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EXHIBIT D

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PUBLIC SERVICE COMMISSION

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of Interconnection Agreement Negotiated By BellSouth Telecommunications, Inc. And ALEC Inc., Pursuant To Sections 251 And 252 Of The Telecommunications Act Of 1996	No. 97-256
ALEC, Inc., *Complainant* v. BellSouth Telecommunications, Inc., *Defendant*	No. 98-255
Complaint to Enforce Interconnection Agreement	

COMPLAINT

The Complaint of ALEC, Inc., respectfully shows that:

I. Parties And Jurisdiction.

1. Complainant ALEC, Inc. ("ALEC"), is a competitive local exchange carrier ("CLEC") certificated by the Kentucky Public Service Commission ("Commission"), with offices at 1158 Jefferson Street, Paducah, Kentucky 42001.

2. Defendant BellSouth Telecommunications, Inc. ("BellSouth") is an incumbent local exchange carrier ("ILEC"). BellSouth is authorized to be a LEC in Kentucky. BellSouth's offices include 601 W. Chestnut Street, Room 408, P.O. Box 32410, Louisville, Kentucky; 675 West Peachtree Street, N.E., Atlanta, Georgia 30375, and 600 North 19th Street, Birmingham, Alabama 35203.

3. The Commission has jurisdiction over BellSouth and ALEC because they are both Kentucky local exchange carriers. As described below, this case arises from BellSouth's breach of its interconnection agreement (the "Agreement") with ALEC. The Commission approved the agreement in July 1997, pursuant to Section 252 of the federal Communications Act of 1934, as amended (the "Act").[1] The Commission has jurisdiction to interpret and enforce interconnection agreements it approves.[2] As a result, the Commission has jurisdiction to resolve this case.

4. Kentucky law also provides the Commission with the authority to grant the relief requested in this Complaint. Under Kentucky Revised Statutes ("KRS") 278.280(1), the Commission may compel BellSouth to establish "rules, regulations [and] practices" that are "just [and] reasonable." As described below, BellSouth's practices under the Agreement are unjust and unreasonable, so under KRS 278.280(1), the Commission may direct BellSouth to correct them.[3]

II. Summary.

5. Under the Agreement, BellSouth is obliged to pay ALEC compensation for local calls that BellSouth's customers make to ALEC's customers. ALEC provides local exchange service to an Internet Service Provider ("ISP") which receives a significant number of local calls from BellSouth's customers. BellSouth has

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[1] Order, *In the Matter of Interconnection Agreement Negotiated by BellSouth Telecommunications, Inc. and ALEC, Inc., Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996*, Case No. 97-256 (Ky. Pub. Serv. Com'n July 16, 1997). Because this case arises out of the previously-approved Agreement, and because that approval provides the basis for the Commission's jurisdiction, ALEC has included the case number associated with the agreement in the caption of this case.

[2] *See Iowa Utilities Board v. Federal Communications Commission*, 120 F.3d 753, 803-04 (8th Cir. 1997), *petition for cert. granted.*

[3] *See* Sections 261(b) and (c) of the Act, 47 U.S.C. §§ 261(b) and (c), which permit states to establish pro-competitive requirements and enforce them against LECs, as long as those requirements are "not inconsistent with" Sections 251 *et seq.* of the Act.

refused to pay ALEC compensation for all but a small fraction of these calls, and has made clear that it is unwilling to pay more than a small fraction of future bills. Unpaid amounts on BellSouth's currently outstanding bills from ALEC total more than $250,000, and are growing at more than $100,000 per month.

6. BellSouth's failure to pay these bills in full is a breach of the Agreement and a violation of the Act, because calls from BellSouth's customers to ALEC's ISP customer are "local" calls subject to compensation under the Agreement and Section 251(b)(5) of the Act. The Commission, therefore, should declare such calls to be local calls subject to terminating compensation and order BellSouth to pay ALEC for all such calls at the rates specified in the Agreement.[4]

III. Overview Of The Issues.

7. This Complaint presents the Commission with an issue that has been addressed by more than a dozen state regulators over the last two years: When the customer of an ILEC (such as BellSouth) dials a local number to reach an ISP served by a CLEC (such as ALEC), is this a local call subject to compensation under Section 251(b)(5) of the Act?

