

**COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION**

PETITION OF)
)
STARPOWER COMMUNICATIONS, LLC)
)
For Declaratory Judgment Interpreting Interconnection)
Agreement with GTE South, Inc. and Directing GTE to)
pay reciprocal compensation for the termination of)
local calls to Internet service providers.)

Case No.

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Dated: February 3, 1999

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Starpower Communications, LLC (“Starpower”) through its undersigned counsel, and pursuant to Section 8.01-184 of the Code of Virginia and Rule 5:3 of this Commission’s Rules of Practice and Procedure, files this Petition against GTE South Incorporated (“GTE”) seeking enforcement of that certain *Interim Interconnection Agreement* between Starpower and GTE (the “Agreement”), adopted by the parties effective as of March 11, 1998.

GTE has taken the unilateral position that it will not make any payments to Starpower as reciprocal compensation for the transport and termination of telephone exchange service traffic handed off by GTE to Starpower for termination by Starpower to its exchange service end users who are Internet Service Providers or Enhanced Service Providers (collectively “ISPs”) despite the clear requirement in the Agreement that the parties will pay such compensation for the transport and termination of “Local Traffic.” GTE’s stance is particularly egregious because it is adhering to a legally untenable position in the face of an express order of this Commission affirmatively rejecting GTE’s position and concluding that *all* local traffic, including traffic

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terminating at ISPs, is subject to the reciprocal compensation provisions of agreements such as the one at issue here.^{1/}

Since the Commission previously has ruled that local traffic terminated at ISPs should be treated the same as other local traffic, Starpower requests that the Commission enter an order enforcing the Agreement and directing GTE to compensate Starpower for the termination of local traffic originated by GTE to Starpower's end user customers, *including ISP customers*, pursuant to Section VI of the Agreement (providing for the reciprocal termination of local exchange traffic) at the rates set forth therein.

I. JURISDICTION

1. Both Starpower and GTE are authorized to provide local exchange services in the Commonwealth of Virginia pursuant to certificates issued by this Commission.

2. Pursuant to section 252(i) of the Telecommunications Act of 1996, 47 U.S.C. , Starpower elected to adopt the interconnection agreement by and between GTE and MFS of Intelenet of Virginia, Inc. ("MFS") (the "MFS Agreement"), which was approved by this Commission in an Order Approving Agreement entered on July 9, 1997 in Case No. PUC970007.

3. The terms of the Agreement specifically provide for the right of either party to petition the Commission – or a court – “in the event of a default or violation hereunder, or for

^{1/} *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, Case No. PUC-970069, Final Order (Oct. 24, 1997).*

any dispute arising under this Agreement . . .² Thus, the Commission has clear jurisdiction to interpret and to enforce the terms of the Agreement as alleged herein. The authority of the Commission to interpret and to enforce an interconnection agreement it previously approved was upheld recently by the United States Court of Appeals for the Eighth Circuit. *Iowa Utilities Board v. Federal Communications Commission*, 120 F.3d 753, 803 (8th Cir. 1997), *cert. granted*, ___ U.S. ___, 118 S.Ct. 879 (1998).

4. Correspondence regarding this Petition should be sent to Starpower at the following address:

Mr. Anthony F. Peduto, General Manager
Starpower Communications, LLC
1130 Connecticut Ave., N.W.
Suite 400
Washington, D.C. 20036

Correspondence regarding this Petition should be sent to Starpower's attorneys as follows:

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5. Correspondence regarding this Petition should be sent to GTE at the address specified in the Agreement, which is:

² Agreement at Section XVIII.

Mr. Stephen C. Spencer
Director Regulatory and External Affairs
GTE South Incorporated
One James Center
901 East Cary Street
Richmond, Virginia 23219

and to GTE's attorneys as it may hereafter designate.

6. Starpower's interest in this proceeding, as stated elsewhere in this Complaint, is in the enforcement of the Agreement between Starpower and GTE, with respect to the provision of local exchange services throughout those portions of the Commonwealth of Virginia served by GTE.

7. Starpower hereby requests that the Commission commence a formal adjudicative proceeding on an expedited basis, to address the issues raised in this Complaint.

II. STATEMENT OF FACTS

A. GTE REFUSES TO PAY RECIPROCAL COMPENSATION TO STARPOWER FOR TERMINATING LOCAL EXCHANGE CALLS TO ISPs

Terms of the Agreement

8. Section 251(a) of the Telecommunications Act obligates all telecommunications carriers to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."

9. Pursuant to the terms of the Agreement, Starpower and GTE have interconnected their networks to enable an end user subscribing to Starpower's local exchange service to place calls to end users subscribing to GTE's local exchange service, and vice versa.

10. Section 251(b)(5) of the Act obligates GTE and Starpower, as local exchange carriers, "to establish reciprocal compensation arrangements for the transport and termination of telecommunications."

11. In accordance with the Act, Section VI.A. of the Agreement requires GTE and Starpower to "reciprocally terminate POTS calls originating on each others' networks" local exchange traffic^{3/} and section VI.B. requires GTE and Starpower to pay reciprocal compensation to each other for the termination of local traffic at "an equal, identical and reciprocal rate of \$.009 per minute."

12. At the same time, however, Section XIX.E of the Agreement specifically states that the parties "shall comply with all federal, state, and local statutes, regulations, rules, ordinances, judicial decisions, and administrative rulings applicable to its performance as described in this Agreement."

13. Similarly, section XIX.Q. makes the Agreement expressly subject to "changes, modifications, orders, and rulings by the Federal Communications Commission and/or the applicable state utility regulatory commission to the extent the substance of this Agreement is or becomes subject to the jurisdiction of such agency.

