terms of an interconnection agreement.[8] Moreover, the proper construction of the specific compensation agreement previously entered into between the parties would not necessarily turn on a subsequent determination by the FCC with respect to its jurisdiction over ISP traffic.

Accordingly, the FCC takes no position on BellSouth's motion for a primary jurisdiction referral of the jurisdictional question and also does not seek referral of questions relating to the enforcement of particular provisions of BellSouth's interconnection agreement with US LEC, including whether calls to ISPs are "local" calls within the meaning of the reciprocal compensation provisions of that agreement. See Iowa Utils. Bd., 120 F.3d at 804.

Respectfully submitted,

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[8] See Iowa Utils. Bd., 120 F.3d at 804 (FCC lacks jurisdiction, except in limited circumstances, to enforce interconnection agreements under section 251 and 252).

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CERTIFICATE OF SERVICE

I, Brian G. Kennedy, hereby certify that on this 27th day of August, 1998, I caused the foregoing Response Of Federal Communications Commission as Amicus Curiae to Motion For Referral Of Issue, to be served via postage prepaid mailing to:

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