8. *Every* state regulator that has addressed this question — from New York to Texas, from Illinois to Virginia, from North Carolina to Oregon — has concluded that such calls are subject to compensation. The remarkable unanimity among the states shows that the issues presented in this complaint are quite clear:

[4] ALEC notes that its counsel engaged in discussions with counsel for BellSouth (Mr. Harris Anthony, Atlanta) in an effort to reach a negotiated settlement of this dispute. ALEC concluded that it would file this complaint only after counsel for both parties concluded that a mutually acceptable settlement could not be reached.

a. **Calls to ISPs terminate at the ISP's premises.** A call "terminates" when customer premises equipment ("CPE") attached to an exchange service (a dial tone line) answers an incoming call dialed from another exchange service. States uniformly hold that when the ISP's modem answers a call from an end user's modem, the call has been "terminated." This is also consistent with the definition adopted by the Federal Communications Commission ("FCC") in 47 C.F.R. § 51.701(d). For these reasons, states hold that a CLEC serving an ISP is entitled to compensation for terminating calls to that ISP.

b. **ISPs are business customers, not carriers.** Even though ISPs obtain information for their subscribers from beyond the local calling area, obtaining that activity is part of the ISPs' ***information service*** function. This is both legally and technically distinct from the ***telecommunications*** functions the CLEC performs in connecting end users to ISPs. CLECs are entitled to compensation from the originating carrier for performing the telecommunications function of terminating calls to ISPs, no matter what the ISPs do for their customers once the call is established.

c. **Any interstate jurisdiction over these issues has been waived.** Views differ as to the ultimate scope of the FCC's authority over traffic between ISPs and their subscribers. At bottom, however, the question of FCC jurisdiction is irrelevant, because the FCC has affirmatively chosen not to exercise whatever jurisdiction it may have. Instead, it has repeatedly stated that ISPs are to be treated as end user business customers who are to purchase service out of intrastate local exchange tariffs. As far as the FCC is concerned, therefore, a call between an ISP's subscriber and an ISP is a call between two ***end users.*** CLECs such as ALEC are entitled to compensation for terminating such calls.

9. The legal conclusions that ISPs are customers and not carriers and that calls to ISPs are subject to state authority makes it unnecessary to examine the nature and routing of the signals that ISPs and end users exchange during an on-line

session. If, however, the nature and routing of those signals is an issue, the fact is that virtually all such signals plainly and unambiguously begin and end within a local calling area. First, for the vast majority of the time that an end user is on line, the only transmissions are between the end user's modem and the ISP's modem, without involving any other end user or ISP equipment. These ongoing, carefully-structured transmissions are an essential part of the ISP's information service, because they keep the modems "in sync" so that higher-level data may be exchanged properly. Second, for the small proportion of the time that higher-level information is being exchanged, much, if not most, of that information comes not from distant locations on the Internet, but instead from the ISP's own computers, located on the ISP's local premises.

10. In these circumstances, while BellSouth's basic legal theory is wrong, even if it were right, that would justify at most a minor downward adjustment in terminating compensation payments — not the abusive and anticompetitive refusal to pay that BellSouth has implemented. Moreover, because BellSouth is (or should be) fully aware both of the flaws in its legal position and the factual situation surrounding ISP operations (through its association with its own ISP affiliate), the only possible conclusion for the Commission to draw is that BellSouth's failure to pay ALEC for terminating calls to ALEC's ISP customer is simply an anticompetitive, monopolistic strategy undertaken to abuse BellSouth's smaller competitors. The Commission should fashion its relief accordingly.[5]

[5] ALEC is aware that two related CLECs, ACSI Louisville and ACSI Lexington (both d/b/a e.spire Communications), have recently filed a complaint against BellSouth. The interconnection agreements that BellSouth has executed with ALEC, on the one hand, and e.spire, on the other, are not identical, and for that reason (among others) e.spire's complaint raises issues not raised by ALEC. Even so, the key underlying issue — whether BellSouth must pay terminating compensation for calls its end users make to ISPs served by CLECs — appears to be the same in both cases.

IV. The Commission Should Require BellSouth To Pay ALEC For Terminating Calls BellSouth Customers Make To ISPs Served By ALEC Because ISPs Are End User Customers.

A. The Agreement And BellSouth's Breach.

11. The Agreement was effective on June 15, 1997,[6] and the Commission approved it in July 1997. It defines local traffic as:

> any telephone call that originates in one exchange and terminates in either the same exchange, or a corresponding Extended Area Service ("EAS") exchange.

Agreement, Section I.D. It also states that:

> The delivery of local traffic between the parties shall be reciprocal and compensation will be mutual according to the provisions of this Agreement. The parties agree that the exchange of traffic on BellSouth's EAS routes shall be considered as local traffic and compensation for the termination of such traffic shall be pursuant to the terms of this section.

Agreement, Section IV.B. It also clearly establishes BellSouth's obligation to pay:

> Each party will pay the other for terminating its local traffic on the other's network the local interconnection rates as set forth in Attachment B-1 ... . The charges for local interconnection are to [be] billed monthly and payable quarterly after appropriate adjustments pursuant to this Agreement are made.

Agreement, Section IV.C.

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[6] The Agreement itself is on file with the Commission in this matter (Case No. 97-256). A copy of the relevant pages of the Agreement is attached as Exhibit A to this Complaint.

12. Nothing in these contractual provisions suggests that a local call dialed by a BellSouth customer to an ALEC customer is exempt from compensation when the ALEC customer is an ISP. To the contrary, if the call originates and terminates in the same local calling area, it is "local traffic," irrespective of who the customers are. Consequently, when an ISP with local exchange service from ALEC receives a call from an end user with local exchange service from BellSouth, ALEC has terminated an incoming call for BellSouth, and is entitled to compensation.

