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June 30, 1998

BY HAND DELIVERY

Ms. Blanca Bayo, Director
Division of Records and Reporting
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 971478-TP, 980184-TP, 980495-TP, and 980499-TP

Dear Ms. Bayo:

Enclosed for filing are an original and 15 copies of WorldCom's Posthearing Brief in the above-referenced dockets.

Please acknowledge receipt of this document by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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

In re: Complaint of Teleport Communications)
Group Inc./TCG South Florida Against BellSouth)
Telecommunications, Inc. For Breach of Terms)
of Interconnection Agreement under Section 252)
of the Telecommunications Act of 1996, and)
Request for Relief.)
_____)

Docket No. 980184-TP

In re: Complaint of Intermedia Communications)
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. 980495-TP

In re: Complaint by MCI Metro Access)
Transmission Services, Inc. Against BellSouth)
Telecommunications, Inc. For Breach of Approved)
Interconnection Agreement by Failure to Pay)
Compensation for Certain Local Traffic.)
_____)

Docket No. 980499-TP
Filed: June 30, 1998

**POSTHEARING BRIEF OF
WORLD COM TECHNOLOGIES, INC.**

WorldCom Technologies , Inc., for itself and its subsidiary Metropolitan Fiber Systems of Florida, Inc. (hereinafter, collectively "WorldCom"), through undersigned counsel, herewith jointly submit this posthearing brief.

I. BASIC POSITION

The WorldCom-BellSouth Interconnection Agreement (“Agreement”) is clear and unambiguous — each party is required to compensate the other for all ISP traffic. Even if the Commission finds the Agreement ambiguous, reciprocal compensation is still required under the Agreement due to the express language of the Telecommunications Act of 1996, prior orders of this Commission, prior FCC rulings, rulings of other state Commission, and custom and usage in the industry.

II. ISSUES AND POSITIONS

ISSUE 1: Under their Florida Partial Interconnection Agreement, are WorldCom Technologies, Inc./MFS Communications Company, Inc. and BellSouth Telecommunications, Inc., required to compensate each other for transport and termination of traffic to Internet Service Providers? If so, what action, if any, should be taken?

SUMMARY OF POSITION: *Yes. The Agreement clearly requires reciprocal compensation for ISP traffic. If found ambiguous, the extrinsic evidence also supports this conclusion. BellSouth should be ordered to pay reciprocal compensation plus interest for all ISP traffic.*

ANALYSIS AND ARGUMENT:

BellSouth’s unilateral decision to terminate reciprocal compensation to WorldCom and other ALECs for traffic terminating to ISPs is a direct violation of the WorldCom-BellSouth interconnection agreement (“Agreement”)¹ and the orders of this Commission. The record in this

¹ The Agreement is the “Partial Interconnection Agreement” dated August 27, 1997, and approved by this Commission in Order No. PSC-97-1508-FOF-TI; this order is listed on Hearing Exh. 1.

case conclusively demonstrates that the WorldCom-BellSouth Agreement is not ambiguous, and it requires BellSouth to fully compensate WorldCom for terminating traffic to ISPs. Moreover, in the event that there is any doubt as to the meaning of the reciprocal compensation obligations under the Agreement, the record further demonstrates that any extrinsic evidence as to the meaning of the interconnection agreements also requires BellSouth to fully compensate WorldCom and the other ALEC for terminating traffic to ISPs. BellSouth should be ordered to comply with the Agreement and fully compensate WorldCom for traffic terminating to ISPs.

**I. THE CONTRACT IS CLEAR AND UNAMBIGUOUS:
RECIPROCAL COMPENSATION IS REQUIRED FOR ISP CALLS**

One of the fundamental tenants of contract law is the requirement that a court must first look solely within the four corners of the contract to resolve any dispute regarding the meaning and effect of the contract's language. If the contract is clear and unambiguous on its face, then the court must give full effect to the words in the contract. Board of Public Instruction of Dade County v. Fred Howland, Inc., 243 So.2d 221, 223 (Fla. 3d DCA 1971). Only if the court finds that the plain meaning of the contract is ambiguous, then and only then may the court look to extrinsic evidence in order to interpret the contract. Gulf Cities Gas Corp. v. Tangelo Park Service Co., 253 So.2d 744, 748 (Fla. 4th DCA 1971). The rationale for this approach is simple: "It is the law in Florida that the language used in a contract is the best evidence of the intent and meaning of the parties." Boat Town U.S.A., Inc. v. Mercury Marine Div., 364 So.2d 15, 17 (Fla. 4th DCA 1978).

The language in the WorldCom-BellSouth Agreement is clear and unambiguous on its face.

The reciprocal compensation provisions of Section 5.8.1 of the Agreement provide as follows:

Reciprocal Compensation applies for transport in termination of Local Traffic (including EAS and EAS-like traffic) billable by BST or MFS which a Telephone

Exchange Service Customer originates on BST's or MFS' network for termination on the other Party's network.

As Mr. Ball testified: "So under this provision we need to know what is -- what does the agreement say local traffic is. Is the traffic billable by BellSouth or MFS? Does the telephone exchange service customer originate on either party's network, and does it get terminated on the other carriers network?" Ball, Tr. 49.

Turning first to the Agreement, the term "Local Traffic" is defined in Section 1.40 of the Agreement as:

calls between two or more Telephone Exchange service users where both Telephone Exchange Services bear NPA-NXX designations associated with the same or local calling area of the incumbent LEC or other authorized area (e.g., Extended Area Service Zones in adjacent local calling areas). Local Traffic includes traffic types that have been traditionally referred to as "local calling" and as "extended area service (EAS.)" All other traffic originates and terminates between end-users within the LATA is toll traffic. In no event shall the Local Traffic area for purposes of local call termination billing between the parties be decreased.