14. Finally, section XIX.H., termed "Entire Agreement", states as follows:

This Agreement constitutes the entire agreement of the Parties pertaining to the subject matter of this Agreement and supersedes all prior agreements, negotiations, proposals, and representations, whether written or oral, and all contemporaneous oral agreements, negotiations, proposals, and representations concerning such

^{3/} "POTS" is defined as: "Plain Old Telephone Service Traffic," which the parties agreed included "local traffic (including EAS) as defined in GTE's tariff." (Agreement, section II.FF.).

subject matter. No representations, understandings, agreements or warranties, expressed or implied, have been made or relied upon in the preparation or execution of this Agreement other than those specifically set forth herein.

15. The impact of these provisions is crystal clear. Reciprocal compensation is owned for the transport and termination of *all* local calls, regardless of the identity of the terminating end-user, the terms of the Agreement are subject to final, binding decisions of this Commission and, if a representation or understanding is not contained within the four-corners of the Agreement, it is ineffective.

Prior Commission Determinations

16. Over a year before the parties executed the letter pursuant to which Starpower adopted the terms of the MFS Agreement, and in the context of a proceeding brought by Cox Virginia Telecom to interpret and enforce the terms of an interconnection agreement by and between Cox and Bell Atlantic-Virginia, Inc. ("Bell Atlantic"), (the "Cox/Bell Atlantic Agreement") the Commission was presented with and had occasion to consider and to decide a dispute over a reciprocal compensation arrangement virtually identical in all material respects to the arrangement set forth in the Agreement at issue here.^{4/} Specifically, in the Cox/Bell Atlantic Agreement, the parties agreed to "compensate each other for the transport and termination of Local Traffic in an equal and symmetrical manner at the rates provided in the Detailed Schedule

^{4/} *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, Case No. PUC-970069, Final Order (Oct. 24, 1997).*

of Itemized Charges.”^{5/} This provision is not materially different from the reciprocal compensation provision of the Agreement at issue here.

17. Bell Atlantic took the same position with Cox that GTE takes here, namely, that calls terminating at ISPs were not local calls subject to the reciprocal compensation provisions of that agreement. Cox filed a Petition with the Commission to resolve that dispute. Considering the positions of the parties, the Commission rejected Bell Atlantic’s arguments, which are identical to the arguments GTE will make here. Simply put, the Commission concluded that calls to ISPs were local. More particularly, the Commission stated its conclusion as follows:

Having considered the response of BA-VA and the replies, the Commission finds that calls to ISPs as described in the Cox petition constitute local traffic under the terms of the agreement between Cox and BA-VA and that the companies are entitled to reciprocal compensation for the termination of this type of call.

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.^{6/}

18. Bell-Atlantic initially appealed the Commissions decision to the Supreme Court of Virginia^{7/} but, for reasons of its own choosing, withdrew that appeal.^{8/} In short, the

^{5/} *Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996* (dated as of February 12, 1997) at section 5.7.2.

^{6/} Final Order at 2.

^{7/} *Bell Atlantic-Virginia, Inc. v. Cox Virginia Telecom, Inc., et al.*, Record No. 980385, Petition for Appeal filed February 24, 1998.

^{8/} *Id.*, Order Granting Motion For Leave To Withdraw Appeal (April 10, 1998).

Commission's decision interpreting the scope of carriers' reciprocal compensation obligations to each other under interconnection agreements, as those provisions relate to telephone calls to ISPs, is final, binding and enforceable in Virginia.

The Nature Of ISP Traffic

19. Both Starpower and GTE provide tariffed local exchange services over their respective networks to end user customers, including certain business customers operating as ISPs. As the term suggests, ISPs provide information obtained from numerous sources, including sources accessed through the Internet and through databases. Typically, an ISP's customer connects to an ISP by means of a local phone call, using telephone exchange service. The interconnection terms of the Agreement permit subscribers to GTE's local exchange service to place calls to ISPs located on Starpower's network, *just as they may with any other local exchange end user customer*. Likewise, subscribers to Starpower's local exchange service may place calls to ISPs served by GTE.

The Dispute

20. At the time the parties agreed on Starpower's adoption of the MFS/GTE Agreement, GTE knew of this Commission's decision in the *Cox Telecom* matter. GTE had every opportunity during the discussions which led to the adoption of that agreement to state its view on reciprocal compensation for calls to ISPs. It said nothing. Even so, after the parties had signed the letter agreement memorializing Starpower's adoption of the MFS Agreement, representatives of GTE began to advise representatives of Starpower that they would not pay reciprocal compensation for calls to ISPs served by Starpower.

21. By letter dated December 28, 1998, from Russell M. Blau, counsel for Starpower, to Ms. Ann Lowery, at GTE Network Services, Starpower advised GTE that its interpretation of the Agreement was fundamentally at odds with the Agreement itself and contradicted by this Commission's decision in *Cox Telecom*. (A copy of the December 28, 1998, letter is attached hereto as Exhibit 1). GTE did not respond in writing, but restated its position in two conference calls with Starpower, on January 21 and January 29, 1999.

22. To date, Starpower has exchanged traffic with GTE, but has not yet submitted a bill to GTE for reciprocal compensation. Nevertheless, in anticipation of GTE's breach of the Agreement, Starpower requests that the Commission enter an Order affirming its earlier decision entered in the *Cox Telecom* matter and to hold – again – that calls to ISPs are local for purposes of reciprocal compensation.

23. In the absence of a negotiated resolution, the Agreement specifically provides for the right of either party to seek intervention from the Commission to resolve a dispute as to the interpretation or enforcement of this Agreement. In light of the inability of the parties to resolve this dispute, the time is ripe for the Commission to decide the issue.