13. Without any reference to the Agreement, in August 1997 BellSouth unilaterally declared that it would not pay terminating compensation for calls its end users make to ISPs served by CLECs.[7] Of course, this generic letter has no legal effect whatsoever on the Agreement, which provides that neither party is bound by any "definition, condition [or] provision" not in it, except for subsequent written modifications signed by "the party to be bound."[8] BellSouth, therefore, cannot reasonably claim that it has the right to unilaterally modify the Agreement. As a result, the Agreement remains in force and (in accordance with applicable law) governs the relationship between the parties.

14. Consistent with its generic announcement, BellSouth has refused to pay the majority of the terminating compensation bills that ALEC has sent to BellSouth. As of the date of this complaint, BellSouth should have paid ALEC roughly $150,000 for terminating compensation but has only paid about $9,700.[9] BellSouth stated in a

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[7] Letter from Ernest L. Bush (BellSouth Assistant Vice President) to "All Competitive Local Exchange Carriers" regarding "Enhanced Service Providers (ESPs) Traffic" (August 12, 1997) ("Bush Letter"). A copy of the Bush Letter is attached as Exhibit B to this Complaint.

[8] *See* Agreement, Section XXVIII (included in Exhibit A).

[9] ALEC's invoices to BellSouth for the first three months of ALEC's operations (which did not begin until December 1997) total $155,123.29. BellSouth's payments to date on these invoices total $9,734.03. ALEC has recently billed BellSouth for an additional $112,422.04 in terminating compensation liability; but under the terms of the agreement, payment for that invoice is not yet due.

recent letter to ALEC that it will treat 99.9% of minutes sent to ALEC as "local" under the Agreement.[10] While that would normally suggest that BellSouth will pay essentially all of its bills to ALEC, the same letter also states that the 99.9% figure is not

> a waiver of BellSouth's position regarding the inclusion or exclusion of information service/enhanced service provider traffic from any and all calculations associated with development of the PLU or BellSouth's position regarding the calculation of payment for the termination of local traffic on the network of a telecommunications carrier.

In order to clarify the matter, ALEC's President, Mr. Jay Campbell, called Mr. Richard McIntire, the author of the recent letter. Mr. McIntire stated that BellSouth's actual practice will not confirm to its letter. While BellSouth will treat 99.9% of minutes it sends to ALEC as "local," it will treat 90% of *those* minutes as "disputed" and "in escrow," and will not pay for them.[11] This refusal to pay for the overwhelming majority of the traffic is an unjustified breach of BellSouth's plain contractual obligation to pay ALEC for calls to ALEC's local exchange service customers (within the same local calling area), including its ISP customer's dial-in modem lines.

15. As described below, BellSouth has no lawful basis for refusing to pay for any of these calls, and no legitimate basis to "dispute" them. ISPs are local exchange customers just like other businesses. Calls that end users make to ISPs are no different than any other calls between local exchange customers served by different

[10] Letter from Richard McIntire (Operations Manager, BellSouth Interconnection Purchasing Center) to Jay Campbell (ALEC, Inc.) dated April 13, 1998. A copy of this letter is attached to this Complaint as Exhibit C. The contractual definition of the "Percentage Local Usage" factor contains no suggestion that local calls to ISPs would ever be excluded from the base of local calls. *See* Agreement, Section I.G.

[11] *See* Letter from Jay Campbell (ALEC) to Richard McIntire (BellSouth) dated April 30, 1998. A copy of this letter (which summarizes the conversation referred to) is attached to this Complaint as Exhibit D.

LECs. As a result, if the end user and the ISP are in the same local calling area, these calls are subject to terminating compensation under the Agreement and the Act.

B. States Addressing This Question Uniformly Conclude That Calls To ISPs Are Local Calls Subject To Terminating Compensation.

16. Many state regulators have confronted claims by ILECs such as BellSouth that calls to ISPs are different from other local calls and, therefore, should be exempt from the terminating compensation obligation in Section 251(b)(5) of the Act. In each case, the regulators have rejected this claim.[12]

