reciprocal compensation to ISP traffic "is plainly within the Commission's *exclusive* jurisdiction."[46]

Having brought this action at the FCC, and indeed asserted that the FCC has exclusive jurisdiction with respect to the legal question presented, the CLECs – not the ILECs – began forum shopping. When they did not obtain a prompt favorable ruling from the FCC on their legally indefensible request, they began filing complaints with state regulators alleging that ISP traffic is "local," and that ILECs were violating interconnection agreements by refusing to pay reciprocal compensation for such traffic. Ameritech, for one, responded to these complaints by arguing that ISP traffic is interstate, that the ISP access charge exemption is FCC policy, and that, accordingly, the application of section 251(b)(5) to ISP traffic is a matter within the exclusive jurisdiction of the FCC.[47]

More than twenty states have now rejected this position. These states have thrown over fifty years of precedent to the wind by accepting CLEC claims

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[46] ALTS June 20, 1997, letter at 1. ALTS is one of the parties that accuses the ILECs of forum shopping. Another (ICG) expressly endorsed the ALTS request for clarification and the views expressed therein. *See* ICG Reply in CCB/CPD 97-30 at 2. The other two parties – AOL and Focal – filed comments supporting ALTS' request. None of these parties suggested in their comments that the issues raised in the ALTS petition ought to be decided by the states.

[47] To demonstrate to the FCC the consistency of its position, Ameritech filed as an *ex parte* in CCB/CPD 97-30 a copy of pleadings that Ameritech filed with the Illinois Commerce Commission and in federal court on reciprocal compensation issues. *See* Letter from John T. Lenahan, Assistant General Counsel, Ameritech, to Christopher Wright, General Counsel, FCC, July 23, 1998. The briefs that Ameritech filed in its other state proceedings were similar. In all of these briefs, of course, Ameritech also had to respond to the CLECs' arguments on the merits. Indeed, Ameritech's jurisdictional position - that ISP traffic is interstate and thus subject to the FCC's exclusive jurisdiction - is inextricably tied to its argument that a dial-up connection to the Internet through an ISP does not terminate at the ISP switch. In no case, however, did Ameritech concede hat the application of section 251(b)(5) to ISP traffic was a matter that the states could or should decide.

that an Internet transmission consists of two calls: the connection to the ISP and the delivery of the traffic by the ISP to the various Internet destinations.

Nevertheless, even as they misapplied the law, most of these states recognized that the FCC could, and likely would, have the final say on this matter.[48] Thus, the very decisions that CLECs seek to insulate from FCC review anticipate, if not invite, such review.

As these facts make clear, CLEC charges of forum shopping are not only baseless, but the ultimate in chutzpah. It is the CLECs that asked the FCC to address the status of ISP traffic for reciprocal compensation purposes and then

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[48] On July 31, 1998, Bell Atlantic filed a letter with the Commission containing an attachment with excerpts from 12 state decisions and one federal district court decision on reciprocal compensation claims. These excerpts manifest the states' recognition that the FCC could, and likely would, rule on whether, as a matter of law, ISP traffic is local traffic. *See* Letter from Edward D. Young, III, Senior Vice President & Deputy General Counsel and Thomas J. Tauke, Senior Vice President, Government Relations, Bell Atlantic to Honorable William E. Kennard, Chairman, FCC, July 31, 1998. Ameritech attaches the Bell Atlantic attachment as Exhibit A hereto.

Bell Atlantic omitted from its list the reciprocal compensation decision of the Illinois Commerce Commission, which likewise noted that the FCC is currently considering Internet issues and directed the parties to bring to its attention any FCC decision on the matter. Moreover, subsequent to the filing of the July 31, 1998, the Public Utilities Commission of Ohio took a similar position. While ruling in favor of CLECs on their reciprocal compensation claims, it stated: "We also recognize that the FCC is in the process of considering arguments addressing these broader policy implications. The FCC's deliberations could, therefore, have an impact on this Commission's view of the issues presented by the parties in this complaint. We specifically reserve our rights to consider these policy implications in a future proceeding." *ICG Telecom Group, Inc. v. Ameritech Ohio*, Case No. 97-1557-TP-CSS (Public Utilities Commission of Ohio, Aug. 27, 1998) at 8. It should also be noted that the Virginia decision – which was based solely on the ground that callers use 7-digit numbers to reach ISPs – was only two paragraphs long, and that the basis for the Georgia Public Service Commission's was stated in one (patently incorrect) paragraph. Moreover, 5 other decisions were arbitration decisions that were likewise no more than one or two paragraphs in length.