24. GTE's refusal to pay reciprocal compensation for the ISP customer calls terminated by Starpower is wholly inconsistent with (1) the *Cox Telecom* decision of this Commission, (2) decisions of the United States District Courts for the Western District of Washington, the Western District of Texas, the Northern District of Illinois and the District of Oregon, (3) the Telecommunications Act of 1996, and (4) relevant FCC orders. Moreover, this attempt to withhold compensation from CLECs that terminate local traffic to ISPs has been

addressed by a number of other state regulatory commissions, all of which have rejected the arguments made here by GTE.

25. The Reciprocal Compensation provisions in Section VI clearly require the parties to compensate each other for the termination of all local traffic; there is no exception in the Agreement for calls terminating at ISPs.

26. The parties thus owe each other reciprocal compensation for any "POTS" Traffic terminated on the other's network, without regard for the identity of the terminating end-user. The issue presented by this Petition is whether there is any reason to treat calls terminating at ISPs any differently if the originating end-user is a GTE customer instead of a Bell Atlantic customer.

27. 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. Nothing in the Agreement or applicable law or regulations create a distinction pertaining to calls placed to telephone exchange service end users *which happen to be ISPs*. All calls that terminate within a local calling area, regardless of the identity of the end user, are local calls as defined in the Agreement, and reciprocal compensation is due for such calls. This includes telephone exchange service calls placed by GTE's customers to Starpower's ISP customers, as well as calls placed by Starpower's customers to GTE's ISP customers.

28. GTE, like all other ILECs, treats calls to ISPs as local traffic in all other contexts. GTE charges its own ISP customers local business line rates for local telephone exchange service. These services are provided pursuant to GTE's local exchange tariff. This practice thus enables customers of GTE's ISP customers to connect to their ISP by making a local phone call.

When a GTE telephone exchange service customer places a call to an ISP within the caller's local calling area, GTE rates and bills such customer for a local call pursuant to the terms of GTE's local tariffs. More to the point, in its own Internet advertising GTE hails the ability of consumers to reach the internet through local calls.

29. In addition, Starpower believes that GTE treats the revenues associated with local exchange traffic to its ISP customers to be local for purposes of interstate separations and ARMIS reports.

B. THIS COMMISSION, NUMEROUS OTHER STATE REGULATORY AUTHORITIES, THE FEDERAL COURTS, AND THE FCC HAVE CONCLUDED THAT CALLS TO ISPs ARE LOCAL TRAFFIC. AS A RESULT, GTE'S POSITION VIOLATES BOTH THE LAW AND PUBLIC POLICY DISCOURAGING ANTI-COMPETITIVE AND DISCRIMINATORY CONDUCT DESIGNED TO THWART COMPETITION IN LOCAL MARKETS.

30. In the *Cox Telecom* proceeding, this Commission gave careful consideration to the issue presented here, *i.e.*, whether local calls terminating at ISPs are subject to the reciprocal compensation provisions of the Agreement between Starpower and GTE. The matter was fully briefed by the parties and Starpower adopts and incorporates by reference the legal arguments made by Cox and the other CLEC intervenors in that proceeding.

31. Of critical importance, however, is that since the Commission announced its decision in October 1997, over 20 state commissions and four United States District Courts, considering the very same issues presented here, or appeals from state regulatory authorities, have reached the very same conclusion this Commission reached in the *Cox Telecom* proceeding. These commission and court decisions squarely hold that, as the Commission found

in the *Cox Telecom* proceeding, local calls terminating to ISPs are local traffic for purposes of the reciprocal compensation provisions of the interconnection agreements.

32. To be sure, only one of the 28 state commission decisions rendered to date has involved GTE directly.^{9/} In a generic pricing proceeding, the Public Utilities Commission of Hawaii was asked to decide the precise issue presented by this Petition; i.e., whether “all local calls should be subject to transport and termination compensation, including calls made to information service providers (ISPs).^{10/} GTE Hawaiian Tel sought “to exempt information service traffic from reciprocal compensation,” a position the Hawaii P.U.C. rejected, concluding that GTE “has not sufficiently justified the exemption of this traffic from reciprocal transport and termination compensation.”^{11/}

33. In all other cases, the ILEC arguing against reciprocal compensation for calls to ISPs was one of the Bell entities, but the decisions and conclusions of those commissions are instructive as this Commission addresses the issue here. Of particular interest to the Commission, every state regulatory agency in Bell Atlantic’s service territory to have considered and decided the issue—seven thus far excluding this Commission—has agreed with the result this Commission reached in *Cox Telecom*. Similarly, every state regulatory agency in Bell South’s territory to have decided the issue—five to date—has reached exactly the same result.

^{9/} A Petition raising the very same issue is pending in one other GTE state. *Complaint of WorldCom, Inc. v. GTE Northwest, Inc.*, Docket No. UT-980338 (W.U.T.C.).

^{10/} *In the Matter of Instituting a Proceeding on Communications, Including an Investigation of the Communications Infrastructure of the State of Hawaii*, Docket No. 7702, Decision and Order, at 60 (Ha. P.U.C., January 7, 1999).

^{11/} *Id.* at 61.