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[12] In some cases — typically, in proceedings directed to the Internet compensation issue — the state regulators provided a substantive discussion of the issues. *See Petition of The Southern New England Telephone Company for a Declaratory Ruling Concerning Internet Services Provider Traffic,* Docket No. 97-05-22 (Conn. Dept. Pub. Util. Sept. 17, 1997); *Arbitration Award, Petition of MCI Telecommunications Corporation for the Arbitration of Unresolved Issues from the Interconnection Negotiations with Bell Atlantic-Delaware, Inc.,* PSC Docket No. 97-323 (Del. Pub. Serv. Com'n Arb. Dec. 16, 1997) (arbitrator's decision); *Teleport Communications Group, Inc. vs. Illinois Bell Telephone Company, Ameritech Illinois: Complaint as to dispute over a contract definition,* Opinion and Order, Docket No. 97-0404 (Ill. Comm. Com'n March 11, 1998); *Letter from Daniel P. Gahagan, Executive Secretary, Maryland Public Service Commission, to Bell Atlantic-Maryland, Inc. in response to Complaint of MFS Intelenet of Maryland, Inc. for Breach of Interconnection Terms* (Sept. 11, 1997); *Application for Approval of an Interconnection Agreement Between Brooks Fiber Communications of Michigan, Inc. and Ameritech Information Industry Services on Behalf of Ameritech Michigan,* Opinion and Order, Case No. U-11178 (Mich. Pub. Serv. Com'n Jan. 28, 1998); *Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic,* Case 97-C-1275, Order Closing Proceeding (N.Y. Pub. Serv. Com'n March 19, 1998); *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. Com'n Feb. 26, 1998); *Complaint and Request for Expedited Ruling of Time Warner Communications,* Order, Docket No. 18082 (Tex. Pub. Util. Com'n February 27, 1998); *Petition of Cox Virginia Telecom, 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. St. Corp. Com'n Oct. 24, 1997).

In other cases — typically, when the issue was raised as one among many in a major arbitration proceeding — the state regulators rejected the ILEC position without detailed discussion. *See Petition of MFS Communications Company, Inc. for Arbitration of*

(continued...)

17. The ILECs' claim depends on the premise that an ISP is not really a local exchange ***customer,*** but is, instead, a type of telecommunications ***carrier*** that receives "traffic" from a LEC and then transmits that "traffic" to distant locations within the Internet. This position ignores the fundamental statutory dichotomy between telecommunications carriers and information service providers. Telecommunications carriers have certain rights and obligations under the Act, including rights of interconnection (Section 251 of the Act) and obligations to pay universal service assessments on their revenues (Section 254 of the Act). ISPs are information service providers and do not have these rights. *See* Section III.C, *infra.* Instead, information service providers ***use*** telecommunications services as inputs to their operations. As a result, when an ILEC's local exchange customer (the end user who is also a subscriber to the ISP's services) calls the CLEC's local exchange customer (the ISP), that is a local call subject to compensation.

18. States confronting this question have all reached this same conclusion. ALEC quotes from these state decisions at some length below, both to make clear that ALEC is not asking the Commission here to plow any new or uncharted regulatory ground, and to show that, as BellSouth itself knows or should know, its

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[12](...continued)
Interconnection Rates, Terms, and Conditions with U S 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 (Oct. 29, 1996); *Petition of MFS Communications Company, Inc. for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions with U S West Communications, Inc.,* Decision No. C96-1185 Regarding Petition for Arbitration, Docket No. 96A-287T (Nov. 5, 1996); *AT&T Communications of the Midwest, Inc.,* Order Resolving Arbitration Issues, Docket No. P-442/M-96-855 (Dec. 2, 1996); *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,* Order No. 96-324 (Dec. 9, 1996); *Petition for Arbitration of an Interconnection Agreement Between MFS Communications Company, Inc. and U S West Communications, Inc., Pursuant to 47 U.S.C. § 252,* Docket No. UT-960323 (Jan. 8, 1997), *aff'd U S West Communications, Inc. v. MFS Intelenet, Inc.,* No. C97-222WD (Jan. 7, 1998); *MCI Telecommunications Corporation Petition for arbitration of unresolved issues for the interconnection negotiations between MCI and Bell Atlantic - West Virginia, Inc.,* Commission Order, Case No. 97-1210-T-PC (Jan. 13, 1998).

refusal to pay ALEC under the Agreement is based on a position has been thoroughly considered and utterly rejected by numerous other state regulators.[13]

a. **North Carolina.** In North Carolina, BellSouth relied on exactly the same theory it is pressing against ALEC, under the terms of an interconnection agreement with essentially identical language to that between ALEC and BellSouth, to avoid paying terminating compensation to calls made to ISPs served by CLECs in that state. The North Carolina Utilities Commission rejected BellSouth's arguments in the following "Findings of Fact" and "Conclusions":

> [Findings of Fact]
>
> 7. Typically, a customer of an ISP connects to an ISP by means of a local phone call, using telephone exchange service. ***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.***
>
> 8. BellSouth treats calls to ISPs interconnected to its network as local traffic and charges its own ISP customers local business line rates for local telephone exchange service, thereby enabling customers of BellSouth's ISP customers to connect to their ISP by making a local phone call. When a BellSouth exchange service customers places a call to an ISP within the caller's local calling area, BellSouth treats this as a local call pursuant to the terms of its local tariffs.
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> ...
>
> 10. ***Calls that terminate within a local calling area, regardless of the identity of the end user, are local calls under ... the Interconnection Agreement ... , and nothing in the Interconnection Agreement or applicable law or regulations creates a distinction pertaining to calls placed to telephone exchange service end users which happen to be ISPs.***
>
> [Conclusions]

[13] In all of the decisions quoted below, emphasis is added unless otherwise noted.

