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RECORDS AND
REPORTING

June 30, 1998

Ms. Blanca S. Bayo
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

RE: Docket Nos. 971478-TP (WorldCom), 980184-TP (Teleport),
980495-TP (Intermedia) and 980499-TP (MCI)

Dear Ms. Bayo:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Brief of the Evidence, which we ask that you file in the captioned dockets.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served on the parties shown on the attached Certificate of Service.

RECEIVED & FILED

Sincerely,

[Signature]
Edward L. Rankin III
Edward L. Rankin III (RW)

Enclosures

cc: All Parties of Record
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Docket Nos. 971478-TP, 980184-TP, 980495-TP and 980499-TP

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of WorldCom Technologies,)
Inc., against BellSouth Telecommunications,) Docket No. 971478-TP
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)

In re: Complaint of Teleport Communica-)
tions Group Inc./TCG South Florida against) Docket No. 980184-TP
BellSouth Telecommunications, Inc. for)
breach of terms of interconnection agree-)
ment under Section 252 of the Telecommuni-)
cations Act of 1996, and request for relief)

In re: Complaint of Intermedia Communica-)
tions, Inc. against BellSouth Telecommuni-) Docket No. 980495-TP
cations Inc. for breach of terms of Florida)
Partial Interconnection Agreement under)
Sections 251 and 252 of the Telecommunica-)
tions Act of 1996, and request for relief)

In re: Complaint by MCI Metro Access)
Transmission Services, Inc. against Bell-) Docket No. 980499-TP
South Telecommunications, Inc. for breach)
of approved interconnection agreement by)
failure to pay compensation for certain)
local traffic) Filed: June 30, 1998

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 Under their Interconnection Agreement, are MCI Metro 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?

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STATEMENT OF THE CASE

Section 251(b)(5) of the Telecommunications Act of 1996 ("Act") imposes upon local exchange carriers ("LECs") the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications. Section 252(d)(2)(A) provides that for purposes of compliance by an incumbent LEC ("ILEC") with Section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless, *inter alia*, they allow recovery of the costs "associated with the transport and termination on each carrier's network of calls that originate on the network facilities of the other carrier." (emphasis added)

As the FCC made clear in its August 8, 1996 Local Competition Order and applicable rules, the reciprocal compensation obligation imposed on LECs by Section 251(b)(5) only applies to local traffic.¹ *First Report and Order*, CC Docket No. 96-98 (Aug. 8, 1996), ¶¶ 1033-1040. The FCC explicitly held that Section 251(b)(5) reciprocal compensation obligations

should apply only to traffic that originates and terminates within a local area ... [R]eciprocal compensation for transport and termination is intended for a situation in which two carriers collaborate to complete a local call ... Traffic originating or terminating outside of the applicable local area would be subject to interstate and intrastate access charges. (emphasis supplied)

¹ Section 51.701 of the FCC Rules, which is discussed below, was vacated by the Eighth Circuit in *Iowa Utilities Board v. FCC*, Case Nos. 96-3321, *et al.*, 1997 WL 403401, * 15 (8th Cir. July 18, 1997). However, the court's discussion makes it clear that it was only addressing the merits of the FCC's pricing rules for resale, network elements, and transport and termination. Nothing in the opinion suggests that the court disagreed with the FCC's conclusions on the scope of the reciprocal compensation obligations, or that it regarded those conclusions as outside the scope of the FCC's rulemaking authority.

Id. at ¶¶ 1034-1035. Section 51.703(a) of the FCC rules requires LECs to “establish reciprocal compensation arrangements for transport and termination of local telecommunications traffic with any requesting telecommunications carrier.” (emphasis supplied) Section 51.701(e) defines a reciprocal compensation arrangement between two carriers as:

one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier’s network facilities of local telecommunications traffic that originates on the network facilities of the other carrier. (emphasis supplied)

For purposes of reciprocal compensation arrangements between LECs, “local telecommunications traffic” means traffic “that originates and terminates within a local service area established by the state commission.” 47 C.F.R. § 51.701(b) (emphasis supplied) The fundamentally local nature of reciprocal compensation is highlighted by Section 252(d)(2)(A) of the Act, which states that reciprocal compensation arrangements must provide for recovery of costs associated with the carriage of calls terminating on the network of the carrier receiving the compensation payments.

On August 12, 1997, BellSouth Telecommunications, Inc. (“BellSouth”) issued a memorandum to its Alternative Local Exchange Carrier (“ALEC”) customers reminding them that BellSouth’s “interconnection agreement [with ALECs] applies only to local traffic” and that “traffic to and from [Internet Service Providers] remains jurisdictionally interstate.” The memorandum continued: “BellSouth will neither pay, nor bill, local interconnection charges for traffic terminated to an [Internet Service Provider].”

The four complaints at issue in this docket--filed by WorldCom, Teleport, MCI and Intermedia-- challenge BellSouth’s position on reciprocal compensation as

articulated in the August 12, 1997 memorandum. Each complaint alleges that BellSouth's refusal to pay reciprocal compensation for calls terminated to Internet Service Providers constitutes a breach of contract. On April 21, 1998, the four complaints were consolidated for purposes of hearing through Order No. PSC-98-0561-PCO-TP. The formal hearing on this matter took place on June 11, 1998. BellSouth submitted the direct and rebuttal testimony of Jerry Hendrix. The hearing produced a transcript of 332 pages and 7 exhibits.

This Brief of Evidence is submitted in accordance with the post-hearing procedures of Rule 25-22.056, Florida Administrative Code. A summary of BellSouth's position on each of the issues to be resolved in this docket is delineated in the following pages and marked with an asterisk.