34. Thus, in one of the more recent published decisions from a state regulatory agency on the issue, the Florida Public Service Commission (“F.P.S.C”) first observed that the case was, at bottom “a contract dispute between the parties and that is the foundation of our decision below.”^{12/} Assessing the agreements and the evidence, the Florida Commission concluded unequivocally that the interconnection agreement between WorldCom and BellSouth:

defines local traffic in such a way that ISP traffic clearly fits the definition. Since ISP traffic is local under the terms of the Agreement, then, a priori, reciprocal compensation for termination is required under Section 5.8 of the Agreement. There is no ambiguity, and there are no specific exceptions for ISP traffic.^{13/}

35. In its decision, the F.P.S.C. considered, and rejected, the very same arguments that GTE will make here, namely, that the FCC considers the services provided by ISPs to be interstate^{14/} and that the call does not terminate at the ISP.^{15/} Similarly, the F.P.S.C. noted BellSouth’s infatuation with the notion that the call to the ISP merely transits through the ISPs point of presence, and does not terminate there, but concluded that BellSouth had “chose[n] to ignore the industry standard definition of the word ‘termination.’”^{16/} Considering the positions of the parties, the Florida Commission adopted the view that termination occurs “when a

^{12/} *Complaint of WorldCom Technologies, Inc. Against BellSouth Telecommunications, Inc. for Breach of Terms of Florida Partial Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 and Request for Relief* Docket No. 971478-TP, Final Order Resolving Complaints (F.P.S.C.) (first of four consolidated cases)(Sept. 15, 1998).

^{13/} *Id.* at 7.

^{14/} *Id.* at 7 - 8.

^{15/} *Id.* at 8 - 11.

^{16/} *Id.* at 9.

connection is established between the caller and the telephone exchange service to which the dialed telephone number is assigned, answer supervision is returned, and a call record is generated.”^{17/} This is the same position Starpower advocates here.

36. Concluding that all parties intended calls originating by an end-user of one LEC and terminating at an ISP served by another LEC would be rated and billed as local, the F.P.S.C. castigated BellSouth for changing the deal just because it didn’t like the outcome:

BellSouth’s conduct subsequent to the Agreement was for a long time consistent with the interpretation of [the definition of local traffic] urged by WorldCom. A party to a contract cannot be permitted to impose unilaterally a different meaning than the one shared by the parties at the time of execution when it later becomes enlightened or discovers an unintended consequence.^{18/}

37. The North Carolina Commission (“N.C.U.C.”) also rejected BellSouth’s efforts to carve out an exception for local calls to ISPs/ESPs from its reciprocal compensation obligations under an interconnection agreement with US LEC.^{19/} In *US LEC*, the N.C.U.C. stated its conclusion as follows:

The Interconnection Agreement speaks of reciprocal compensation for local traffic. There is no exception for local traffic to an end user who happens to be an ISP. For the purposes of reciprocal compensation, the Commission concludes that the call terminates

^{17/} *Id.* at 10. This is virtually identical to the definition adopted by the Illinois Commission (*see. infra*, at 20, n. 58) .

^{18/} *Id.* at 19.

^{19/} *Petition of US LEC of North Carolina, L.L.C. To Enforce Interconnection Agreement, Order Concerning Reciprocal Compensation For ISP Traffic, Docket No. P-55 (N.C.U.C. February 26, 1998).*

when it is delivered to the called local exchange number of the end-user ISP.^{20/}

38. This is the very same result announced by the Tennessee Regulatory Authority (“T.R.A.”),^{21/} which affirmed the finding of its Hearing Officer that “the term ‘Local Traffic’ as used in the reciprocal compensation arrangement of the Interconnection Agreement at issue, includes, as a matter of law, calls to ISPs.”^{22/}

39. More important, two United States District Courts, considering appeals of the very same issues from state regulatory authorities enforcing interconnection agreements, have affirmed the underlying commission decisions and squarely held, as the Hawaii P.U.C. held in the Pricing Proceeding, the F.P.S.C. found in *WorldCom*, the Georgia Public Service Commission found in *MFS Intelenet*^{23/}, the T.R.A. found in *Brooks Fiber*, and the N.C.U.C. found in *US LEC*, that telephone calls terminating at ISPs, which otherwise meet the definition of local traffic in an interconnection agreement are local for purposes of the reciprocal compensation provisions of the interconnection agreements.

^{20/} *Id.* at 6.

^{21/} *Petition of Brooks Fiber To Enforce Interconnection Agreement And For Emergency Relief*, Docket No. 98-00118, Order Affirming The Initial Order of Hearing Officer (T.R.A., Aug. 17, 1998).

^{22/} *Petition of Brooks Fiber To Enforce Interconnection Agreement And For Emergency Relief*, Docket No. 98-00118, Initial Order of Hearing Officer, at 19 (T.R.A., April 21, 1998).

^{23/} *Complaint of MFS Intelenet of Georgia, Inc. Against BellSouth Telecommunications, Inc. and Request for Immediate Relief*, Docket No. 8196-U (G.P.S.C. December 28, 1998).

40. In June 1998, the United States District Court for the Western District of Texas affirmed the earlier decision of the Texas PUC.^{24/} Relying on established principles of contract interpretation, the Court held that the interconnection agreement at issue was unambiguous and “the PUC appropriately found that . . . ‘the definition of ‘local traffic’ in the applicable interconnection agreements includes ISP traffic that otherwise conforms to the definition.”^{25/}

41. This is the very same result reached by the Illinois Commerce Commission (“I.C.C.”),^{26/} and upheld on appeal by the United States District Court for the Northern District of Illinois.^{27/} Before the I.C.C., Ameritech Illinois made exactly the same arguments that Southwestern Bell made before the Texas PUC, which GTE made to the Hawaii P.U.C. and which BellSouth made to the Florida Commission in *WorldCom*, to the N.C.U.C. in *US LEC*, and to the T.R.A. in *Brooks Fiber*. The Illinois Commission rejected the arguments and the Northern District Court affirmed. The Court upheld the ICC’s decision on two separate grounds: First, the ICC properly concluded, based on its interpretation of industry practice, that a call

^{24/} *Southwestern Bell Telephone Company v. Public Utility Commission of Texas, et al.*, Case No. MO-98-CA-43 (W.D. Tx., filed June 16, 1998). On July 20, 1998, the District Court denied a motion by Southwestern Bell to alter or amend the judgment. *Southwestern Bell Telephone Company v. Public Utility Commission of Texas, et al.*, Case No. MO-98-CA-43 (W.D. Tx., July 20, 1998), *appeal pending*, *Southwestern Bell Telephone Company v. Public Utility Commission of Texas, et al.*, No. 98-50787 (5th Cir.).