Ball, Tr. 27-28. Critically, it must be noted at the outset that this definition of local traffic does not contain any exceptions or exclusions for ISP traffic. Indeed nowhere within the Agreement is there any language that could be construed as constituting an exception for ISP calls from the requirements for reciprocal compensation or the definition of local traffic. Ball, Tr. 41, 50; see also, Martinez, Tr. 208-209.

As for the meaning of the various elements of the definition of local traffic, Mr. Ball testified that calls to a WorldCom local customer that happens to be an ISP are no different than calls to any other local customer. The BellSouth customer that is making a call to a WorldCom ISP utilizes BellSouth telephone exchange services that have a local NPA-NXX. Moreover, the ISP customer

that is being called also subscribes to a WorldCom telephone exchange service that has an NPA-NXX that is a local call to the BellSouth customer. Ball, Tr. 49-50.

With respect to the balance of the definition, even BellSouth does not dispute the fact that these types of calls are billable by MFS or BellSouth, that BellSouth accounts for these calls as local traffic, that the call is routed through the BellSouth network in the same manner as any other local call, and that the call clearly originates on a telephone exchange service of BellSouth. Ball, Tr. 49-50.

The only issue raised by BellSouth with respect to the definition of local traffic in the Agreement is the meaning of the requirement that the call terminate on the network of the other party. Hendrix, Tr. 257. However, Mr. Ball, in testimony that was not refuted by BellSouth, stated: “Standard industry practice is that a call is terminated essentially when it’s answered; when the customer that is buying the telephone exchange service that has the NPA-NXX answers the call by – whether it’s a voice great phone, if it’s a fax machine, and answering machine or, in the case of an ISP, a modem.” Ball, Tr. 50-51.

BellSouth’s argument that the call merely transits the ALEC network (Hendrix, Tr. 229) ignores this answer function by the ISP and the fact that it constitutes a telephone call termination. Moreover, on cross examination, Mr. Hendrix had to admit that there were examples of “end-to-end calls” that actually involved separate and distinct terminations. Hendrix, Exh. 7, at 83-87. Indeed, Mr. Hendrix further acknowledged that for billing purposes BellSouth would treat a 1+ dialed call to an ISP as a separate call that terminates at the ISP. Hendrix, Exh. 7, at 106-107. Thus, the transit argument does not explain what is happening in calls to ISPs.

In addition to the transit argument, BellSouth attempts to cloud the plain meaning of these

contractual provisions by arguing that it never intended for this language to encompass calls that terminate to an ISP. Hendrix, Tr. 266. However, as a matter of law, a party cannot challenge the plain meaning of a contractual provision by arguing that extrinsic evidence creates an ambiguity. Lambert v. Berkley South Condominium Assn., 680 So.2d 588, 590-91. Thus, irrespective of any merit to BellSouth's intent argument, the parties' statements of intent cannot be considered if this Commission determines that the plain meaning of the contract is understandable.

On the basis of the language in this Agreement, the only proper conclusion is that the language is clear and unambiguous. Therefore, the Commission should find that the WorldCom-BellSouth Agreement requires the payment of reciprocal compensation for calls that terminate to an ISP.

II. EVEN IF FOUND AMBIGUOUS, RECIPROCAL COMPENSATION IS STILL REQUIRED FOR ISP TRAFFIC

Basic contract law requires that a court may look behind the words used in a contract if and only if the ambiguity exists on the face of the document. Boat Town U.S.A., 364 So.2d at 17. There should be no dispute over the plain meaning of this Agreement, especially given the lack of any exceptions to exclude ISP traffic from the reciprocal compensation obligations. However, in the event that the Commission believes that there is some ambiguity in the words used in this Agreement, the extrinsic evidence of record only further substantiates BellSouth's obligation to pay reciprocal compensation for calls terminating to an ISP.

The Federal Telecommunications Act of 1996 ("1996 Act") requires that local exchange carriers such as BellSouth "establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). Under the Agreement, reciprocal

compensation obligations apply to “local traffic,” which is defined in Section 1.40 as “calls between two or more Telephone Exchange service users where both Telephone Exchange Services bear NPA-NXX designations associated with the same local calling area of the incumbent LEC or other authorized area (e.g., Extended Area Service Zones in adjacent local calling areas).” The FCC has a similar definition. See 47 C.F.R. § 51.701 (“Local traffic is traffic that originates and terminates within a local service area”). As Mr. Ball discussed in his testimony, all of the surrounding facts and circumstances demonstrate BellSouth’s obligation to pay reciprocal compensation for calls the terminate to ISPs.

A. The Parties’ Actions Reveal Their Intent

Both WorldCom and BellSouth agree that the subject of reciprocal compensation for ISP traffic was never openly discussed during any of the negotiations. Ball, Tr. 62; Hendrix, Tr. 277. However, the parties dispute why this subject never arose. Mr. Ball testified that he understood this traffic to be local, and that if BellSouth wanted to exclude these calls, it was BellSouth’s obligation to raise the issue. Ball, Tr. 62-64. On the other hand, Mr. Hendrix testified that BellSouth never considered these calls to be local traffic, and that it was WorldCom’s obligation to raise this as an issue. Hendrix, Tr. 300-301. Simple logic and common sense reveal that the duty to separately address this issue lay squarely with BellSouth, and that BellSouth’s failure to explicitly address this traffic does not exempt BellSouth from its obligation to pay reciprocal compensation.