STATEMENT OF BASIC POSITION

The core issue raised by the Complaints of WorldCom, Teleport, Intermedia and MCIIm ("Complainants") is whether the parties agreed through their respective Interconnection Agreements ("Agreements") to treat calls through which an end user obtains access to services offered by an Internet Service Provider or other Information Service Provider ("ISP") as local traffic subject to reciprocal compensation.²

² The term "ISP" is used in the industry to refer to an Information Service Provider, of which an Internet Service Provider is a subset. The Telecommunications Act of 1996 defines the term "information service" as:

the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but not including any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service. (emphasis added)

47 U.S.C. § 153(20). BellSouth uses the term "ISP traffic" herein to mean traffic originated by a residence or business end user to an ISP which

As the record in this matter makes clear, calls made by an end user to access the Internet or other services offered by an ISP do not constitute local traffic, but rather represent traffic that is jurisdictionally interstate, because the information service itself is interstate, such as Internet service. There is no dispute that one Internet call can access computer databases in the same state, in other states, and in other countries not merely at different times during the transmission, but at one and the same time. The fact that a single Internet call may simultaneously be interstate, international and intrastate makes it inseverable for jurisdictional purposes. Thus, this traffic must be treated as interstate, based on the inseverability criteria of *Louisiana Pub. Svc. Comm'n v. FCC*, 476 U.S. 355 (1986). Indeed, jurisdiction over ISP traffic has been and continues to be clearly vested with the Federal Communications Commission ("FCC"), which is presently considering the precise issue raised by the Complainants,³ because of the traffic's interstate nature.

Although the Complainants try mightily to camouflage the true jurisdictional nature of ISP traffic, they cannot argue away a simple truth -- the jurisdictional boundaries of a communication are determined by its beginning and ending points, and

provides that end user, via telecommunications, with the information services--including Internet access service-- defined above.

³ The FCC has initiated a proceeding in response to a June 20, 1997 letter from the Association for Local Telecommunications Services (ALTS) in which ALTS seeks a ruling that "nothing in the [FCC's] Local Competition Order ... altered the [FCC's] long standing rule that calls to an [ISP] made from within a local calling area must be treated as local calls by any and all LECs involved in carrying those calls." *Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic*, CCB/CPD 97-30 ("ALTS proceeding"). The FCC has also opened a separate proceeding to resolve various issues related to the impact of Internet traffic on the public switched network. See, *Usage of the Public Switched Network by Information Service and Internet Access Providers*, CC Docket No. 96-263 (Dec. 24, 1996) ("Internet Traffic proceeding").

the ending point of a call to an ISP is not the ISP switch, but rather is the database or information source to which the ISP provides access. As such, calls to an ISP constitute interstate traffic, not telephone exchange service (local service) subject to reciprocal compensation.⁴

Complainants bear the burden of proving that they and BellSouth mutually agreed to subject ISP traffic to the reciprocal compensation obligations of their respective Agreements, and that BellSouth's refusal to pay reciprocal compensation for ISP traffic constitutes a breach of contract. Each party to this proceeding has admitted that the explicit topic of whether ISP traffic would be subject to reciprocal compensation never arose during the parties' contractual negotiations. Complainants uniformly testified that they assumed BellSouth agreed that ISP traffic would be encompassed by the "local traffic" definition in their respective Agreements. For the reasons set forth in more detail below, the law existing at the time the parties negotiated these Agreements reflects that it was unreasonable for the Complainants to blithely assume that BellSouth agreed with their proposed treatment of ISP traffic. Based on the law at the time of the negotiation of these Agreements, BellSouth did not view ISP traffic to "terminate" within the local calling area and Complainants have not shown that

⁴ The term "telephone exchange service" means:

(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of a character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

47 U.S.C. § 153(47)

BellSouth either held a contrary view or that such a view was inherently unreasonable. Accordingly, the Complainants have failed to show that the parties mutually agreed to an essential element of the Agreements, i.e. the scope of the parties' reciprocal compensation obligations, and therefore they cannot show that BellSouth breached those Agreements when it refused to pay reciprocal compensation for ISP traffic.

Finally, BellSouth had no rational economic reason to have agreed to pay reciprocal compensation for the ISP traffic, because, as explained below, such assent would have likely guaranteed that BellSouth would lose money on every customer it serves who subscribed to an ISP served by a Complainant. Such a result is nonsensical and, accordingly, BellSouth could not reasonably have been expected to agree to such a result.

In sum, no factual or legal basis exists to grant the relief sought by Complainants through this proceeding. ISP traffic is clearly interstate in nature, and charges paid with respect to such traffic by all parties--ISPs, CLECs and ILECs--should be resolved in the pending proceedings before the FCC. Between now and the time the FCC resolves this issue, the Commission should take no action. Deferring a ruling in this proceeding will place Complainants at parity with BellSouth in the treatment of this traffic. Complainants and BellSouth would be required to hand off traffic to ISPs without receiving reciprocal compensation (other than from local service rates and related charges) from each other. Alternatively, should the Commission choose not to defer ruling on these petitions, it should find that BellSouth did not breach the Interconnection Agreements in question and, therefore, is not required to pay the reciprocal compensation sought by Complainants.

STATEMENT OF POSITION ON THE ISSUES⁵

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?

****Position:** No. BellSouth is only required to compensate WorldCom for transport and termination of local traffic. ISP traffic is interstate traffic. No action need be taken by this Commission.

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?

****Position:** No. BellSouth is only required to compensate Teleport for transport and termination of local traffic. ISP traffic is interstate traffic. No action need be taken by the Commission.