^{25/} *Id.*, Slip Op. at 26.

^{26/} *Teleport Communications Group, Inc. v. Illinois Bell Telephone Company (Ameritech Illinois)* (first titled of four consolidated cases), Order, Case No. 97-0404 (I.C.C. March 11, 1998).

^{27/} *Illinois Bell Telephone Company d/b/a Ameritech Illinois v. WorldCom Technologies, Inc., et al.*, No. 98 C 1925 (N.D. Ill., July 21, 1998), *appeal pending*, *Illinois Bell Telephone Company d/b/a Ameritech Illinois v. WorldCom Technologies, Inc., et al.* No. 98-3150 (7th Cir.).

“terminates” at the ISP, thus making it a local call subject to reciprocal compensation^{28/} and, second, the Agreements themselves unambiguously provide that reciprocal compensation is applicable to local traffic billable by Ameritech, and Ameritech bills calls to ISPs as local calls.^{29/}

42. Other state agencies, considering the identical arguments BellSouth made in North Carolina, Georgia, Tennessee, Florida and which GTE made in Hawaii and no doubt will make here in Virginia, have reached this same conclusion. For example, in the context of interpreting and/or enforcing interconnection agreements, the Alabama Public Service Commission,^{30/} the Arkansas Public Service Commission,^{31/} the California Public Utility Commission,^{32/} the Connecticut Department of Public Utility Control,^{33/} the Maryland Public

^{28/} *Id.*, slip op. at 26-28.

^{29/} *Id.* at 25.

^{30/} *In Re: Emergency Petitions of ICG Telecom Group Inc., And ITC^Deltacom Communications, Inc., for a Declaratory Ruling*, Docket No. 26619 (Ala. P.S.C.)(decision announced on February 2, 1999, no written opinion has been issued).

^{31/} *Connect Communications Corporation v. Southwestern Bell Telephone Company*, Docket No. 98-167-C, Order (Ark. P.S.C., December 31, 1998).

^{32/} *Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service*, Decision 98-10-057 (Cal. P.U.C. Oct. 22, 1998).

^{33/} *Petition of the Southern New England Telephone Company for a Declaratory Ruling Concerning Internet Services Provider Traffic*, Docket No. 97-05-22, Decision (Conn. D.P.U.C. September 17, 1997).

Service Commission,^{34/} the Massachusetts Department of Telecommunications and Energy,^{35/} the Michigan Public Service Commission,^{36/} the New York Public Service Commission,^{37/} the Ohio Public Utilities Commission,^{38/} the Oklahoma Corporation Commission,^{39/} the Pennsylvania Utility Commission,^{40/} the Utah Public Service Commission,^{41/} and the Public

^{34/} Letter dated September 11, 1997 from Daniel P. Gahagan, Executive Secretary, Maryland Public Service Commission, to David K. Hall, Esq., Bell Atlantic-Maryland, Inc. On October 1, 1997, the Maryland Commission dismissed Bell Atlantic's Motion for Reconsideration. The Circuit Court for Montgomery County, Maryland affirmed the Public Service Commission's decision in an unreported decision. CA No. 17-8260.

^{35/} *Complaint of WorldCom Technologies, Inc. against Bell Atlantic-Massachusetts for alleged breach of interconnection terms entered into under Section 251 and 252 of the Telecommunications Act of 1996*, D.T.E. 97-116 (Mass. D.T.E. Oct. 21, 1998).

^{36/} *In the matter of the application for approval of an interconnection agreement between Brooks Fiber Communications of Michigan, Inc., and Ameritech Information Industry Services on behalf of Ameritech Michigan*, Case No. U-11178 (first listed of four consolidated cases) (January 28, 1998).

^{37/} *Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic*, Case 97-C-1275, Order Denying Petition and Instituting Proceeding (NYPSC July 17, 1997). In its recent Order Closing Proceeding, the New York Public Service Commission reiterated its view that "[c]alls to local telephone numbers of ISPs are intrastate in nature and will be treated as intrastate for the purpose of reciprocal compensation." (NYPSC March 19, 1998).

^{38/} *In the Matter of the Complaint of ICG Telecom Group, Inc. v. Ameritech Ohio Regarding the Payment of Reciprocal Compensation*, Opinion and Order, Case No. 97-1557-TP-CSS (O.P.U.C., Aug. 27, 1998).

^{39/} *In the Matter of the Application of Brooks Fiber Communications of Oklahoma, Inc. and Brooks Fiber Communications of Tulsa, Inc. for an Order Concerning Traffic Terminating To Internet Service Providers and Enforcing Compensation Provisions of the Interconnection Agreement with Southwestern Bell Telephone Company*, Final Order, Cause No. PUD 970000548, Order No. 423626 (O.C.C., June 3, 1998).

^{40/} *Petition for Declaratory Order of TCG Delaware Valley, Inc. for clarification of Section 5.7.2 of its Interconnection Agreement with Bell Atlantic-Pennsylvania, Inc.* Opinion and Order, Case No. P-00971256 (P.P.U.C., June 16, 1998).

^{41/} *In the Matter of a Complaint Against US WEST COMMUNICATIONS, INC., by ELECTRIC LIGHTWAVE, INC., Requesting the Utah Public Service Commission Enforce An Interconnection Agreement Between Electric Lightwave, Inc. and US West Communications, Inc.*, Order, Docket

Service Commission of Wisconsin (in two separate cases)^{42/} all have reached the same conclusion and ordered the respective ILECs to pay reciprocal compensation for calls terminating to ISPs.