Calls to ISPs are dialed on a local 7-digit or local 10-digit basis. Thus, even if BellSouth is correct in its opinion that these calls constitute interstate calls, the contract itself must, first, provide an exception in the definition for local traffic, since calls to ISPs are dialed like any other local NPA-NXX call within the meaning of the Agreement; and second, establish a means to separately record

and exclude these calls so compensation will not be paid for them.

With respect to an explicit exception for ISP calls, as has been previously discussed, an examination of the contract indicates that there is no exception language anywhere within the Agreement to exclude ISP calls. On the other hand, when exceptions were needed, they were drafted and included within the Agreement. Ball, Tr. 62-64.

With respect to a recording mechanism to segregate the traffic, the Agreement is also silent on this subject. Thus, there is no stated methodology for identifying this traffic and, assuming BellSouth is correct, for ensuring that this traffic is excluded from compensation. So whose obligation was it to raise this issue? An examination of the mechanics of the Agreement reveals that if BellSouth wanted to exclude this traffic, it was BellSouth's duty to have this traffic addressed. As the cross-examination of Mr. Hendrix by Commissioner Clark makes clear, it was BellSouth's obligation to raise this issue because without exception language and an exclusion process ISP calls would be included with all other local traffic. Hendrix, Tr. 297-301. However, BellSouth did not begin to undertake any measures to identify and exclude this traffic until just prior to its August 1997 letter advising all ALECs that BellSouth would not pay compensation on ISP calls, which was nearly a year after the execution of the WorldCom-BellSouth Agreement and nearly a year-and-a-half after the effective date of the 1996 Act. Hendrix, Tr. 303.

The best Mr. Hendrix could offer as an excuse for BellSouth's failure to include this issue was its concern with the imbalance of traffic. Hendrix, Tr. 301. But this argument, and BellSouth's corresponding economic sense argument, do not rescue BellSouth's position.

The traffic imbalance argument simply does not hold up given contemporary events. Less than a year prior to the execution of the WorldCom-BellSouth Agreement, BellSouth participated

in this Commission's proceedings to investigate reciprocal compensation under state law. During those proceedings, BellSouth executed interconnection agreements that established compensation caps for traffic that was out of balance by more than 105%. See, e.g., Order No. PSC-96-0082-AS-TP at 10-11 (Jan. 17, 1996). Meanwhile, in the interconnection docket, BellSouth advocated usage-based pricing for reciprocal compensation in order to ensure that the terminating carrier was properly compensated for all of its transport and termination costs. Indeed, one of the primary consequences of usage-based compensation is that it encourages ALECs to seek customers with high volumes of terminating traffic as a means of increasing their total compensation. Ball, Tr. 46-47. Thus, while the Commission in that docket approved bill and keep, all the parties were well versed on the consequences of a usage-based compensation system. See, Order No. PSC-96--445-FOF-TP, (Mar. 29, 1996).

Against this background, some six months after the bill and keep order the WorldCom-BellSouth Agreement is executed. Ball, Tr. 64-65. Given this background, and the requirement for usage-based compensation in the WorldCom-BellSouth Agreement at issue here, BellSouth should have immediately undertaken action to record and segregate ISP traffic. It did not.

BellSouth's lack of action is especially glaring given Mr. Hendrix's acknowledgment that there are transport and termination costs associated with calls terminating at an ISP. Hendrix, Tr. 320. In essence than, it appears that BellSouth's now preferred methodology for reciprocal compensation is usage-based rates except for ISP traffic, for which BellSouth wants bill and keep. Hendrix, Tr. to 321-22.

BellSouth's economic sense argument also does not justify BellSouth's attempt to exclude ISP calls from its reciprocal compensation requirement. In essence, BellSouth argues that it would

never sign an agreement where it would have to pay out in reciprocal compensation more than it would receive from its customer. Hendrix, Tr. 235-37. This argument is nothing more than an after-the-fact rationalization predicated on some assumptions that are not true. Ball, Tr. 45; Hendrix, Exh. 7, at 107-110. Moreover, this argument ignores the reciprocal obligation to compensate BellSouth at exactly the same rates for calls that terminate to ISPs that are BellSouth customers. Ball, Tr. 45. In short, there is no sense to these economics.

In the final analysis, the intent of the parties is revealed not just by what is said, but by an analysis of all of the facts and circumstances surrounding the disputed issue. In this case, all of the facts and circumstances confirm that with the Agreement's definition of local traffic and the well understood means by which ISPs are reached on a local 7-digit or local 10-digit basis, the duty was on BellSouth to affirmatively act if it wanted to exclude ISP calls. BellSouth did not. Accordingly, BellSouth's failure to address these issues should not be used to permit it to unilaterally terminate reciprocal compensation for calls that terminate to ISPs.

B. ISP Access Is By A Local Call

In Order No. 21815 this Commission specifically found that calls to enhanced service providers, which includes ISPs, constitutes local traffic. Ball, T. 33-34. Mr. Hendrix attempts to dismiss this order on the theory that it was only an interim order based upon BellSouth's then position, that it now asserts has been overruled. Hendrix, Tr. 265-66, 269, 272, 330-31. However Mr. Hendrix cannot identify any order of this Commission implementing a different policy, nor can he identify any FCC or judicial order that expressly overrules the Commission's order. Hendrix, Hearing Exh. 7, at 81-82. As Commissioner Deason pointed out, what BellSouth seeks is a leap of faith — a leap of blind, stupid faith: because the Florida Commission and the FCC both found these

types of calls to be local, they are therefore interstate! Hendrix, Tr. 324-25.

The BellSouth analysis of the applicable FCC orders reveals a complete misunderstanding of the applicable decisions that should be rejected by this Commission. There are five basic errors in BellSouth's opinion that ISP calls are interstate calls.