Ameritech recognizes that NARUC recently passed a resolution asserting state jurisdiction over ISP reciprocal compensation as well as other interstate matters. The actual decisions, though, tell a different story: they contemplate FCC action.. In any event, what should be controlling here is the law, particularly, since the states have no legitimate complaint at the FCC's assertion of jurisdictional principles that have been settled for fifty years, and the FCC created a vacuum for state action by its failure to decide this issue in a timely manner.

shifted to another forum by filing state complaints on the very same issue. It is the CLECs – in particular, ALTS - that asserted the FCC's "exclusive jurisdiction" over this matter, and then, after its members had "shopped" at the states, sought to withdraw its FCC petition. In contrast, it is the ILECs that have steadfastly asserted that ISP traffic is interstate traffic subject to the FCC's exclusive jurisdiction. If there is an equitable estoppel claim to be made in this proceeding, as the CLECs have suggested, it is the CLECs that ought to be estopped from disputing the FCC's jurisdiction with respect to this tariff.

V. NORTHPOINT'S PRICE SQUEEZE CONCERNS ARE UNFOUNDED AND DO NOT WARRANT A TRANSFER OF RATEMAKING RESPONSIBILITY TO THE STATES.

The final argument raised by CLECs is not a jurisdictional argument at all; rather it is an argument that the Commission should delegate ratemaking responsibility for DSL service to the states in order to lessen the possibility of a price squeeze.[49] Ameritech believes that any concerns as to a price squeeze can be fully addressed without deferring DSL rate regulation to the states.

First, Northpoint's concerns as to the possibility of a price squeeze are exaggerated even from a theoretical standpoint. Because, as a matter of law, unbundled network elements must be priced at cost, LECs lack the margins in

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[49] Designation Order at ¶ 12. Although characterized as such in the Designation Order, this is not a jurisdictional argument, *per se*, but rather an argument that the Commission should exercise its jurisdiction by deferring to state regulation of DSL rates – a deferral that – like the ISP access charge exemption itself - would in no way alter the Commission's jurisdiction over such rates.

the sale of unbundled loops that, even theoretically, could be the basis for a price squeeze. Second, LEC prices for unbundled loops may not be filed at the FCC, but those prices are a matter of public record. There is no reason why the FCC cannot review those prices, as necessary, in the event of a complaint alleging a price squeeze. Third, the Commission has recently proposed rules that should incent ILECs to provide data services, such as DSL services, through a separate affiliate. To the extent ILECs choose to offer DSL services through a separate affiliate (as Ameritech already has), that affiliate would have to purchase its inputs, such as unbundled loops, on the same terms as are available to other CLECs. It would also have to maintain separate books and records. This should all but eliminate any possibility of an undetected price squeeze. Fourth, there is no reason the Commission cannot impose imputation requirements on ILECs who choose to provide DSL service on an unseparated basis.

Under the circumstances, ceding ratemaking responsibility to the states would be overkill in the extreme. Indeed, insofar as network elements can be used to provide any interstate access service, Northpoint's reasoning would suggest that all interstate access services should be regulated by the states. Obviously, that is an untenable proposition.

Finally, Ameritech notes that, just last year, the Commission rejected arguments that Bell operating company long-distance affiliates should be classified as dominant carriers in order to prevent them from effecting them from

effecting a price squeeze based on inflated access costs.[50] The Commission acknowledged that access charges were priced above cost, at the time, and even concluded that a price squeeze was thus theoretically possible. It concluded, however, that "imposing advance tariffing and cost support data requirements on the BOC interLATA affiliates would not be an efficient means of preventing the BOCs from engaging in such a predatory price squeeze strategy."[51] The Commission noted that "if the predatory behavior described above were to occur, it could be adequately addressed through our complaint process and enforcement of the antitrust laws, coupled with the biennial audits required by section 272(d)[.]"[52]

Significantly, the Commission also recognized that the availability of unbundled network elements, priced at cost, reduces the possibility of a price squeeze:

> We agree with commenters that assert that the risk of the BOCs engaging in a price squeeze will be greatly reduced when interLATA competitors gain the ability to purchase access to the BOCs' networks at or near cost, and as competition develops in the provision of exchange access services. As noted, we believe that the ability of competing carriers to acquire access through the purchase of unbundled elements enables them to avoid originating access charges and thus partially protect themselves against a price squeeze.[53]

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[50] *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace,* 12 FCC Rcd 15756 (1997).

