

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AMERICAN COMMUNICATIONS SERVICES )  
OF LOUISVILLE, INC., D/B/A e.spire )  
COMMUNICATIONS, INC. )

and )

AMERICAN COMMUNICATIONS SERVICES )  
OF LEXINGTON, INC., D/B/A e.spire )  
COMMUNICATIONS, INC. )

COMPLAINANTS )

v. )

CASE NO. 98-212

BELLSOUTH TELECOMMUNICATIONS, INC. )

DEFENDANT )

ALEC, INC. )

COMPLAINANT )

v. )

CASE NO. 98-255

BELLSOUTH TELECOMMUNICATIONS, INC. )

DEFENDANT )

ORDER

BellSouth Telecommunications, Inc. ("BellSouth") is hereby notified that it has been named as defendant in a formal complaint filed on May 6, 1998, in Case No. 98-255, a copy of which is attached hereto. On May 12, 1998, BellSouth was named as a defendant in Case No. 98-212 and was ordered to satisfy or answer the complaint.

Both of these complaints allege the same facts and assert that BellSouth has violated its interconnection agreements with the respective complainants. Therefore, the Commission will consolidate these cases.

IT IS THEREFORE ORDERED that:

1. Case Nos. 98-212 and 98-255 are hereby consolidated into Case No. 98-212.
2. Case No. 98-255 is hereby closed.
3. From the date of this Order, the parties shall use the following case style on all documents concerning this case:

In the Matter of:

AMERICAN COMMUNICATIONS SERVICES )  
OF LOUISVILLE, INC., D/B/A e.spire )  
COMMUNICATIONS, INC. )

and )

AMERICAN COMMUNICATIONS SERVICES )  
OF LEXINGTON, INC., D/B/A e.spire )  
COMMUNICATIONS, INC. )

and )

ALEC, INC. )

COMPLAINANTS )

v. )

BELLSOUTH TELECOMMUNICATIONS, INC. )

DEFENDANT )

CASE NO. 98-212

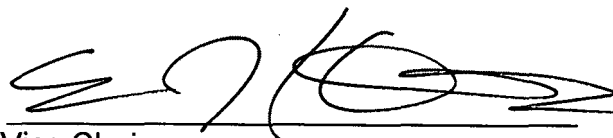
4. Pursuant to 807 KAR 5:001, Section 12, BellSouth shall satisfy the matters complained of or file a written answer to both complaints within 20 days from the date of service of this Order.

5. All documents filed with the Commission in the course of this proceeding shall be served on all parties of record.

Done at Frankfort, Kentucky, this 16th day of June, 1998.

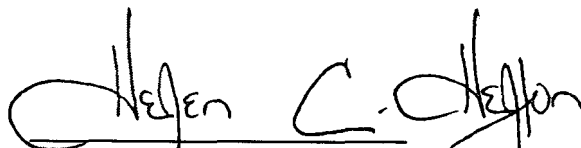
PUBLIC SERVICE COMMISSION

  
Chairman

  
Vice Chairman

  
Commissioner

ATTEST:

  
Executive Director

ATTACHMENT

AN ATTACHMENT TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE COMMISSION IN  
CASE NO. 98-212 DATED JUNE 16, 1998

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

COPY  
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PUBLIC SERVICE  
COMMISSION

In the Matter of

Interconnection Agreement Negotiated By  
BellSouth Telecommunications, Inc. And ALEC  
Inc., Pursuant To Sections 251 And 252 Of The  
Telecommunications Act Of 1996

ALEC, Inc., *Complainant*

v.

BellSouth Telecommunications, Inc., *Defendant*

Complaint to Enforce Interconnection Agreement

No. 97-256

No. 98-255

COMPLAINT

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

**I. Parties And Jurisdiction.**

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

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

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

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

## II. Summary.

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

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

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

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

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

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

### III. Overview Of The Issues.

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

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

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

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

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

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

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

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

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

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



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

**A. The Agreement And BellSouth's Breach.**

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

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

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

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

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

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

Agreement, Section IV.C.

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

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

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

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

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

<sup>8</sup> See Agreement, Section XXVIII (included in Exhibit A).