1. Call Termination

The first problem with BellSouth's analysis is that it misconstrues the concept of call termination. Hendrix, Tr. 228-230. The FCC has defined termination for purposes of reciprocal compensation as the delivery of a call to the called party's premises:

We define "termination" for purposes of section 251(b)(5) [the reciprocal compensation provision of the 1996 Act] as the switching of traffic that is subject to section 251(b)(5) [e.g. local traffic] at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises.

FCC 96-325, In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order ¶ 1040 ("First Report and Order"). A call to an ISP is terminated at the ISP. The caller dials the ISP's 7-digit number (or 10-digit number in those areas with 10-digit local dialing). If the call is originated by a BellSouth caller to an ALEC-served ISP, it is transported on BellSouth's network to the ALEC's switch and then "delivered" to the ISP's premises. As Mr. Ball testified, "Standard industry practice is that a call is terminated essentially when it's answered; when the customer that is buying the telephone exchange service that has the NPA-NXX answers the call by – whether it's a voice grade phone, if it's a fax machine, an answering machine or, in the case of an ISP, a modem." Ball, Tr. 50-51. BellSouth did not refute this basic telephony fact.

The FCC has also recognized in other contexts that calls to ISPs are local and therefore

terminate at the ISP. For example, the FCC commented on May 16, 1997, that: “To maximize the number of subscribers that can reach them through a local call, most ISPs have deployed points of presence.” In re Access Charge Reform, First Report & Order, 12 FCC Rcd. 15982, ¶ 342 n.502 (emphasis added) (“Access Charge Order”). It is axiomatic that the ISP is the called party when, as the FCC stated, callers “reach them through a local call.” Id. The FCC also directed local exchange carriers to address state regulators with any complaints about inadequate compensation for high volumes of traffic to ISPs, thereby recognizing the local nature of calls to ISPs. Id. ¶ 346. Thus, calls to ISPs terminate at the ISP.

Even BellSouth has agreed with this termination fact – but at the FCC and when it was seeking relief under section 272 of the 1996 Act. Commissioner Clark directly asked Mr. Hendrix as to how he could square that position before the FCC “with the notion you’re advancing in this case that the whole thing is interstate?” Mr. Hendrix answer was the same old refrain: it’s local for not applying access charges but yet the FCC still has jurisdiction over it. Tr. 285-88. In other words, he can’t square the answer because the two actions don’t square.

2. Information Services versus Telecommunications Services

The second problem with BellSouth approach to local calls is that BellSouth fails to recognize the distinction between telecommunications services and information services. Hendrix, Tr. 382-84. In a call to an ISP, the only telecommunications service provided to the caller is the call to the ISP. Beyond the ISP, as the FCC found, ISPs “generally do not provide telecommunications.”

1998 Universal Service Report ¶¶ 15, 55.² BellSouth's assertion that the distinction is irrelevant is incorrect. Hendrix, Tr. 284.

The FCC's determination that ISPs do not provide telecommunications was mandated by the 1996 Act's express distinction between telecommunications and information services. "Telecommunications" is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).³ By contrast, "information services" is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20).

Despite this statutory distinction, BellSouth claims that the call is interstate because from the end user's perspective, the ISP's point of presence is merely a routing point that gives that end user access to the databases or persons of his or her own choice. To the contrary, the FCC specifically rejected this approach. 1998 Universal Service Report ¶¶ 72-82. The FCC recognized that the 1996 Act's distinction between telecommunications and information services is crucial. The FCC noted

² The FCC qualified this response only because there remain unresolved questions as to whether newly-emerging phone-to-phone voice telephony provided over the Internet is a telecommunications service. 1998 Universal Service Report ¶¶ 84, 89. The FCC opted not to make any classification decision about phone-to-phone voice telephony because it lacked a sufficient record on the issue. Id. ¶ 90.

³ "Telecommunications service" is "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public . . ." 47 U.S.C. § 153(46).

that “Congress intended ‘telecommunications service’ and ‘information service’ to refer to separate categories of services” despite the appearance from the end user’s perspective that it is a single service because it may involve telecommunications components. 1998 Universal Service Report ¶ 57; see also id. ¶ 58. In fact, the FCC recognized that Congress intended the categories of ‘telecommunications’ and ‘information service’ to be “mutually exclusive.” Id. ¶ 59 (emphasis added).

As the FCC explained, the distinction between telecommunications and information services is functional, and does not depend on who provides the service or by what method:

A telecommunications service is a telecommunications service regardless of whether it is provided using wireline, wireless, cable, satellite, or some other infrastructure. Its classification depends rather on the nature of the service being offered to customers. Stated another way, if the user can receive nothing more than pure transmission, the service is a telecommunications service. If the user can receive enhanced functionality, such as manipulation of information and interaction with stored data, the service is an information service.

Id. ¶ 59 (emphasis added).

The FCC applied these definitions to Internet services in the 1998 Universal Service Report and reached a carefully drawn conclusion that the Internet access services that ISPs provide are information services, not telecommunications services -- and this remains true even though they provide information services “via telecommunications.” Id. ¶ 73. The FCC stated:

We find that Internet access services are appropriately classified as information, rather than telecommunications, services. Internet access providers do not offer a pure transmission path; they combine computer processing, information provision, and other computer mediated offerings with data transport.