43. Still other states have reached similar conclusions, albeit in the context of reviewing interconnection agreements reached through arbitration. Thus, the state commissions in Arizona,^{43/} Colorado,^{44/} Minnesota,^{45/} Missouri,^{46/} Oregon,^{47/} Washington^{48/} and West

No. 98-049-36 (Utah P.S.C., January 22, 1999).

^{42/} *Contractual Dispute About the Terms of an Interconnection Agreement Between Ameritech Wisconsin and TCG Milwaukee, Inc.*, Letter Order, Docket Nos. 5837-TD-100, 6720-TD-100 (P.S.C. of Wisconsin, May 13, 1998); *Contractual Dispute About the Terms of an Interconnection Agreement Between Ameritech Wisconsin and Time Warner Communications of Milwaukee, L.P.*, Letter Order, Docket No. 5912-TD-100 (W.P.S.C. June 10, 1998).

^{43/} *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.*, 1996 WL 787940 (Arizona Corp. Comm. Oct. 29, 1996) at 7.

^{44/} *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 (Col. PUC Nov. 5, 1996) at 30.

^{45/} *Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCI Metro 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, 1996 Minn PUC LEXIS 188 (Minn. PUC Dec. 2, 1996) at 75-76.

^{46/} *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 (M.P.S.C., April 23, 1998).

^{47/} *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, 1996 WL 786931 (Ore. PUC Dec. 9, 1996), *aff'd*, *US West Communications, Inc. v. WorldCom Technologies, Inc., et al.*, 1998 WL 8970222 (D. Or., Dec. 10, 1998).

^{48/} *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) at 26, *aff'd* *U.S. West*

Virginia.^{49/} have declined to treat traffic to enhanced service providers, including ISPs, any differently than other local traffic.

44. These cases show the Commission that there is a great uniformity among state commissions in exercising their duty to arbitrate and review interconnection agreements under the standards and terms enunciated in the 1996 Act, and to interpret and enforce the provisions of those approved agreements. They have uniformly concluded that nothing in the 1996 Act provides for disparate treatment of traffic delivered to ISP customers. These decisions, reaching from one end of the country to the other, should be considered by this Commission as very persuasive evidence that GTE's position is totally without merit.

45. Nor can GTE find any solace from the FCC's recent decision addressing the jurisdictional nature of an ADSL service offered by GTE^{50/} as casting doubt on the continuing validity of the Commission's prior decisions addressing ISP traffic.

46. That would be misguided. A clear reading of the *ADSL Order* eviscerates any arguments GTE might make. At the very outset, the FCC addresses the limited scope of its decision on the ADSL service and states clearly that the decision has no impact on the reciprocal compensation issue, stating as follows:

We emphasize that we decide here only the issue designated in our investigation of GTE's federal tariff for ADSL service

Communications, Inc. v. MFS Intelenet, Inc. Case No. C97-222WD (W.D. Wash., filed January 7, 1998).

^{49/} *MCI Telecommunications Corporation Petition for arbitration of unresolved issues for the interconnection negotiations between MCI and Bell Atlantic -- West Virginia, Inc., Case No. 97-1210-T-PC (W.V.P.S.C. January 13, 1998).*

^{50/} *In the Matter of GTE Telephone Operating Cos., GTE Tariff No. 1, CC Docket No. 98-79, Memorandum Opinion and Order, FCC 98-292 (October 30, 1998)(the "ADSL Order").*

. . . This Order does not consider or address issues regarding whether local exchange carriers are entitled to receive reciprocal compensation when they deliver to information service providers, including Internet service providers, circuit-switched dial-up traffic originated by interconnecting LECs.

ADSL Order at p. 1 - 2, ¶ 2 (emphasis added).

47. The FCC then stated the very fundamental reason why the scope of the *ADSL Order* was so narrow:

Unlike GTE's ADSL tariff, the reciprocal compensation controversy implicates: the applicability of the separate body of Commission rules and precedent regarding switched access service, the applicability of any rules and policies relating to intercarrier compensation when more than one local exchange carrier transmits a call from an end user to an ISP, and the applicability of interconnection agreements under sections 251 and 252 of the Communications Act . . . entered into by incumbent LECs and competitive LECs that state commissions have found, in arbitration, to include such traffic. Because of these considerations, we find that this Order does not, and cannot, determine whether reciprocal compensation is owed . . .

(*ADSL Order* at ¶ 2).

48. This decision is entirely consistent with prior decisions of the FCC which, in every decision since the passage of the Telecommunications Act, has made it clear that it also recognized that calls to ISPs consist of two components: a telecommunications component and an information services component. In the *Universal Service Order*^{51/}, for example, the FCC determined that Internet access consists of severable components: the connection to the Internet service provider via voice grade access to the public switched network, and the information

^{51/} *In the Matter of Federal-State Joint Board on Universal Service, Report and Order, CC Docket No. 96-45 (rel. May 8, 1997) ("Universal Service Order").*

service subsequently provided by the ISP.^{52/} In other words, the first component is a simple local exchange telephone call – a "Plain Old Telephone Service" call. Such a call is eligible for reciprocal compensation under the Agreement by its express terms. In addition, while all providers of interstate telecommunications services must contribute to the Universal Service Fund, the FCC explicitly excluded ISPs from the obligation, treating the ISP, instead, as an end-user, not a carrier.^{53/}

49. Moreover, the FCC has repeatedly referred to the telecommunications component as a local service. Thus, in the *Access Charge Reform Order*^{54/} the FCC unambiguously characterized the connection from the end user to the ISP as local traffic: "To maximize the number of subscribers that can reach them *through a local call*, most ISPs have deployed points of presence."^{55/}

50. Later, in the FCC's *Non-Accounting Safeguards Order*, the FCC determined that a local call placed to an Information Service Provider was separate from the subsequent information service provided.^{56/} The severability of these components was key to the FCC's

^{52/} *Universal Service Order*, paras. 83, 788-789.