Issue 3: Under their Interconnection Agreement, are MCI Metro 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?

****Position:** No. BellSouth is only required to compensate MCI for transport and termination of local traffic. ISP traffic is interstate traffic. No action need be taken by the Commission.

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?

****Position:** No. BellSouth is only required to compensate Intermedia for transport and termination of local traffic. ISP traffic is interstate traffic. No action need be taken by the Commission.

⁵ Because BellSouth's position on the four issues is identical, BellSouth will set forth its summary position on each issue at the outset of this portion of the brief and will then provide a complete basis for its four summary positions below.

**A. THE PARTIES DID NOT MUTUALLY AGREE TO INCLUDE ISP TRAFFIC
WITHIN THE DEFINITION OF LOCAL TRAFFIC SUBJECT TO RECIPROCAL
COMPENSATION**

Mutual or reciprocal assent to a certain or definite proposition is an essential element to the creation of a contract. *Goff v. Indian Lake Estates, Inc.*, 178 So. 2d 910 (Fla. App. Dist. 2, 1965). It is, therefore, necessary that there be a meeting of the minds as to all the essential terms of the contract. *Flagler Co. v. Amerifirst Bank*, 559 So. 2d. 1210 (Fla. App. Dist. 4, 1990). It is undisputed that the Agreements in question do not specifically address the treatment of ISP traffic for reciprocal compensation purposes. Each witness testified that the subject of ISP traffic never arose during negotiations. (Tr. at 42, 62, 113, 128, 158, 185, 209-10, 223-227). While the parties did settle on a definition of "local traffic" in each Agreement, they did not specify whether ISP traffic was subject to this definition.

The Complainants (not surprisingly) take the view that there was no need to specifically discuss ISP traffic because they presumed BellSouth did not object to its inclusion within the definition of "local traffic" that would be subject to reciprocal compensation. BellSouth witness Jerry Hendrix testified that, because of the FCC's treatment of ISP traffic over the years, particularly the FCC's explicit finding that ISPs provided interstate services, there was no need for BellSouth to presume that ISP traffic would be subject to the reciprocal compensation obligations attendant to local traffic. (Tr. at 228-235, 244-245).

An actual assent of the parties upon exactly the same matter is indispensable to the formation of a contract. *General Finance Corp. v. Stratton*, 156 So. 2d 664 (Fla. App. Dist. 1, 1963). Clearly, the record in this proceeding reflects that the parties never

mutually agreed that ISP traffic would be subject to the reciprocal compensation obligations of the respective Agreements. The language used by the parties to define their reciprocal compensation obligations simply does not express a mutual intention to subject ISP traffic to payment of reciprocal compensation. Because the parties never had an express meeting of the minds on an essential term of the Agreements, *i.e.*, the scope of the definition of “local traffic”, the Commission should find that BellSouth did not breach the Agreements when it later refused to pay reciprocal compensation for ISP traffic.

B. FUNDAMENTAL PRINCIPLES OF CONTRACT INTERPRETATION DO NOT SUPPORT THE RESULT SOUGHT BY COMPLAINANTS.

Despite their admission that they never discussed the inclusion of ISP traffic within the definition of “local traffic” in their respective Agreements, Complainants contend that they win solely on the basis of the Agreements’ “plain” language. Apparently, Complainants are proponents of the “gotcha” theory of contract interpretation. According to this argument, because BellSouth did not affirmatively except ISP traffic from the definition of “local traffic” when it negotiated its Agreements, it must be required to pay reciprocal compensation for that traffic.

This flawed argument ignores several fundamental principles of contract interpretation. First, parties to a contract are presumed to enter into their agreement with full knowledge of the state of existing law, which in turn is incorporated into and sheds light on the meaning of the parties’ agreement. *See, e.g., Wilcox v. Atkins*, 213 So. 2d 879 (Fla. App. Dist. 2, 1968); *General Development Corp. v. Catkin*, 139 So. 2d

901 (Fla. App. Dist. 3, 1962)⁶ Second, in interpreting the language of a contract, words referring to a particular trade will be interpreted by the courts according to their widely accepted trade meaning. See, e.g., *Southern Crane Rentals, Inc. v. Gainesville*, 429 So. 2d. 771 (Fla. App. Dist. 1, 1983); *Financial Federal Sav. & Loan Assoc. v. Burleigh House, Inc.*, 305 So. 2d. 59 (Fla. App. Dist. 3, 1974). Third, the interpretation of a contract must be one consistent with reason, probability, and the practical aspect of the transaction between the parties. *Bay Management, Inc. v. Beau Monde, Inc.*, 366 So. 2d 788 (Fla. App. Dist. 2, 1978). In other words, to arrive at the intentions of the parties and give effect to the terms of the contract, the contractual terms must be given a reasonable construction. *Thompson v. C.H.B. Inc.*, 454 So. 2d 55 (Fla. App. Dist. 4 1984). A reasonable interpretation is preferred to one that is unreasonable. *Harris Air Systems, Inc. v. Gentran, Inc.*, 578 So. 2d 879 (Fla. App. Dist. 1, 1991). Importantly, an absurd conclusion must be abandoned for one more consistent with reason and probability. *Paddock v. Bay Concrete Indus., Inc.*, 154 So. 2d 313 (Fla. App. Dist. 2, 1963).