Id. The FCC explained that ISPs provide information services, not telecommunications:

- ISPs “typically provide their subscribers with the ability to run a variety of applications The service cannot accurately be characterized from this perspective as a ‘transmission, between or among points specified by the user’; the proprietor of a Web page does not specify the points to which its files will be transmitted, because it does not know who will seek to download its files. Nor is it ‘without change in form or content,’ since the appearance of the files on a recipient’s screen depends in part on the software that the recipient chooses to employ. When subscribers utilize their Internet service provider’s facilities to retrieve files from the World Wide Web, they are similarly interacting with stored data, typically maintained on the facilities of either their own Internet service provider (via a Web page ‘cache’) or on those of another. Subscribers can retrieve files from the World Wide Web, and browse their contents, because their service provider offers the ‘capability for . . . acquiring . . . retrieving [and] utilizing . . . information.’ Most of the data transport on the Internet relates to the World Wide Web and file transfer.” Id. ¶ 76 (emphasis added).
- ISP offers “a capability for generating, acquiring, storing . . . retrieving . . . and making available information through telecommunications.” The FCC found this service to be “indistinguishable” from a “database proprietor offering subscribers access to information it maintains on-site,” which is “the paradigmatic example of an information service.” Id. ¶ 77.
- The “provision of Internet access service involves data transport elements: an Internet access provider must enable the movement of information between customers’ own computers and the distant computers with which those customers seek to interact. But the provision of Internet access service crucially involves information processing elements as well; it offers end-users information service capabilities inextricably intertwined with data transport. As such, we conclude that it is appropriately classed as an ‘information service.’” Id. ¶ 80 (emphasis added) (footnote omitted).

To be sure, ISPs use telecommunications in providing information services. See id. ¶ 81.

But the FCC in 1997 rejected the assertion BellSouth makes here that information services are like telecommunications merely because information services are offered “via telecommunications”:

We observe that ISPs alter the format of information . . . while the statutory definition of telecommunications only includes transmissions that do not alter the form or content of the information sent. When a subscriber obtains a connection to an [ISP] via voice grade access to the public switched network, that connection is a telecommunications service and is distinguishable from the [ISP’s] offering. The language in Section 254(h)(2) also indicates that information services are not inherently telecommunication services.

In re Federal-State Joint Board on Universal Service, CC Dkt. No. 96-45, Report & Order ¶ 789 (emphasis added) (May 8, 1997) (“1997 Universal Service Order”). As the FCC reported to Congress in 1998: “When an entity offers subscribers the ‘capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications,’ it does not provide telecommunications; it is using telecommunications.” 1998 Universal Service Report ¶ 41.⁴

Thus, under the 1996 Act and the FCC regulations, the telecommunications and information service elements of what BellSouth claims is an “ISP call” are severable. The telecommunications component is provided jointly by BellSouth and WorldCom, and is purchased by an end user from BellSouth. The information service is provided separately by the ISP, and is sold separately to the end user by the ISP. The effect of this distinction is that the telecommunications component is no different from any other local telephone call, and is subject to the same obligations as all other local telephone traffic, including reciprocal compensation. Mr. Hendrix’ assertion that its all telecommunications or irrelevant just is not true.

3. The FCC Has Not Determined That ISPs Provide Interexchange Service

BellSouth’s claim that the ISPs provide interstate or interexchange access services is likewise incorrect. Hearing Exh. 7, at 120 (Late Filed Deposition Exhibit No. 2) BellSouth begins its analysis by citing the 1983 FCC order that created the access charge regime arising out of the Bell System’s breakup in the early 1980s. In re MTS & WATS Market Structure, 97 F.C.C.2d 682

⁴ As the FCC noted, “we do not treat an [ISP] as providing as providing a telecommunications service to its subscribers. . . . The [ISP], indeed, is itself a user of telecommunications; that is, telecommunications is an input in the provision of an information service.” Id. ¶ 69 n. 138.

(1983). In that order, the FCC determined that ISPs could continue to obtain the same local telephone service as any other business customers. BellSouth seized on that decision to argue that calls to ISPs are like interexchange calls.

The 1983 Order, however, provides little insight into the resolution of the issues before this Commission in light of the passage of time and the 1996 Act. Fourteen years later, the FCC noted in May 1997 that its prior discussion of information services did not provide significant insight into issues under the 1996 Act, in part because technology had changed.⁵ The FCC stated that, “given the evolution in technologies and markets since we first established access charges in the early 1980s, it is not clear that ISPs use the public switched network in a manner analogous to IXC’s [interexchange carriers].” Access Charge Order ¶ 345.⁶

Indeed, in order for the disputed traffic to be exchange access under the 1996 Act, the service provided by the ISP must be “telephone toll service,” which also means it must be “telephone” and “telecommunication” services. The 1996 Act defines exchange access as “the offering of access to telephone exchange services of facilities for the purpose of originating or terminating telephone toll service.” 47 U.S.C. § 153(16). The service provided by ISPs is not telephone toll service because

⁵ Moreover, in the 1998 Universal Service Report, the FCC reiterated that “the 1996 Act effectuated landmark changes in a variety of areas of communications policy.” Id. ¶ 39. The FCC noted that the 1996 Act’s definitions of telecommunications and information services were the culmination of almost two decades of regulatory evolution. Id.

⁶ In fact, the “World Wide Web,” which most Internet Traffic uses, did not even exist until 1989. 1998 Universal Service Report ¶ 65.

it is not telecommunications.⁷ See 1998 Universal Service Report ¶¶ 15, 55. Instead, ISPs provide information services, of which telecommunications is simply a component. See id. ¶ 40 n.78. Because ISPs do not provide telecommunications, they cannot provide telephone toll service, and the disputed traffic cannot be exchange access as defined by the 1996 Act or the interconnection agreements. The orders relied upon by Mr. Hendrix are no longer relevant in view of subsequent technology, statutory enactments and FCC orders.