[51] *Id.* at ¶ 128.

[52] *Id.*

[53] *Id.* at ¶ 130.

The Commission was correct. Any risk of a price squeeze from "inflated" unbundled loop prices is miniscule – nonexistent in the Ameritech region, where unbundled loops are priced at the lowest rates in the country. Northpoint has presented no basis for a transfer of ratemaking responsibilities.

VI. CONCLUSION

During the past fifteen months, Ameritech has explained over and over again why, from both a legal and a policy standpoint, CLECs are not entitled to reciprocal compensation for ISP traffic. It has explained that, as a matter of law, ISP traffic does not "terminate" at the ISP switch. It has explained that CLEC reciprocal compensation for ISP traffic would represent a mammoth subsidy that discourages CLECs from providing facilities-based competition and ISPs from migrating their services from subsidized circuit-switched access to the very types of advanced services – such as DSL – the Commission is required by law to encourage. A prominent Wall Street analyst with special expertise in telecommunications issues recently said it best:

> reciprocal compensation for one-way Internet traffic is arguably the single greatest arbitrage opportunity and hence market distortion in the telecom sector today. ... No other place in the sector can companies reap as much as a 4,000 percent arbitrage for minimal, value-added service. No competitive market, legal or illicit, can generate such gargantuan arbitrage.[54]

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[54] "Reciprocal Comp For Internet Traffic—Gravy Train Running Out of Track," Scott C. Cleland, Legg Mason Research Technology Team, June 24, 1998.

Ameritech, frankly, cannot understand the Commission's refusal to decide this issue. The Commission seems to be laboring under the illusion that if it does nothing, the problem will be addressed in the next round of interconnection agreements.

That is an inappropriate abdication of responsibility. Many existing interconnection agreements do not expire for another two years. During that time hundreds of millions – if not billions – of dollars in illegitimate claims will have been sanctioned.

Moreover, there is no guarantee that this problem will, in fact, be addressed in subsequent interconnection agreements. It is entirely conceivable that, absent FCC action, arbitrators and state regulators will impose similar reciprocal compensation rates and arrangements.

Regardless of what is driving FCC inaction on ISP reciprocal compensation issues, the Commission must understand that this is a proceeding with serious implications that relate directly to fundamental jurisdictional principles. The Commission cannot find, or leave unchallenged the finding of other forums that an Internet transmission consists of two calls. To stand by and do nothing, while waiting for superseding interconnection agreements that might or might not be executed, is to trifle with principles that transcend short-term considerations. The Commission must find that DSL service is an interstate service because the telecommunications it transmits does not terminate at the ISP

switch, thereby re-establishing the longstanding principle that the boundaries of a communication are determined on an end-to-end basis.

Respectfully Submitted,

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Sept. 18, 1998

EXHIBIT A

Excerpts From State Orders

1. "[T]he Commission agrees that a final determination on this matter rests with the FCC. . . . If the FCC should change its position, then the Commission expects interconnection agreements to be applied in accordance with the FCC's new policy. Moreover, the parties will be directed to bring the FCC's final determination to the Commission's attention in order to allow it to consider whether any further action is appropriate." MCI Telecommunications Corporation, Case No. 97-1210-T-PC at 29-30 (W.Va. PSC Jan. 13, 1998).

2. "Moreover, we note this issue is currently being considered by the FCC and may ultimately be resolved by it. . . . In the event the FCC issues a decision that requires revision to the directives announced herein, the Commission expects the parties will so advise it." Letter Order by Daniel Gahagan, Executive Secretary, Maryland Public Service Commission, at 1 (Md. PSC Sept. 11, 1997).

3. "[P]rior to a decision from the Federal Communications Commission on the issue of reciprocal compensation for traffic to ISPs within a local calling scope, the parties shall compensate one another for such traffic in the same manner that local calls to non-ISP end users are compensated, subject to a true-up following the Federal Communication Commission's determination on the issue." In re Birch Telecom of Missouri, Inc., 1998 WL 324141 *5 (Mo. PSC Apr. 24, 1998).