⁶This same common sense rule has been frequently stated and applied by federal courts. See, e.g., *Florida East Coast Railway Co. v. CSX Transportation, Inc.*, 42 F.3d 1125, 1129 (7th Cir. 1994) ("[T]he legal framework that existed at the time of a contract's execution must bear on its construction. Contracts are presumed written in contemplation of the existing applicable law. Specifically, parties are assumed to have contracted with reference to those statutory provisions that relate to the subject matter of their contract.") The existing "law" that contracting parties are presumed to have in mind includes court orders, judicial decisions, and administrative regulations. See, *Green v. Lehman*, 544 F. Supp. 260, 263 (D. Md. 1982) ("[I]t is a fundamental principle of contract law, which should be well known to the parties, that implied into every contract, as a term thereof, is the law as it exists at the time and place of contracting. Further, this principle extends to valid regulations having the force and effect of general application.")

Under these principles of construction, the Commission must consider the extant FCC orders, case law, and trade usage at the time the parties negotiated and executed the Agreements, both to determine what types of calls the parties intended to encompass within the term “local traffic” and to aid in interpreting the requirement that reciprocal compensation applies only to that traffic. Further, the Commission must decide whether the interpretation of the Agreements urged by Complainants is reasonable, given the practical effect of such interpretation.

As the parties with the burden of proof, Complainants must show that, at the time BellSouth negotiated these Agreements, BellSouth considered extant FCC precedent (discussed below) to require ISP traffic to be included within the definition of “local traffic” for purposes of reciprocal compensation. Complainants have not met, and cannot meet, this burden of proof for all the reasons stated below. As Mr. Hendrix repeatedly testified, BellSouth cannot be presumed to have intended for ISP traffic to meet the “local traffic” definitions when it negotiated the Agreements, because 1) the FCC had expressly found services provided by ISPs to be interstate in nature, 2) the FCC had traditionally determined the jurisdictional nature of a call by examining its end-to-end nature, and 3) it was economically irrational for BellSouth to have agreed to subject ISP traffic to payment of reciprocal compensation. (Tr. at 235-237).

1. Law at Time of Execution of Agreements Reveals That The FCC Viewed ISP Traffic to be Interstate in Nature.

A careful review of the precedent discussed below demonstrates that, at the time BellSouth negotiated its Agreements with Complainants, existing law reflected that the FCC considered ISP traffic to be interstate, not local, traffic and, that the FCC

determined a call's jurisdiction by its end-to-end nature (its originating and terminating points), not by the facilities involved to transmit the call.

Complainants uniformly and adamantly argue that the call from an end user to the ISP switch is a "telecommunications service" and classify the subsequent forwarding of that call to the Internet as an "information service" that is separate and distinguishable from the first call for jurisdictional purposes. (Tr. at 55-56, 95, 150-52, 201-204). As explained below, this two-part call theory, which attempts to sidestep the obvious conclusion that a call to the Internet is an interstate call, has been specifically repudiated by the FCC. In its *Report to Congress*, CC Docket No. 96-45, April 10, 1998, the FCC analyzed whether ISPs would be subject to the Act's universal service support obligations. In its *Report* (p. 52, n. 220), the FCC stated:

We make no determination here on the question of whether competitive LECs that serve Internet service providers (or Internet service providers that have voluntarily become competitive LECs) are entitled to reciprocal compensation for terminating Internet traffic. That issue, which is now before the Commission, does not turn on the status of the Internet service provider as a telecommunications carrier or information service provider. See Pleading Cycle Established for Comments on Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic, *Public Notice*, CCB/CPD 97030 (released July 2, 1997). (emphasis supplied).

Obviously, the FCC has ruled that whether the "first" call from the end user to the ISP is a "telecommunications" service and the "second" call from the ISP to Internet data bases is an "information" service is meaningless in the context of the FCC's pending reciprocal compensation decision. This Commission likewise should conclude that the "two-call" theory urged by the Complainants is truly a distinction without a difference. The important point is that a communication (no matter how it is "classified")

from an end user to the ISP does not end at the ISP's premise, a fact that has not been contested by any party to this proceeding. As discussed below, every party recognizes that an end user subscribes to an ISP's services not to talk to personnel at the ISP's premises, but rather to gain access to the information service (like the Internet) provided by that ISP. The following network description explains this point.

ISPs use the public switched network to collect their subscribers' calls to the Internet. ISP subscribers access the ISP by dialing a local telephone number via their computer and modem that connects the end user/ISP subscriber to the ISP, who has purchased flat-rated business service lines from various LEC end offices and has physically terminated those lines at an ISP premise consisting of modem banks. The ISP then converts the analog signal of the incoming call to a digital signal and then routes the call over the ISP's own network to a backbone provider, where it is ultimately routed to an Internet-connected host computer. In short, an ISP takes a call and, as part of the information service it offers to the public, transmits that call to and from the communications networks of other telecommunications carriers (e.g., Internet backbone providers such as MCI or Sprint) whereupon it is ultimately delivered to Internet host computers, almost all of which are not located in the local serving area of the ISP. (Tr. at 228-229).

Moreover, Complainants' contention that a call from an end user to the ISP is nothing more than a local call separate and distinguishable from the ISP's subsequent routing of that call to the Internet is fallacious and is contradicted by the FCC's description of Internet service in its Non-Accounting Safeguards Order:

The Internet is an interconnected global network of thousands of interoperable packet-switched networks that use a standard protocol

... to enable information exchange. An end user may obtain access to the Internet from an Internet service provider, by using dial-up or dedicated access to connect to the Internet service provider's processor. The Internet service provider, in turn, connects the end user to an Internet backbone provider that carries traffic to and from other Internet host sites.⁷

Thus, the call from the end user to the ISP only transits through the ISP's local point of presence; it does not terminate there. There is no interruption of the continuous transmission of signals that would justify treating the ISP as anything other than another link in the chain of transmission between the end user and the host computer. (Tr. at 229).