4. Local Traffic to ISPs is Distinct from Feature Group A Traffic

BellSouth also incorrectly claims that local calls to ISPs are indistinguishable from Feature Group A exchange access traffic. Ball, Tr. 75-77; Hendrix, Tr. 293-94. BellSouth's claim rests solely on the technical similarity that both calls are commenced by dialing a 7-digit local number, and ignores dissimilar technical aspects and the legal distinctions between local exchange and exchange access traffic.

First, no one disputes that Feature Group A traffic is exchange access. The 1996 Act and the interconnection agreements make this express. The parties specifically agreed that Feature Group A should be treated as exchange access in the interconnection agreements because it has characteristics of local traffic, even though it is not local traffic. BellSouth offers Feature Group A out of its exchange access tariff. If service to ISPs is exchange access it should be provided under the exchange access tariff and, like the situation with Feature Group A, the agreement should have

⁷ Telephone toll service is defined by the Act as "telephone service between stations in different exchange areas for which there is made a separate charge not included in the contracts with subscribers for exchange service." 47 U.S.C. § 153(48). Although the Act does not define "telephone service" it does define "telephone exchange service" as "a . . . service provided . . . by which a subscriber can originate and terminate a telecommunications service" within a local exchange. 47 U.S.C. § 153(47).

expressly excluded those calls which are treated as local calls for all other purposes.

Second, when a customer of BellSouth uses Feature Group A service to place a long distance call, BellSouth and the selected IXC are already providing a telecommunications service to its customer. The communications provided never alters from or becomes anything but telecommunications. In contrast, once an ISP answers the call, the telecommunications service ends and the information services begin.

Third, technical and billing distinctions exist between Feature Group A and ISP calls, distinctions that are fundamental to the differences between them. Like ordinary business customers ordering regular local lines, an ISP cannot specify any of the technical parameters of the lines it orders. In effect, the ISP purchases its lines “off the shelf” like any other customer. By contrast, the purchaser of an Feature Group A line must specify a number of custom technical and transmission characteristics, as well as the “percent interstate usage” expected for that line. Similarly, BellSouth bills ISP calls and Feature Group A calls differently. Although a Feature Group A call appears on the end-user’s phone bill as a local call, the entity that purchased the Feature Group A line is given a credit equal to the amount of the local bill on his bill to offset the local charge paid by the end-user. ISPs, like other business customers, do not receive any such “credit.”

In short, BellSouth’s Feature Group A argument simply has no basis in reality. As Mr. Ball testified,

[If BellSouth was] not charging for it because the FCC said they couldn’t, it would have made sense that they would have sold the service out of their Feature Group A service tariff, and they’d have some provision relative to Internet providers. But what in actuality they’ve done is they sold the service out of their retail local exchange service all along and accounted and billed for it under those means.

Ball, Tr. 78. As Commissioner Clark rightly concluded, “if we are to buy into their argument that

it's like Feature Group A service, it would have made sense for them to sell it under either that tariff, the Feature Group A, or they could have done it under another tariff." Tr. 78. As is clear from the record, BellSouth did neither.

5. Information Services and Telecommunications Services are Severable

BellSouth argues that the FCC has determined that a telecommunications service cannot be severed into separate pieces, but must be viewed jurisdictionally on an end-to-end basis. Hendrix, Tr. 228-233. The FCC cases BellSouth relies on are inapposite, however, because the FCC merely found that a single telecommunications service is not divided into separate telecommunications services simply because it passes through a switch. By contrast, as discussed above, the FCC has determined that the telecommunications services relevant here are severable from the information services, and that determination is reinforced by the recent discussion of this subject in the FCC's April 1998 Report to Congress.

In its Report to Congress, the FCC noted that it was investigating whether to extend the benefits under the 1996 Act of telecommunications carriers to ISPs. In that context, the FCC stated:

We make no determination here on the questions of whether competitive LECs that service Internet service providers . . . are entitled to reciprocal compensation for terminating Internet traffic. That issue . . . does not turn on the status of the Internet service provider as a telecommunications carrier or an information service provider.

1998 Universal Service Report at 52-53 n.220.

This reinforces the distinction between information services and telecommunications as it relates to the issue of reciprocal compensation. The thrust of footnote 220 is that whether a local exchange call terminating with an ISP is eligible for reciprocal compensation depends not on

whether the ISP is *classified* as a carrier or information provider, but on whether the ISP *provides* a telecommunications or information service. As described above, the FCC explained at length in the 1998 Universal Service Report that this issue turns on whether telecommunications or information *service* is being provided. Thus, the FCC's analysis focuses on the function the ISP provides, not its status as an ISP. Undoubtedly, here the ISP is providing information services. By reaffirming that the distinction between an ISP and a common carrier is the functionality of the services offered, the FCC left open the possibility that some day, in some proceeding, and based on a full record, it might determine that phone to phone voice telephony has the characteristics and functionality of telephone service. If so, the FCC indicated it might regulate that particular service. But since the FCC has not yet made such a determination, such speculation is irrelevant for purposes of the present proceeding.

C. The ALTS Letter Is Not Relevant - It's A State Question

In an attempt to bolster its position, BellSouth attempts to rely upon the ALTS letter to the FCC. Quite simply, rationalizes Mr. Hendrix, ALTS would not have requested a ruling from the FCC unless it believed that the traffic was interstate. Hendrix, Tr. 325. But Mr. Hendrix's conclusion regarding the ALTS letter are wrong.

First, BellSouth ignores basic fact that the ALTS letter asks the FCC to confirm that nothing done in any subsequent decision has changed the FCC's prior decisions that classified this traffic as local. Ball, Tr. 80. Thus, at its core, the ALTS letter merely seeks a re-affirmation of prior FCC policy regarding the classification of ISP traffic as local calls. Ball, Tr. 79.