> 1. The Interconnection Agreement speaks of reciprocal compensation for local traffic. ***There is no exception for traffic to an end user who happens to be an ISP. For the purposes of reciprocal compensation, the Commission concludes that the call terminates when it is delivered to the called local exchange telephone number of the end user ISP.*** ...
>
> 2. BellSouth treats calls from its own end-user customers to ISPs it serves with telephone numbers in the same local calling area as local traffic. BellSouth charges its own ISP customers local business line rates for local telephone exchange service. When a BellSouth telephone exchange service customer places a call to an ISP within that caller's local calling area, BellSouth treats this as a local call pursuant to the terms of its local tariffs. BellSouth also treats the revenues associated with the local exchange traffic to its ISP customers as local for purposes of separations and ARMIS reporting.

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. Com'n Feb 26, 1998), slip op. at 4-6.[14]

b. **Texas.** In Texas, an arbitrator who initially conducted a proceeding addressing these issues was led astray by Southwestern Bell. His decision, however, was promptly reversed by the Texas Public Utilities Commission ("PUC"). The PUC's decision first stated the key questions, then provided its answers:

> *To the extent that "calls" to ISPs are interstate, can such calls be considered "local" for the purpose of reciprocal compensation? (TWC-3) Does a "call" from an end user to an ISP "terminate" at the ISP location? (TWC-7)*
>
> The Commission agrees with the [FCC] that the provision of Internet service via the traditional telecommunications network involves multiple components. One component is the information service — the content — which appears to consist of a significant amount of non-local traffic. ***The network component, however, is the carrier-to-carrier and carrier-to-end-user telecommunications component, which in the case of a call between two end users in the same local calling area is local traffic.***

[14] BellSouth has recently appealed the NCUC's decision to federal court. This shows that the analysis above is the NCUC's last word on these issues.

> Therefore, it is the telecommunications service component, rather than the information service component, that constitutes the basis for determining the jurisdiction of the traffic involved in calls to ISPs. ***When a transmission path is established between two subscribers in the same [local] calling area, traffic carried on that path is local traffic, with the telecommunications component of the call terminating at the ISP location.***

Complaint and Request for Expedited Ruling of Time Warner Communications, Order, Docket No. 18082 (Tex. Pub. Util. Com'n February 27, 1998), slip op. at 4-5.

c. **Virginia.** In Virginia, Bell Atlantic declared that it would not pay terminating compensation on calls to ISPs served by Cox Communications, even though nothing in the parties' interconnection agreement called for any special treatment of those calls. When Cox sued, the Virginia State Corporation Commission rejected Bell Atlantic's arguments:

> Calls that are placed to a local ISP are dialed by using the traditional local-service, seven-digit dialing sequence. Local service provides the termination of such calls at the ISP, and any transmission beyond that point presents a new consideration of service(s) involved. The presence of CLECs does not alter the nature of this traffic.

Petition of Cox Virginia Telecom, 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. St. Corp. Com'n Oct. 24, 1997), slip op. at 2.

d. **Illinois.** In Illinois, Ameritech (like BellSouth here) unilaterally chose to stop paying terminating compensation for calls its end users made to ISPs served by CLECs, on the theory (like BellSouth's here) that such calls were "really" jurisdictionally interstate. When the affected CLECs challenged this practice, the Illinois Commerce Commission totally rejected Ameritech's position:

> There is no legal basis for treating ISP traffic differently than the traffic of any other similarly-situated end users for purposes of reciprocal compensation. Nothing in the [federal] Act exempts ISP traffic or

otherwise [from] incumbent LECs ... reciprocal compensation obligation with respect to local traffic. The Act imposes upon all LECs the "duty to establish reciprocal compensation agreements for the transport and termination of telecommunications." ***We conclude that Ameritech Illinois, by discontinuing its reciprocal compensation payments thereby violated, and is continuing to violate, its interconnection agreements, and its duty under the Act.***

... Contrary to Ameritech Illinois' contentions, ISP traffic is not exchange access. ***[I]ndustry practice with regard to call termination[is] that call termination within the public switched network "occurs when a call connection is established between the caller and the telephone exchange service to which the dialed telephone number is assigned, and answer supervision is returned."*** ...

Ameritech Illinois' conception that the "jurisdictional" basis for a call is determined by a determination of the ultimate end points of the call (such as the databases and web sites accessed by an Internet user) and that therefore the FCC has exclusive jurisdiction over the issue in this [proceeding] reflects not only an outdated conception of the telecommunications network, but from a legal stand point is belied by the Act and the FCC's own decisions. ... ***[W]hen an originating end user calls an ISP provider in order to use the Internet, the traffic exchanged after the call is terminated to an ISP is not considered to be telecommunications traffic by the FCC. Instead, it is considered to be an information service and that is true regardless of whether the ISP retransmits information received over such calls to or from further interstate or international destinations.***

The FCC has concluded that information services are not telecommunications services, and, indeed, the Telecommunications Act draws clear distinctions between "telecommunications," "information service," and "exchange access."