Further, the fact that ISPs (as a part of the information service they provide) reformat information received from users via circuit-switched connections into packets does not, as Complainants would have this Commission believe, demonstrate that the calls to the ISP terminate at the ISP location. There are many contexts (as this Commission knows) in which information is reformatted while it is transmitted from one user to another. Asynchronous Transfer Mode (ATM) technology, for example, uses the same conversion from circuit-switching to packet-switching as is involved in an Internet call. No party, however, has ever suggested that this conversion marks the beginning of a jurisdictionally separate communication. Mr. Kouroupas admitted that the conversion from circuit switching to packet switching does not somehow change the jurisdictional nature of a call. (Tr. at 119). To argue that this conversion process has

⁷ *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 (released Dec. 24, 1996), note 291.

jurisdictional significance ignores the basic characteristics of today's network and demonstrates the tenuousness of Complainants' position.

Moreover, the fact that ILECs deliver ISP traffic to ALECs over local interconnection trunks, use signaling associated with local calling, and send answer supervision when a call is received, also has no jurisdictional significance. First, ILECs deliver ISP traffic over local interconnection trunks for the simple reason that ISPs are permitted by the FCC to obtain and use local exchange services to collect and terminate their traffic. (Tr. at 228). ISP traffic, however, is not unique in this regard. ILECs also transmit Feature Group A access traffic over local interconnection trunks and use signaling associated with local calls. (Tr. at 238). In addition, it is self-evident that ILECs use local interconnection trunks when they terminate interstate toll calls. Obviously, the fact that local interconnection trunks are used in these instances does not render that traffic "local traffic."

The FCC has long held that the jurisdiction of a call is determined not by the physical location of the communications facilities or the type of facilities used, but by the nature of the traffic that flows over those facilities. It is, therefore, irrelevant that the originating end user and the ISP's point of presence are in the same local calling area or that local interconnection trunks are used to transmit those calls, because the ISP's point of presence is not the terminating point of this ISP traffic. What is dispositive, from a jurisdictional perspective, is the relationship between where the call begins and where it ends.

The FCC's jurisdiction extends over interstate and foreign communication by wire or radio.⁸ "Communication by wire" is defined as:

[T]he transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including the instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.⁹ (emphasis added)

A call from an end user to one or more Internet websites through an ISP is such a communication. Even if the ISP "forwards" the call (via telecommunications) from the end user to the websites, the communication does not end at the ISP's facilities. It is irrelevant from a jurisdictional standpoint whether that "forwarded" communication is carried by a common carrier or whether it allows an end user to access information services provided by an ISP. The so-called "second call" (which in actuality is part of one continuous transmission and not a second call at all) is ultimately routed to a destination that is almost always outside the local exchange area of the end user and the ISP's modem banks. (Tr. at 228-229). The fact that a single Internet call may simultaneously be interstate, international and intrastate makes it inseverable for jurisdictional purposes. In such situations, this traffic must be treated as interstate, based on the inseverability criteria of *Louisiana Pub. Svc. Comm'n v. FCC*, 476 U.S. 355 (1986).

Prior to the time the parties to this proceeding had negotiated their Agreements, the FCC had uniformly rejected attempts to partition interstate calls into jurisdictionally

⁸ 47 U.S.C. § 152(a).

⁹ 47 U.S.C. § 153(51).

intrastate segments. In *Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation*, 7 FCC Rcd 1619 (1992), *aff'd*, *Georgia Public Service Commission v. FCC*, 5 F.3d 1499 (11th Cir. 1993), the FCC employed an end-to-end analysis to determine the jurisdictional nature of a call.¹⁰ Even though an out-of-state caller retrieved messages from a voice messaging processor (an information service) by using an intrastate call forwarding service, the FCC found that there was a "continuous two-way transmission path from the [out-of-state] caller to the voice mail service" and that, therefore, this entire call constituted "an interstate communication." *Id.* at 1620-21. In so finding, the FCC stated:

The language of the Act contradicts the narrow reading of our jurisdiction urged by the states that would artificially terminate our jurisdiction at the local switch and ignore the 'forwarding and delivery of [the] communications' to the 'instrumentalities, facilities, apparatus and services' that comprise BellSouth's voice mail service. Indeed, the communications from the out-of-state caller to the local telephone number and switch, its forwarding to the voice mail service by the local switch and its receipt and interaction with BellSouth's voice mail service, fall within the explicit subject matter jurisdiction of this Commission under the Act. (emphasis supplied)

Id.

The FCC concluded:

Our jurisdiction does not end at the local switch but continues to the ultimate termination of the call. The key to jurisdiction is the nature of the communication itself rather than the physical location of the technology. Jurisdiction over interstate communications does not end at the local switchboard, it continues to the transmission's ultimate destination. The fact that the facilities and apparatus used to provide

¹⁰ See also, *Teleconnect Co. v. Bell Telephone Co. of Pennsylvania*, 10 FCC Rcd 1626 (1995), *aff'd*, *Southwestern Bell Telephone Co. v. FCC*, No. 95-1139 (D.C.Cir. June 27, 1997) ('[W]e regulate an interstate wire communication under the Act from its inception to its completion. Such an interstate communication does not end at the intermediate switch') (emphasis supplied); *Exchange System Access Line Terminal Charge for FX and CCSA Service*, Memorandum Opinion and Order, 76 FCC 2d. 349 (1980).

BellSouth's voice mail service may be located within a single state ... does not affect our jurisdiction or expand the Georgia PSC's jurisdiction. This Commission has jurisdiction over, and regulates charges for, the local network when it is used in conjunction with the origination and termination of interstate calls. (emphasis supplied)

Id.