Second, and more importantly, Mr. Hendrix ignores the fact that here in Florida, WorldCom and three other ALEC's have all filed petitions with this Commission for resolution of BellSouth's

failure to pay reciprocal compensation for ISP traffic. These petitions have all been filed pursuant to the Eighth Circuit Court decision that it is the duty of the states to resolve disputes under the state-approved interconnection agreements. Ball, Tr. 80; Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997).

Finally, pursuant to this Eighth Circuit Court ruling, petitions on this very same issue have been heard and decided by some 20 other states' regulatory commissions. With a degree of unanimity that is unprecedented, BellSouth's position has been rejected by every state agency in its service area that has decided the issue. More important, the position advocated by BellSouth here and by other LECs around the country has been rejected by every state regulatory agency to have considered and decided the question. Exh. 1 at 4-6. These decisions arise out of two distinct contexts: First, in actions brought by ALEC's to enforce the terms of approved agreements and, second, in situations where commissions were asked to arbitrate the terms of interconnection agreements. In both contexts the results have been the same: commission after commission has ruled that traffic terminated to an ISP was local in nature and was subject to the reciprocal compensation provisions of the Act.

Thus, when considering a petition to enforce or modify the terms of an approved interconnection agreement, the North Carolina Utilities Commission unequivocally rejected BellSouth's efforts to carve out local calls to ISPs from the reciprocal compensation provisions of an interconnection agreement based solely on the identity of the end user.⁸ The Utilities Commission stated its conclusion as follows:

⁸ *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).

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 when it is delivered to the called local exchange number of the end-user ISP.⁹

This is the very same result recently announced by the Tennessee Regulatory Authority.¹⁰ In the Tennessee decision, the Regulatory Authority 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.”¹¹ Similarly, in Georgia, the Hearing Officer has reached a similar conclusion.¹²

Other state agencies, considering the identical arguments as BellSouth has made elsewhere and makes here, have reached this same conclusion in their dealings with other LECs. For example, the New York Public Service Commission ordered New York Telephone to continue to pay reciprocal compensation for local exchange traffic delivered to ISPs served by MFS Intelenet of New York, Inc.¹³ The Maryland Public Service Commission also ruled that local exchange traffic to ISPs

⁹ *Id.* at p. 6.

¹⁰ *Petition of Brooks Fiber To Enforce Interconnection Agreement And For Emergency Relief*, Docket No. 98-00118, Order (Tenn. Regulatory Authority, June 2, 1998). The order was announced in open session, no written decision has been released yet.

¹¹ *Petition of Brooks Fiber To Enforce Interconnection Agreement And For Emergency Relief*, Docket No. 98-00118, Initial Order of Hearing Officer, at p. 19 (Tenn. Regulatory Authority, April 21, 1998).

¹² Initial Decision of Hearing Officer at pp. 6,7.

¹³ *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).

is eligible for reciprocal compensation,¹⁴ as did the Connecticut Department of Public Utility Control,¹⁵ the Public Utility Commission of Texas,¹⁶ the Michigan Public Service Commission,¹⁷ the Virginia State Corporation Commission,¹⁸ the Oklahoma Commission,¹⁹ the Illinois Commerce Commission,²⁰ and the Public Service Commission of Wisconsin.²¹

Recently, the United States District Court for the Western District of Texas, the first district court to address the merits of the reciprocal compensation issue in the context of an enforcement

¹⁴ 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.

¹⁵ *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).

¹⁶ *Complaint and Request For Expedited Ruling of Time Warner Communications*, PUC Docket No. 18082, Order (Tex. P.U.C. February 27, 1998). The Commission's decision was recently upheld by the United States District Court for the Western District of Texas. *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).

¹⁷ *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).

¹⁸ *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. October 24, 1997) at 2.

¹⁹ Final Order, Order No. 423626, issued June 3, 1998, Cause No. PUD 970000548.

²⁰ *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).

²¹ *Contractual Dispute About the Terms of an Interconnection Agreement Between Ameritech Wisconsin and TCG Milwaukee, Inc.*, Order, Docket Nos. 5837-TD-100, 6720-TD-100 (P.S.C. of Wisconsin, May 13, 1998).

action, soundly rejected the arguments that BellSouth and is advancing in this docket. In Southwestern Bell Telephone Company v. Public Utility Commission of Texas, No. MO-98-CA-043 (W.D. Tex., June 16, 1998), the Hon. Lucius Bunton affirmed the conclusions of the Public Utilities Commission of Texas that calls made to ISPs which otherwise fit the definitions of local traffic in the interconnection agreement at issue in the case, and in the 1996 Act, are local calls for purposes of reciprocal compensation. Considering the very same arguments that BellSouth makes to this Commission, Judge Bunton held as follows:

Thus, as end-users, ISPs may receive *local calls* that *terminate* within the local exchange network. The FCC recognizes that ISPs are ‘providers of information services [that] use . . . [local exchange] networks to receive *calls* from their customers.’ . . . In the instant case, the “call” from Southwestern Bell’s customers to Time Warner’s ISPs terminates where the telecommunications service ends at the ISPs’ facilities. As a technologically different transmission, the ISPs’ information service cannot be a continuation of the “call” of a local customer. Southwestern Bell is bound by its interconnection agreements because ‘*reciprocal compensation* for transport and termination of calls is intended for a situation in which two carriers collaborate to complete a local call . . . [where] the local caller pays charges to the originating carrier, and the originating carrier must compensate the terminating carrier for completing the call.’