^{53/} *Universal Service Order*, paras. 787-788.

^{54/} *In the Matter of Access Charge Reform*, First Report and Order, CC Docket No. 96-262 (rel. May 17, 1997) ("*Access Charge Reform Order*"), *aff'd*, *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 542 (8th Cir. 1998).

^{55/} *Access Charge Reform Order*, n. 502 (emphasis added).

^{56/} *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-149 (rel. Dec. 24, 1996), ¶ 120.

conclusion that if each component was provided, purchased, or priced separately, the combined transmissions did not constitute a single interLATA transmission.^{57/}

51. The FCC reaffirmed the conclusions of these earlier rulings in its April 1998 Report to Congress. In the *Federal-State Joint Board on Universal Service*, Report to Congress^{58/}, released on April 10, 1998, the FCC reiterated the distinct difference between the *telecommunications services* that customers use to connect to ISPs and the *information services* which the ISPs provide. In fact, the FCC recognized that Congress intended the categories of “telecommunications” and “information service” to be “*mutually exclusive.*”^{59/} The FCC further concluded that just because ISPs might provide their services via telecommunications did not make the subject to regulation as telecommunications carriers.^{60/}

52. Recently, the Chairman of the FCC, in an address to the National Association of Regulatory Utility Commissioners (“NARUC”) confirmed this interpretation and put to rest any notion that the FCC would interfere with state authority over reciprocal compensation arrangements when he expressly stated that any decision the FCC might issue on the issue of reciprocal

^{57/} *Id.*

^{58/} *Federal-State Joint Board on Universal Service*, Report to Congress, CC Docket 96-45 (rel. April 10, 1998).

^{59/} *Id.* ¶ 59 (emphasis added).

^{60/} See also, *Deployment of Wireline Services Offering Advanced Telecommunications Capability, and Consolidated Cases*, Memorandum and Opinion Order and Notice of Proposed Rulemaking, CC Docket 98-187, ¶ 36 (Aug. 7, 1998)(“an end-user may utilize a telecommunications service together with an information service, as in the case of Internet access. In such a case, however, we treat the two services separately: the first is a telecommunications service . . . and the second service is an information service, in this case Internet access.”)(Emphasis added).

compensation would **not** disturb, in any way, prior state commission decisions on that subject.

Mr. Kennard stated, in pertinent part, as follows:

I know that a large number of states have already weighed in on the issue of reciprocal compensation between local carriers handling Internet traffic. I believe that those states have been right to decide that issue when it has been presented to them and I do not believe it is the role of the FCC to interfere with those state decisions in any way.

Parties should be held to the terms of their agreements, and if a state has decided that a reciprocal compensation agreement provides for the payment of compensation for Internet-bound traffic, then that agreement and that decision by the state must be honored.^{61/}

53. Thus, in the *ADSL Order* itself, as well as in the subsequent statement from Mr. Kennard, the FCC signaled its clear intent to leave undisturbed the treatment of ISP providers under the access charge regime and its intent to adopt and to reinforce the decisions of the 28 state regulatory agencies which, interpreting that regime in the context of enforcing interconnection agreements, concluded that calls to ISPs should be compensated under the reciprocal compensation provisions of those agreements.

54. GTE's current position on this issue also would have severe and far-reaching anti-competitive implications. This is because any carrier terminating calls to an ISP obviously incurs costs in terminating such calls – the same costs incurred in terminating calls to any other end user, and the same costs GTE would incur if it had to terminate the call. GTE's announced position effectively would compel Starpower and other new entrants to terminate the calls

^{61/} Remarks of William E. Kennard, Chairman of the Federal Communications Commission, to the National Association of Regulatory Utility Commissioners, November 11, 1998 (text of speech may be found at: <http://www.fcc.gov/commissioners/kennard/speeches.html>).

without compensation. The inevitable result would be that, practically speaking, no CLEC would be able to furnish service to an ISP, since providing that service would result in uncompensated termination costs. This would leave GTE with an unreasonable *de facto* monopoly over ISP end users, a state of affairs that was clearly not intended by the 1996 Act.

55. Indeed, in a similar situation, the potential anticompetitive impact of BellSouth's conduct and position on the reciprocal compensation issue was noted by the F.P.S.C., which stated in its recent *WorldCom* decision:

The potential impact of BellSouth's actions on local competition is perhaps the most egregious aspect of the case. As witness Hendrix testified, . . . "[t]he payment of reciprocal compensation for ISP traffic *would impede local competition.*" We are more concerned with the adverse effect that BellSouth's refusal to pay reciprocal compensation could have on competition. We agree with this assessment by TCG witness Kouroupas:

As competition grows, the smaller, leaner ALECs may well win other market segments from ILECs. If each time this occurs the ILEC, with its greater resources overall, is able to fabricate a dispute with ALECs out of whole cloth and thus invoke costly regulatory processes, local competition could be stymied for many years.^{62/}

56. A similar finding was made by the Illinois Commerce Commission, which stated in examining the unilateral decision of Ameritech Illinois to refuse to pay reciprocal compensation payments for the termination of calls to ISPs, as GTE refuses to do here:

Ameritech Illinois' unilateral "remedy" is so ill tailored to its perceived problem that it lends credence to the complainants' allegations that Ameritech Illinois' conduct is intentionally anti-competitive. Ameritech Illinois' local exchange competitors are

^{62/}

Final Order Resolving Complaints at 18 (emphasis added).