4. "As to the meaning of the FCC's prior rulings and pronouncements, the Commission is not persuaded that the FCC has ruled as Ameritech asserts. . . . When the FCC rules in the pending docket, the Commission can determine what action, if any, is required." In re Brooks Fiber Communications of Michigan, Inc., Case No. U-1178, et al., at 14-15 (Mich. PSC Jan. 28, 1998).

5. "[T]he precise issue under review in the instant case is currently being decided by the FCC. . . . Any ruling by the FCC on that issue will no doubt affect future dealings between the parties on the instant case." "Instead of classifying the web sites as the jurisdictional end of the communication, the FCC has specifically classified the ISP as an end user. [citation omitted] Given the absence of an FCC ruling on the subject, this court finds it appropriate to defer to the ICC's finding of industry practice regarding termination." Illinois Bell Tel. Comp. v. Worldcom Technologies, Inc., No. 98 C 1925, Mem. Op. and Order at 18, 27 (N.D. Ill. July 21, 1998).

6. "The Commission will adopt the exemption permitted by the FCC. However, the Agreement should indicate that if and when the FCC modifies the access charge exemption, the Agreement will also be modified." MFS Communications Comp., Inc., 1996 WL 787940 *5 (Ariz. Corp. Com'n Oct. 29, 1996).

7. An important consideration is "whether or not pending FCC proceedings counsel in favor of deferring action," but "the FCC has had occasion to state its position on the issue and has not, thus far, definitively addressed the issue." Petition for Declaratory Order of TCG Delaware Valley, Inc., P-00971256 at 20 (Pa. PUC June 16, 1998).

8. "Irrespective of how the FCC's 1983 access charge exemption policy might otherwise be interpreted, for purposes of this cause the more recent Telecommunications Act and the FCC's Universal Service Order would provide the controlling federal precedent. . . . No support has been offered to show that the FCC has acted in any manner to limit or dictate the type of compensation local exchange carriers can assess each other under an interconnection agreement for termination of traffic destined to ISPs." In re Application of Brooks Fiber Communications of Oklahoma, Inc., Cause No. 970000548, Order 423626, at 10-11 (Okla. PSC June 3, 1998).

9. "The FCC has not squarely addressed this issue, although it may do so in the future. While both parties presented extensive exegeses on the obscurities of FCC rulings bearing on ISPs, there is nothing dispositive in the FCC rulings thus far." In re Interconnection Agreement Between BellSouth Telecommunications, Inc. And US LEC of North Carolina, LLC, Docket No. P-55, SUB 1027 at 7 (N.C. PUC Feb. 26, 1998).

10. "We have searched the Act and the FCC Interconnection Order and find no reference to this issue." In re Petition of MFS Communications Comp., Inc., Docket No. 96A-287T, at 30 (Colo. PUC Nov. 5, 1996).

11. Based on MFS's argument that the issue is governed by the enhanced service provider exemption, "[t]here is no reason to depart from existing law or speculating what the FCC might ultimately conclude in a future proceeding." In re MFS Communications Comp., Inc., 1996 WL 768931 *13 (Or. PUC Dec. 9, 1996).

12. "All parties agree that the FCC has for many years declared that enhanced service providers, which include ISPs, may obtain services as end users under intrastate tariffs." "Based upon the long-standing position of the FCC that existed years before the execution of the Interconnection Agreement, the Hearing Officer concludes that the term 'Local Traffic' . . . includes, as a matter of law, calls to ISPs." In re Petition of Brooks Fiber, Docket No. 98-00118 (Tenn. Reg. Auth. Apr. 21, 1998).

13. Recognizing that the issue is pending at the FCC but concluding that "postponing a Commission decision to await a Federal Communications Commission decision is not in the parties' interest or in the public interest." Letter Order from Lynda L. Dorr, Secretary to the Public Service Comm'n of Wisconsin, to Rhonda Johnson and Mike Paulson, 5837-TD-100, 6720-TD-100 (Wisc. PSC May 13, 1998).

CERTIFICATE OF SERVICE

I, Anisa A. Latif, do hereby certify that a copy of the Ameritech Comments on the Direct Case of Pacific Bell has been served on the party below via UPS next-day mail, on this 18th day of September 1998.

By: Anisa A. Latif

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