As recently as May of 1997 the FCC indicated that it considers Internet access as consisting of more than one element: "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 offering." Based on these critical distinctions the FCC has determined that ISP traffic is not exchange access service, but rather, ISPs should be treated as "end users."

Teleport Communications Group, Inc. vs. Illinois Bell Telephone Company, Ameritech Illinois: Complaint as to dispute over a contract definition, Opinion and Order, Docket No. 97-0404 (Ill. Comm. Com'n March 11, 1998), 1998 Ill. PUC LEXIS 161 at **24-27 (citations omitted).

e. **Connecticut.** In Connecticut, Southern New England Telephone ("SNET"), the ILEC, sought a declaratory ruling from the Connecticut Department of Public Utilities ("DPU") that calls to ISPs were not subject to terminating compensation payments under the DPU's generic rules governing local competition. The DPU flatly rejected SNET's request:

> [A]s evidenced by the comments submitted by other participants in this proceeding, the overwhelming opinion is that local calls to ISPs should be subject to mutual compensation. The Department concurs.
>
> ***ISPs are business local exchange customers that purchase services from SNET, use the network in a similar manner to the Company's other end users and, therefore, should not be treated any differently than other business local exchange customers. ... The Department considers calls originating and terminating between these customers (ISPs and other SNET customers) within the same local calling area to be local and, therefore, should be subject to the mutual compensation provisions of [the DPU's local competition rules].*** This is consistent with the FCC's position that ISPs may pay business line rates and the appropriate subscriber line charge, rather than interstate access rates, even for calls that appear to traverse state boundaries. Access Charge Order ¶342.
>
> The Department also concurs with the FCC that Internet access is composed of various components including the local voice grade connection to the PSN [public switched network] to which an ISP subscribes and the information service actually provided by the ISP. In its Access Charge Order, the FCC indicated that Internet access includes the network transmission component (the connection over an LEC network from a subscriber to an ISP) and the underlying information service. In its Access Charge Order, the FCC also stated that voice grade access to the PSN enabled customer access to the ISP and, ultimately, to the Internet. Access Charge Order ¶83. In the opinion of the Department, it is the local connection component and the traffic carried over it that should be subject to mutual compensation. ***Subscription of a local voice grade connection to the PSN by ISPs, as well as its use of these connections, is no different than those subscribed to and utilized by other SNET business and***

> ***residential customers. The Department finds that any traffic originating and terminating in the local calling area carried over these connections should be subject to compensation*** ... . Not applying ... mutual compensation arrangements to this traffic would discriminate against these users and violate the 1996 Telecom Act and [state law]. The fact that ... compensation [must] be paid for all local traffic carried over the LEC and CLEC networks does not, and should not, depend on the usage characteristics of a specific end user. Therefore, ISP traffic should be subject to mutual compensation.

Petition of The Southern New England Telephone Company for a Declaratory Ruling Concerning Internet Services Provider Traffic, Docket No. 97-05-22 (Conn. Dept. Pub. Util. Sept. 17, 1997), slip. op. at 9-10.

f. **Michigan.** As in Illinois, Ameritech Michigan attempted to deprive its competitors of the revenues they earned by terminating calls that Ameritech's customers made to ISPs served by CLECs. When the CLECs complained, the Michigan Public Service Commission also utterly rejected Ameritech's theory:

> As a service matter, the calls terminate within the local calling area. The disputed calls are made from one local number to another in the local calling area, and the agreements do not distinguish between calls based on the nature of the customer receiving the call. As such, the calls are local traffic. ***Contrary 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.***

Application for Approval of an Interconnection Agreement Between Brooks Fiber Communications of Michigan, Inc. and Ameritech Information Industry Services on Behalf of Ameritech Michigan, Opinion and Order, Case No. U-11178 (Mich. Pub. Serv. Com'n Jan. 28, 1998), 1998 Mich. PSC LEXIS 47 at *10.

g. **New York.** In New York, NYNEX/Bell Atlantic asserted the same theory as BellSouth, and ceased paying terminating compensation for calls to ISPs. When the affected CLECs complained, the New York PSC conducted a thorough

investigation of the nature of ISP traffic and whether it warranted any special regulatory treatment. Its answer was the same as all the others

> A call to an ISP is no different from a call to any other large volume customer, such as a local bank or a radio call-in program. ***These calls are all local calls.*** They are billed at local rates and are treated as local calls for ARMIS Reporting and Separations. ***The fact that a call may sometimes be handed off and routed within the ISP's computer network(s) or through the Internet backbone does not alter the jurisdictional nature of the call from the end user to the ISP. Indeed, many intrastate communications ultimately connect to other networks.*** In any event, the 1996 Act reserves to the states authority to determine appropriate reciprocal compensation.
>
> ...
>
> Calls to local telephone numbers of [ISPs] are intrastate in nature and will be treated as intrastate for the purpose of reciprocal compensation. Further, there is nothing unique about Internet traffic, or the way such traffic is routed in the public switched network, that would warrant a different compensation structure for this type of call. Carriers should continue to include calls to [ISPs] in calculations of reciprocal compensation payments. To the extent that the local exchange carriers have concerns about the adequacy of their networks to handle increasing volumes of Internet traffic, these should be addressed in the context of normal construction forecasting and budgeting.

Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic, Case 97-C-1275, Order Closing Proceeding (N.Y. Pub. Serv. Com'n March 19, 1998), slip op. at 3, 5 (footnotes omitted).[15]

[15] In addition to the decisions discussed above, Complainant is aware that an arbitrator in Tennessee has rejected BellSouth's legal theories and ordered the payment of terminating compensation for calls to ISPs. No written decision is available at this time. Also, an arbitrator in Delaware has issued a decision in accordance with the decisions discussed in the text. *See* note 12, *supra*.

C. Federal Law Supports The Uniform State-Level Conclusion That Calls To ISPs Are Subject To Terminating Compensation.

19. As indicated above, the linchpin of BellSouth's position is that when its end users call an ISP, it is the FCC, not the states, that has "jurisdiction" over the traffic in question. Based on this premise, BellSouth asserts that because the FCC has jurisdiction, calls to an ISP served by ALEC cannot be "local" calls subject to compensation.[16] This line of reasoning is invalid.

20. The FCC has stated that it may, in the abstract, have "jurisdiction" in some sense over calls that carry signals from an end user to points on the Internet that are in a different state than the end user that originated the call. But it has also expressly and repeatedly declined to exercise whatever hypothetical "jurisdiction" it may have. Instead, it has held that ISPs are end users, not carriers, and directed that LECs treat ISPs just like any other end user business customers.

21. In the August 1996 *Local Competition Order,* the FCC declined to grant ISPs interconnection rights against LECs under Section 251 because ISPs are not "telecommunications carriers."[17] In May 1997, the FCC confirmed its long-standing ruling that ISPs are to be treated as end users, not carriers, for purposes of access charges.[18] In May 1997, the FCC also released its *Universal Service Order,* which held that there is a distinction between the telecommunications functions that carriers provide

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[16] *See* Exhibits B and C hereto.

[17] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *First Report and Order,* CC Docket Nos. 96-98 and 95-185 (released August 8, 1996) ("*Local Competition Order*") at ¶ 995.

[18] In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, and End User Common Line Charges, *First Report and Order,* CC Docket Nos. 96-282 *et al.*, FCC 97-158 (released May 16, 1997) ("*Access Charge Order*") at ¶¶ 341-48.

to link end users to ISPs (which ***are*** "telecommunications" subject to universal service assessments) and the information services that ISPs provide (which are ***not*** "telecommunications" and not subject to universal service assessments).[19] Most recently, in April 1998, the FCC re-affirmed its earlier universal service decision, holding that the categories of "information service" provider and "telecommunications carrier" are mutually exclusive. ISPs provide ***information services;*** they are not "carriers."[20] As the FCC observed, ISPs

> use telecommunications networks to reach their subscribers, ***but they are in a very different business from carriers.*** [ISPs] provide their customers with value-added functionality by means of computer processing and interaction with stored data. They leverage telecommunications connectivity to provide these services, but this makes them ***customers*** of telecommunications carriers rather than their competitors.[21]

22. All of these rulings indicate a consistent understanding that, from the perspective of the public telephone network, ISPs are end users. While an ISP's subscribers connect to the ISP by means of telecommunications services provided by carriers, the "telecommunications function" involved begins at the end user's premises and ends at the ISP's premises. Everything the ISP does is an ***information service*** function, not a ***telecommunications function***. In this capacity, the ISP is just another

[19] In the Matter of Federal-State Joint Board on Universal Service, *Report and Order,* CC Docket No. 96-45 (released May 8, 1997) ("*Universal Service Order*") at ¶¶ 788-90.

[20] In the Matter of Federal-State Joint Board on Universal Service, *Report To Congress,* CC Docket No. 96-45 (April 10, 1998) at ¶ 13 ("We conclude ... that the categories of 'telecommunications service' and 'information service' in the 1996 Act are ***mutually exclusive.***"). *See id.* at ¶ 21 (footnote omitted) ("We find ... that Congress intended to maintain a regime in which information service providers are not subject to regulation as common carriers merely because they provide their services 'via telecommunications'.")

[21] *Id.* at ¶ 105 (emphasis supplied).

business local exchange customer, and, if the end user and the ISP are in the same local calling area, the normal rules for terminating compensation apply.[22]

23. BellSouth's position that state regulators such as this Commission do not have jurisdiction over calls to ISPs cannot be squared with the FCC's own pronouncements on this issue. Perhaps someday the FCC will assert jurisdiction over calls that end users make to ISPs. At present, however, the FCC's position is clearly and unambiguously that ISPs are to be treated as end users who purchase service out of intrastate local exchange tariffs. It makes no sense, therefore, to claim that the supposedly "interstate" character of the traffic means that calls to ISPs are not local calls or deprives state regulators of jurisdiction over the issue.[23]

24. Indeed, if the FCC has jurisdiction, then it only makes sense to pay attention to what the FCC has said. What the FCC has said, repeatedly, is that ISPs are not carriers and that ISPs should connect to the network like any other business end user, obtaining service under intrastate local exchange tariffs. As long as this is the FCC's position, state regulators are lawfully empowered to decide the issue, and calls to ISPs within a local calling area are properly treated as local calls.