The FCC analysis in the Georgia Voice Mail Order eviscerates Complainants' attempts here to distinguish away the "second call" from the ISP as merely an "information service." The Georgia PSC similarly argued that the second part of the call from an out-of-state caller seeking to reach his or her voice mailbox should be classified as part of an intrastate enhanced service. To the contrary, the FCC viewed the entire communication as interstate even though the "second call" (the actual accessing of the customer's voice mailbox) occurred within a piece of equipment that was purely in the state of Georgia and that was an enhanced (i.e., information) service. Like the Georgia PSC, Complainants emphasize the fact that the ISP forwards the end user's call only as part of an "information service" provided by it to the end user and not as part of a "telecommunications service." For the reasons articulated by the FCC in the Georgia Voice Mail Order, this distinction cannot transform the call from the end user to ISP into a local call, because the ultimate destination of the call clearly is outside the local exchange.

In addition to the Georgia Voice Mail Order, the FCC--well before the parties negotiated their Agreements--also firmly delineated its jurisdictional authority over local calls used to provide an interstate service in an interstate Foreign Exchange (FX) decision.¹¹ In that case, petitioners challenged an intrastate New York Telephone tariff

¹¹ *New York Telephone Co.--Exchange System Access Line Terminal Charge for FX and CCSA Service*, Memorandum Opinion and Order, 76 F.C.C. 2d 349 (1980).

imposing a charge on the local exchange service used by out-of-state customers of FX and Common Control Switching Arrangement (CCSA) services. The services allowed an end user in New York to call a customer located out of state by dialing a local number and paying local rates. For example, an FX service purchased by a Washington, D.C. business would allow a New York City resident to call that business's out-of-state premises by dialing the local New York City number associated with the local exchange portion of service.¹²

Notwithstanding the fact that the originating caller could access the service by dialing a local number and paying local charges, and despite the fact that the FX customer had to purchase local exchange service from New York Telephone, the FCC concluded that the service as a whole was interstate and thus subject to FCC jurisdiction.¹³ Moreover, the FCC concluded that the Communications Act did not "reserve to the state jurisdiction over the local exchange portion of interstate services."¹⁴

This holding is directly relevant to the instant dispute. In both cases, an interstate call is completed in part through the use of intrastate local exchange services, and in both cases the originating end user makes the call by dialing a local number and paying local service charges. In such a situation, the FCC explicitly declined to treat the call as the sum of jurisdictionally separable components, and instead ruled that the

¹² *Id.* at 351.

¹³ *Id.* at 352.

¹⁴ *Id.*

service as a whole was interstate. Further, the FCC held that it had jurisdiction over all the call's components, including the originating local exchange component, subject to the FCC's discretion to defer to state jurisdiction where appropriate.

While Complainants attach a great deal of significance to the fact that the ISP does not forward the communication originated by the end user in a role of a "common carrier", this is a distinction without a difference from a jurisdictional perspective. The jurisdictional classification of ISP traffic simply does not turn on whether the ISP is a common carrier or even whether the traffic leaves the public switched network. Neither the FCC nor the courts have recognized such a limitation on the FCC's end-to-end jurisdiction over interstate communications.¹⁵ Indeed, the FCC's jurisdiction over the interstate aspects of private networks and CPE, which are not parts of the traditional public switched telephone network, is well-established, as is its jurisdiction with respect to interstate enhanced services.¹⁶

Thus, under clear FCC and other precedent in existence at the time the parties negotiated their Agreements, calls bound for the Internet through an ISP's switch could

¹⁵ See, *United States v. AT&T*, 57 F. Supp. 451, 454-455 (S.D.N.Y. 1944) (rejecting a claim that the FCC's jurisdiction over interstate wire communication ends at the switchboard of a PBX), *aff'd*, *Hotel Astor Inc. v. United States*, 325 U.S. 837 (1945); *Ambassador, Inc. v. United States*, 325 U.S. 317 (1945). See also, *Southern Pacific Communications Co. Tariff F.C.C. No. 4*, 61 FCC 2d 144, 146 (1976) ("As we have often recognized, this Commission's jurisdiction over interstate communications does not end at the local switchboard, it continues to the transmission's ultimate destination.').

¹⁶ See, *NARUC v. FCC*, 737 F.2d 1095, 1138-1144 (D.C. Cir. 1984) (affirming FCC jurisdiction over the interstate aspects of "leaky PBXs" and private communications systems); *Computer and Communications Industry Ass'n v. F.C.C.*, 693 F.2d 198 (D.C. Cir. 1982) (CPE). See also, *Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corp.*, 7 FCC Rcd 1619 (1992), *aff'd*, *Georgia Pub. Svc. Comm'n v. FCC*, 5 F.3d 1499 (11th Cir. 1993) (noting FCC jurisdiction over interstate enhanced services).

only have been characterized by BellSouth as interstate exchange access traffic -- not local traffic -- because they "terminate" not at the ISP's equipment, but rather at the Internet host computer containing the data that the originating end user seeks to access. Accordingly, BellSouth did not view those calls as "local" in nature and subject to reciprocal compensation.¹⁷

2. The FCC Has Never Held That ISP Traffic Is Local Traffic For Purposes Of Reciprocal Compensation.

The FCC has not held that ISP traffic is local traffic for purposes of the instant dispute before the Commission. Further, despite the representations by Complainants, the FCC has also not held that ISPs are end users for all regulatory purposes. Rather, through a series of orders, the FCC has exempted ISPs from paying switched access charges to the LECs for originating traffic to them. Instead, ISPs are permitted to receive calls over local exchange service lines purchased from the LEC, rather than over switched access facilities. In support of its decision, the FCC explicitly stated its policy concern that the nascent ISP industry would be harmed if ISPs were required--like IXCs--to pay LECs for originating traffic to them.