Order at 22-23 (Citations and footnotes omitted; emphasis in original). Addressing the Texas Commission’s interpretation of the interconnection agreement at issue there, which is similar in all material respects to the ones at issue here, Judge Bunton stated as follows:

As a matter of law, with respect to ISP traffic, this Court agrees with the PUC’s finding that ‘[w]hen a transmission path is established between two subscribers in the same mandatory calling area, traffic carried on that path is local traffic, with the telecommunications service component of the call terminating at the ISP location.’ [] Moreover, based on a reasonable interpretation of the interconnection agreements, the PUC appropriately found that the agreements were not ambiguous and ‘that the definition of ‘local traffic’ in the applicable interconnection agreements includes ISP traffic that otherwise conforms to the definition.’

Order at 26 (Citations omitted).

Still other states have reached similar conclusions, albeit in the context of reviewing agreements reached through arbitration. Thus, when other LECs, in the course of arbitrations with ALECs, asserted similar arguments, that traffic terminated to enhanced service providers should be exempted from reciprocal compensation arrangements under their respective interconnection agreements, the states of Arizona,²² Delaware,²³ Colorado,²⁴ Minnesota,²⁵ Missouri,²⁶ Oregon,²⁷

²² *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.

²³ Arbitration Award, issued December 16, 1997, Docket No. 97-323.

²⁴ *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. The Colorado Public Utilities Commission has since affirmed its rejection of US West's efforts to exclude ISP traffic from reciprocal compensation by rejecting such a provision in a proposed US West tariff. *The Investigation and Suspension of Tariff Sheets Filed by US West Communications, Inc. With Advice Letter No. 2617, Regarding Tariffs for Interconnection, Local Termination, Unbundling and Resale of Services*, Docket No. 96A-331T, Commission Order, at 8, § I.C.1.c (Colo. P.U.C. July 16, 1997).

²⁵ *Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCImetro Access Transmission Services, Inc., and MFS Communications Company for Arbitration with US WEST Communications, Inc., Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996*, Order Resolving Arbitration Issues, Docket Nos. P-442, 421/M-96-855, P-5321, 421/M-96-909, P-3167, 421/M-96-729, 1996 Minn PUC LEXIS 188 (Minn. PUC Dec. 2, 1996) at 75-76.

²⁶ Arbitration Order, Case No. TO-98-278, issued April 23, 1998.

²⁷ *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) at 13.

Washington²⁸ and West Virginia²⁹ all declined to treat traffic to enhanced service providers, including ISPs, any differently than other local traffic.

These cases show the Commission that one federal district court and numerous state commissions, in exercising their duty to arbitrate and review interconnection agreements under the standards and terms enunciated in the Act and to interpret and enforce the provisions of those approved agreements, with the authority in their states equivalent to the Commission's powers in Florida, have decided that nothing in the Act provides for disparate treatment of traffic delivered to ISP customers. Even Mr. Hendrix had to concede that BellSouth's position has been soundly rejected in every state that has considered the issue. Hendrix, Exh. 7, at 87-88. These decisions, reaching from one end of the country to the other, should be considered by this Commission as persuasive evidence that BellSouth's position is totally without merit.

III. APPROPRIATE RELIEF

Based upon the evidence of record and the meaning and effect of the WorldCom-BellSouth Agreement, the Commission should enter an order: (1) enforcing the Interconnection Agreement as written, (2) directing the release of escrowed funds to WorldCom, and (3) directing the parties, WorldCom and BellSouth, to compensate each other for transport and termination of **all** local traffic, including local traffic that terminates at end-users who happen to be ISPs, whether previously billed

²⁸ *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 Communications, Inc. v. MFS Intelenet, Inc. Case No. C97-222WD (W.D. Wash., filed January 7, 1998).*

²⁹ *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).*

and unpaid or to be incurred and invoiced in the future. Ball, Tr. 38-39. As the Eighth Circuit has found, disputes under the interconnection agreements should be resolved by the state commissions, which is why this proceeding is here and not at the FCC. Ball, Tr. 47. Accordingly, the Commission should issue the indicated order.

ISSUE 2: Under their Interconnection Agreement, are Teleport Communications Group, Inc./TCG South Florida and BellSouth Telecommunications, Inc. required to compensate each other for transport and termination of traffic to Internet Service Providers? If so, what action, if any, should be taken?

SUMMARY OF POSITION: *Not at issue for WorldCom.*

ISSUE 3: Under their Interconnection Agreement, are MCImetro Access Transmission Services, Inc., and BellSouth Telecommunications, Inc., required to compensate each other for transport and termination of traffic to Internet Service Providers? If so, what action, if any, should be taken?

SUMMARY OF POSITION: *Not at issue for WorldCom.*

ISSUE 4: Under their Interconnection Agreement, are Intermedia Communications, Inc., and BellSouth Telecommunications, Inc., required to compensate each other for transport and termination of traffic to Internet Service Providers? If so, what action, if any, should be taken?

SUMMARY OF POSITION: *Not at issue for WorldCom.*

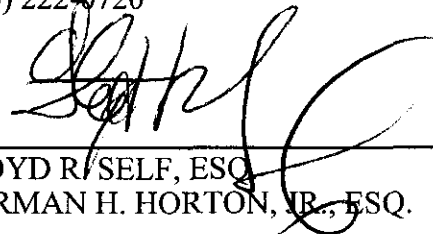
Dated this 30th of June, 1998.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of WorldCom's Posthearing Brief in Docket Nos. 971478-TP, 980184-TP, 980495-TP and 980499-TP has been furnished by Hand Delivery (*) and/or U.S. Mail to the following parties of record this 30th day of June, 1998:

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