25. This is the conclusion reached in the state proceedings quoted above, and this is the conclusion reached by the National Association of Regulatory Utility Commissions ("NARUC") at its most recent annual meeting. NARUC was aware that many of its member commissions were being asked by the ILECs to rule that, in light

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[22] This conclusion is also supported by the FCC's definition of "termination" in 47 C.F.R. § 51.701(d). That rule states that "termination is the switching of local telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises." While, as described above, all states to have addressed the issue reach a conclusion consistent with this definition, as a technical legal matter the FCC's definition is not binding because it is one of the rules vacated by the 8th Circuit's order in the *Iowa Utilities Board* case. *See* 120 F.3d at 819 n.39.

[23] *See* Bush Letter, Exhibit B hereto.

of lingering FCC assertions of "jurisdiction," state-level regulators did not have the authority to rule that calls to ISPs are local calls subject to terminating compensation. NARUC, therefore, resolved as follows:

> WHEREAS, Calls from end users to ISPs which originate and terminate within the same local calling area are being charged as local calls pursuant to intrastate tariffs; and
>
> WHEREAS, The FCC has waived application of interstate access charges to this traffic, which has resulted in these calls continuing to be charged under applicable local intrastate tariffs, and to be treated as local under separations procedures; and
>
> WHEREAS, Incumbent local exchange companies treat such traffic as local pursuant to their local intrastate tariffs, ARMIS reports, rate case submissions, and in their local interconnection agreements with adjacent incumbent local exchange companies; and
>
> WHEREAS, Each of the nine states that have take up the issue to date (Arizona, Colorado, Maryland, Minnesota, New York, Oregon, Virginia and Washington) continue to treat this traffic as subject to State jurisdiction; now, therefore, be it
>
> RESOLVED, That [NARUC] advocates that at least as long as the FCC's current rule regarding ISP traffic remains in effect, such traffic should continue to be treated as subject to State jurisdiction in interconnection agreements or tariffs between incumbent local exchange companies and CLECs, and continue to be governed by the same legal authority of the applicable State commission that applies to all such interconnection agreements or tariffs between local exchange carriers.

NARUC Convention Floor Resolution No. 7, "Resolution Asserting State Authority Regarding ISP Reciprocal Compensation."[24]

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[24] *Accord, Letter from Daniel P. Gahagan, Executive Secretary, Maryland Public Service Commission, to Bell Atlantic-Maryland, Inc. in response to Complaint of MFS Intelenet of Maryland, Inc. for Breach of Interconnection Terms* (Sept. 11, 1997), which states:

> The Commission recognizes that there is a question as to whether these communications are "jurisdictionally interstate communications." However, it does not believe that this question affects the results herein because of the

(continued...)

V. To The Extent That The Nature And Routing Of The Signals Exchanged Between End Users And ISPs Are Relevant, As A Factual Matter Virtually All Such Signals Are Clearly Local.

26. The discussion above shows that as a matter of law, ISPs are end user customers, not carriers. It follows as a matter of law that when BellSouth customers call ALEC's ISP customer on a 7-digit, local basis, these are nothing more or less than local calls, properly subject to terminating compensation under the Agreement and the Act. This conclusion is not affected by what an ISP does (or does not do) with the signals it receives from its subscribers, and is not affected by where the information that the ISP sends to its end users ultimately "comes from."[25] If, however, the Commission concludes that its decision might be affected by the nature and routing of signals exchanged between end users and ISPs, then the Commission should be aware that, as explained below, for the vast majority of the time that end users are on line, the traffic that they exchange with the ISP is plainly "local" in nature.

27. **Modem-to-Modem Traffic.** Once the end user's modem and the ISP's modem are connected, they "talk" to each other constantly. This constant CPE-to-CPE exchange of information is needed to keep the two devices "in sync" so that the maximum possible amount of data can be sent over the analog exchange lines that most

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[24](...continued)

> [FCC's] requirement that although ISPs use incumbent LEC facilities to originate and terminate interstate calls, these services should be purchased "under the same intrastate tariffs available to end users."

(Citations omitted.)

[25] As the New York PSC observed, "[t]he fact that a call may sometimes be handed off and routed within the ISP's computer network(s) or through the Internet ... does not alter the jurisdictional nature of the call from the end user to the ISP. Indeed, many intrastate communications ultimately connect to other networks." *See Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic*, Case 97-C-1275, Order Closing Proceeding, *supra*, slip op. at 3 (footnote omitted).