Complainants erroneously characterize the FCC's access charge exemption, pursuant to which ISPs are treated as end users -- as opposed to IXCs -- for access charge purposes, as a ruling that somehow classifies calls made to ISPs over local facilities as "local traffic" for reciprocal compensation purposes. (Tr. at 35). This

¹⁷ While BellSouth realizes the Commission issued an order in 1989 (Docket No. 880423-TP) addressing the issue of end user access to information service providers, BellSouth's consistent, regionwide position on the interstate nature of ISP traffic has been based on subsequent FCC rulings, discussed above, that clearly show ISP traffic to be interstate and, therefore, not subject to reciprocal compensation.

argument amounts to nothing more than an attempt to bootstrap a holding that was narrowly tailored to accomplish a specific policy goal of the FCC into a conclusion that calls to ISPs are local calls subject to reciprocal compensation.

The FCC has never held that ISPs are end users for all purposes, and certainly not for purposes of the reciprocal compensation rules; rather, it has held only that ISPs are to be treated as end users “for purposes of the access charge system.”¹⁸ (emphasis supplied) The fact that, for policy and political reasons, the FCC has exempted ISPs from paying access charges in no way alters the fact that the traffic they collect is access-type traffic, not local traffic.

The FCC has always recognized that the true nature of ISP traffic was access traffic. For example, in the 1983 order in which it initially established the ISP access charge exemption, the FCC stated: “Among the variety of users of access service are ... enhanced service providers.”¹⁹ Likewise, in its 1987 Notice of Proposed Rulemaking in which it proposed to lift the ISP access charge exemption, the FCC stated:

We are concerned that the charges currently paid by enhanced service providers do not contribute sufficiently to the costs of the exchange access facilities they use in offering their services to the public. As we have frequently emphasized in our various access charge orders, our ultimate objective is to establish a set of rules that provide for recovery of the costs of exchange access used in interstate service in a fair, reasonable, and efficient manner from all users of access service, regardless of their designation as carriers, enhanced service providers, or private customers. Enhanced service providers, like facilities-based interexchange carriers and resellers, use the local network to provide interstate services. To the extent that they are

¹⁸ See, e.g., *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, CC Docket Nos. 96-262, 91-213, and 95-72, FCC 97-158, released May 16, 1997 (“Access Reform Order”), ¶ 348.

¹⁹ *MTS and WATS Market Structure*, 97 FCC 2d. 682, 711 (1983).

exempt from access charges, the other users of exchange access pay a disproportionate share of the costs of the local exchange that access charges are designed to cover.²⁰ (emphasis supplied)

In both of these dockets, the FCC decided not to impose access charges on ISPs. In each case, however, the FCC--after referring to the interstate nature of the calls--cited only policy reasons for its decision, in particular, its concern that imposing access charges at that time upon enhanced service providers could jeopardize the viability of what was still a fledgling industry.

More recently, in the Access Reform Order, the FCC again declined to impose access charges upon ISPs. The FCC found that “[t]he access charge system contains non-cost-based rates and inefficient rate structures” that were not wholly addressed by access reform.²¹ The FCC also found that existing access charges may not reflect certain differences between circuit switching and packet switching. The FCC held that it was not convinced that exempting ISPs from access charges imposed uncompensated costs on LECs or contributed to network congestion. Thus, while extending the ISP access charge exemption, the FCC issued a Notice of Inquiry to “consider the implications of information services more broadly, and to craft proposals for a subsequent Notice of Proposed Rulemaking that are sensitive to the complex economic, technical and legal questions raised in this area.”

Notably absent from any of these decisions is a determination by the FCC, or even a question raised by it, that traffic to ISPs is local traffic, rather than access traffic

²⁰ *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Notice of Proposed Rulemaking*, 2 FCC Rcd 4305, 4306 (1987).

²¹ *Access Reform Order*, at ¶¶ 344-348.

used to originate interstate calls. Instead, in each case, the FCC granted or perpetuated an exemption from the access charge regime, based solely on pragmatic (and political) considerations regarding the impact of existing access charges on the ISP industry. Moreover, in each instance, the FCC specifically noted the possibility that access charges, either as currently structured or modified, might be applied at some point in the future to ISPs.

Obviously, if the FCC had concluded that traffic received by ISPs was local, there would have been no need for it to exempt that traffic from the access charge regime; access charges would not have applied in the first place. Moreover, the FCC could not have held out the possibility that it might, in the future, assess some sort of access charge on such traffic. If the ISP traffic at issue is truly local traffic, it could never be subjected to any form of interstate access charges. The Complainants, now matter how hard they try, cannot deny this obvious truth.

Not to be deterred, Complainants argue that the Universal Service Order²² and Access Charge Reform Order evidence the FCC's understanding that calls to ISPs are local calls. (Tr. at 35-36). Complainants have misread each of these orders. In the Universal Service Order (§ 789), the FCC stated:

When a subscriber obtains a connection to an Internet service provider via voice grade access to the public switched network, that connection is a telecommunications service and is distinguishable from the Internet service provider's offering.

²² *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 97-157, released May 8, 1997.

According to Complainants, this statement manifests the FCC's recognition that the call to the ISP is a separate call from any Internet transmission that follows and, accordingly, stands on its own as a local call. (Id.).