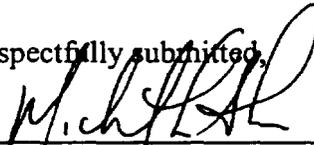
obligated by law to terminate calls made by Ameritech Illinois' customers, they incur substantial costs in order to do so, and they are entitled to be compensated for the use of their equipment and facilities.^{63/}

57. Further aggravating this anti-competitive effect is the fact that GTE now offers its own Internet access service to consumers. By gaining monopoly power over local exchange service to ISPs and increasing their costs for network access, GTE will be in a position to drive competing ISPs out of the local market, thereby leaving GTE with a *de facto* monopoly over access to the Internet as well. This inevitable result cannot be permitted to occur.

III. REQUEST FOR RELIEF

For all the reasons stated herein, Starpower respectfully requests that the Commission adopt and apply the decision reached in the Order resolving the Cox/Bell Atlantic proceeding and declare that the traffic exchange provisions contained in the Agreement between the parties are fully applicable to telephone exchange service calls that terminate to ISP customers.

Respectfully submitted,



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Counsel for Starpower Communications, LLP.

Dated: February 3, 1999

268531.1

^{63/} *Teleport Communications Group, et al. vs. Illinois Bell Telephone Company*, Dkt. No. 97-0404, Illinois Commerce Commission Order at 14 (March 11, 1998).

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of February, 1999, a true and correct copy of the foregoing Petition of Starpower Communications, LLC For Declaratory Judgment Interpreting Interconnection Agreement with GTE South, Inc. and Directing GTE to pay reciprocal compensation for the termination of local calls to Internet service providers was served by first class mail, postage pre-paid upon:

Mr. Stephen C. Spencer
Director Regulatory and External Affairs
GTE South Incorporated
One James Center
901 East Cary Street
Richmond, Virginia 23219

Ms. Ann Lowery
Manager-Interconnection/Negotiations
GTE Network Services
NC999142
4100 N. Roxboro Road
P.O. Box 1412
Durham, N.C. 27702



Michael L. Shor

EXHIBIT 1

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December 28, 1998

Ms. O. Ann Lowery
GTE Network Services
NC999142
4100 N. Roxboro Road
Durham, NC 27702

Re: Reciprocal Compensation for Local Traffic Delivered to Internet Service Providers

Dear Ann:

I am writing to you on behalf of Starpower Communications, LLC ("Starpower") and in response to communications you have had recently with James Warta regarding the position of GTE South Incorporated ("GTE") that it will not pay reciprocal compensation to Starpower for local exchange traffic in Virginia delivered to Internet Service Providers ("ISPs"). The position asserted by GTE, that traffic delivered to ISPs is not local traffic eligible for reciprocal compensation, is wholly untenable. As you know, pursuant to Section 252(i) of the Telecommunications Act of 1996, Starpower has opted into the MFS/GTE Interim Virginia Co-Carrier Agreement executed by GTE on September 30, 1996 ("Interconnection Agreement"). Nothing in the Interconnection Agreement between MFS and GTE allows GTE to treat traffic delivered to ISPs using local exchange service as anything but local traffic. Moreover, the Virginia State Corporation Commission has already decided that local exchange traffic delivered to ISPs is eligible for reciprocal compensation.¹ Starpower hereby demands that GTE comply with the clear terms of the Interconnection Agreement and the *Cox Virginia Telcom* decision and treat all local traffic, including traffic delivered to ISPs, as eligible for reciprocal compensation.

It is our understanding that GTE has taken the position that the *Cox Virginia Telcom* decision is not applicable to GTE because GTE was not a party in that litigation. While this fact may be true as the basis for a purely procedural argument, it would strain credulity for GTE to assert that the language in the Cox Virginia Telcom interconnection agreement with Bell Atlantic of Virginia, Inc. that was found to obligate Bell Atlantic to pay reciprocal compensation to Cox Virginia Telcom for telecommunications traffic delivered to ISPs is so different from the corresponding language in the

¹ *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).

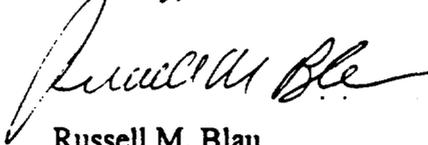
Ms. Ann Lowry
December 28, 1998
Page 2

Interconnection Agreement that a contrary ruling by the Virginia State Corporation Commission would be warranted.

Starpower considers GTE's statements to Starpower that GTE will not pay reciprocal compensation to Starpower for the termination of local traffic to Internet service providers to be an anticipatory breach of the Interconnection Agreement. Accordingly, and pursuant to Section XVIII of the Interconnection Agreement, Starpower hereby requests a conference with GTE to discuss the dispute and seek resolution. As agreed, this conference shall occur at least at the Vice President level for each party. In the case of GTE, its Vice President of Regulatory Affairs, or equivalent office, is obligated to participate in the meeting. Scott Burnside, Senior Vice President, Regulatory and Government Affairs of RCN Corporation (Starpower's parent company), will participate on behalf of Starpower.

We ask that you respond to this letter no later than Friday, January 8, 1998. Please respond directly to the undersigned. In the event that GTE continues this dispute and a conference must be held, Starpower asks that the requested conference be scheduled no later than Friday, January 15, 1998. In the event that Starpower does not receive a timely response to this letter, or that the conference is not held by January 15, 1998, Starpower shall file a complaint with the Virginia State Corporation Commission seeking to enforce the terms of the Interconnection Agreement. We look forward to your response and a speedy resolution of this dispute.

Sincerely,



Russell M. Blau

Counsel for Starpower Communications, LLC

cc: Scott Burnside
Joseph Kahl
James Warta
Tony Peduto
Glenn Richards, Esq.