This argument misconceives the FCC's decision. The fact that Internet service itself may not be a telecommunications service -- the actual issue before the FCC in the universal service proceeding -- is relevant only to whether Internet service providers must contribute to the universal service fund. It is not, however, relevant to the jurisdictional classification of traffic received by Internet service providers. Indeed, there are many types of calls that involve discrete components that are treated differently under the universal service rules. A typical long distance call, for example, consists of three separate services: originating access, terminating access, and the long distance transmission service in between. Only the latter (the retail service) is subject to universal service support obligations; the access services are wholesale services that are exempt from those obligations. Yet, the distinction drawn between these services does not signify that the access components constitute a jurisdictionally separate call. On the contrary, since both the access service and the interexchange service are used in transmitting the communication from its point of origin to its point of termination, they are jurisdictionally linked. Similarly, with Internet traffic, it is the beginning and end point of the communication, not the application of universal service rules to the components of the transmission, that dictates its jurisdictional status.

Complainants also cite to a footnote in the Access Reform Order to support its theory that the FCC views ISP traffic as local traffic. (Tr. at 35-36). That footnote states:

To maximize the number of subscribers that can reach them through a local call, most ISPs have deployed points of presence.²³

That footnote in no way signifies that ISP traffic is local traffic; rather, it simply reflects the fact that, for purposes of the ISP access charge exemption and rate setting, ISPs are treated as end users. It reflects today's reality of the marketplace, wherein local business rates serve as an unfortunate surrogate for switched access charges. Indeed, the reference to "points of presence" underscores the similarity between interexchange carriers and ISPs.

Nothing in any of the FCC decisions cited by Complainants compels the conclusion that ISPs should have been viewed by BellSouth as end users at whose premises Internet calls "terminate." Rather, FCC precedent cited herein clearly evidences the FCC's recognition of the interstate nature of calls carried by ISPs and supports Mr. Hendrix's testimony that BellSouth did not agree to include ISP traffic within the definition of "local traffic" for purposes of reciprocal compensation.

3. BellSouth's Purported Agreement to Pay Reciprocal Compensation for ISP Traffic Leads to an Absurd Result and Cannot be a Reasonable Interpretation of the Agreements.

Under the Complainants' interpretation of the Agreements, BellSouth voluntarily agreed to subject ISP traffic to payment of reciprocal compensation. As explained by Mr. Hendrix, such an interpretation is nonsensical, because it would have made no economic sense for BellSouth to have agreed to such a contract provision.

Traffic collected by non-voice ISPs will always be one-way, not two-way, traffic. As described earlier, this traffic will originate from an end user through the ISP network

²³ Access Reform Order, at note 502.

and terminate on an Internet host computer. Reciprocal compensation, therefore, becomes one-way compensation to those ALECs specifically targeting large ISPs. Hence, if ISP traffic were subject to payment of reciprocal compensation, the originating carrier in most instances would be forced to pay the interconnecting carrier (ALEC) more than the originating carrier receives from an end user to provide local telephone service. As Mr. Hendrix testified, it would have made no economic sense for BellSouth to have agreed to such an absurd result. (Tr. at 235-237). The following example makes that point.

A BellSouth residential customer in Miami subscribes to an ISP and that ISP is served by an ALEC. That customer uses the Internet two hours a day, which is a reasonable assumption given the long holding times associated with Internet usage. (Tr. at 236). This usage would generate a reciprocal compensation payment by BellSouth to the ALEC of \$36.00 per month, assuming a 1.0 cents per minute reciprocal compensation rate ($\$.01 \times 2 \text{ hours} \times 60 \text{ minutes/hr.} \times 30 \text{ days}$). BellSouth serves residence customers in Miami for a flat rate of \$10.65 per month. (Id.).

Thus, in this example, BellSouth would be forced to pay the ALEC \$25.35 per month more than it receives from the end user for local service. Further, a significant portion of additional residential lines are bought primarily to access the Internet and would not require more than a simple flat-rate line with no additional features. The originating carrier (BellSouth in this example) would not only be forced to turn over to the ALEC that serves the ISP every penny of local revenue it receives from its end users, but it would also have to pay a significant amount more per month in reciprocal compensation alone. It is incomprehensible that BellSouth would have willingly agreed

to pay Complainants in this proceeding \$25 more per month per customer than it receives from those customers for providing local service. Yet, under the interpretation of these Agreements urged by Complainants, that is precisely the result their interpretation would yield.

C. CONCLUSION

Complainants have failed to prove that BellSouth mutually agreed with them to treat the transport and termination of traffic to ISPs as local traffic for purposes of reciprocal compensation. Further, the language of the Agreements in question cannot be reasonably interpreted to support the result sought by Complainants. The law existing at the time the Agreements were negotiated clearly revealed that the FCC's jurisdiction under the Communications Act extends from the inception of the communication to its completion, regardless of the presence of intermediate facilities such as ISP switches.

The Commission should defer ruling on the complaints in this proceeding until such time as the FCC has ruled on either of the dockets described in BellSouth's testimony. Alternatively, should the Commission decide not to defer ruling on the complaints, it should find that ISP traffic is not "local traffic" under the parties'

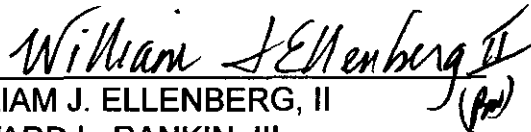
Interconnection Agreements and, accordingly, is not subject to payment of reciprocal compensation.

Respectfully submitted this 30th day of June, 1998.

BELLSOUTH TELECOMMUNICATIONS, INC.

Handwritten signature of Robert G. Beatty in cursive, with a circled 'P' at the end.

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