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

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

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

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

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

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

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

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

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

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

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<sup>12</sup> In some cases — typically, in proceedings directed to the Internet compensation issue — the state regulators provided a substantive discussion of the issues. *See Petition of The Southern New England Telephone Company for a Declaratory Ruling Concerning Internet Services Provider Traffic*, Docket No. 97-05-22 (Conn. Dept. Pub. Util. Sept. 17, 1997); *Arbitration Award, Petition of MCI Telecommunications Corporation for the Arbitration of Unresolved Issues from the Interconnection Negotiations with Bell Atlantic-Delaware, Inc.*, PSC Docket No. 97-323 (Del. Pub. Serv. Com'n Arb. Dec. 16, 1997) (arbitrator's decision); *Teleport Communications Group, Inc. vs. Illinois Bell Telephone Company, Ameritech Illinois: Complaint as to dispute over a contract definition*, Opinion and Order, Docket No. 97-0404 (Ill. Comm. Com'n March 11, 1998); *Letter from Daniel P. Gahagan, Executive Secretary, Maryland Public Service Commission, to Bell Atlantic-Maryland, Inc. in response to Complaint of MFS Intelenet of Maryland, Inc. for Breach of Interconnection Terms* (Sept. 11, 1997); *Application for Approval of an Interconnection Agreement Between Brooks Fiber Communications of Michigan, Inc. and Ameritech Information Industry Services on Behalf of Ameritech Michigan*, Opinion and Order, Case No. U-11178 (Mich. Pub. Serv. Com'n Jan. 28, 1998); *Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic*, Case 97-C-1275, Order Closing Proceeding (N.Y. Pub. Serv. Com'n March 19, 1998); *Interconnection Agreement Between BellSouth Telecommunications, Inc. and US LEC of North Carolina, LLC*, Order Concerning Reciprocal Compensation for ISP Traffic, Docket No. P-55, SUB 1027 (N.C. Util. Com'n Feb. 26, 1998); *Complaint and Request for Expedited Ruling of Time Warner Communications*, Order, Docket No. 18082 (Tex. Pub. Util. Com'n February 27, 1998); *Petition of Cox Virginia Telecom, Inc., for enforcement of interconnection agreement with Bell Atlantic-Virginia, Inc. and arbitration award for reciprocal compensation for the termination of local calls to Internet service providers*, Final Order, Case No. PUC970069 (Va. St. Corp. Com'n Oct. 24, 1997).

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

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

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

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<sup>12</sup>(...continued)

*Interconnection Rates, Terms, and Conditions with U S West Communications, Inc., Pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996*, Opinion and Order, Decision No. 59872, Docket No. U-2752-96-362 (Oct. 29, 1996); *Petition of MFS Communications Company, Inc. for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions with U S West Communications, Inc.*, Decision No. C96-1185 Regarding Petition for Arbitration, Docket No. 96A-287T (Nov. 5, 1996); *AT&T Communications of the Midwest, Inc.*, Order Resolving Arbitration Issues, Docket No. P-442/M-96-855 (Dec. 2, 1996); *Petition of MFS Communications Company, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to 47 U.S.C. Sec. 252(b) of the Telecommunications Act of 1996*, Order No. 96-324 (Dec. 9, 1996); *Petition for Arbitration of an Interconnection Agreement Between MFS Communications Company, Inc. and U S West Communications, Inc., Pursuant to 47 U.S.C. § 252*, Docket No. UT-960323 (Jan. 8, 1997), *aff'd U S West Communications, Inc. v. MFS Intelenet, Inc.*, No. C97-222WD (Jan. 7, 1998); *MCI Telecommunications Corporation Petition for arbitration of unresolved issues for the interconnection negotiations between MCI and Bell Atlantic - West Virginia, Inc.*, Commission Order, Case No. 97-1210-T-PC (Jan. 13, 1998).

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

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

[Findings of Fact]

7. Typically, a customer of an ISP connects to an ISP by means of a local phone call, using telephone exchange service. *A call placed over the public switched telecommunications network is considered to be "terminated" when it is delivered to the telephone exchange service bearing the called telephone number.*

8. BellSouth treats calls to ISPs interconnected to its network as local traffic and charges its own ISP customers local business line rates for local telephone exchange service, thereby enabling customers of BellSouth's ISP customers to connect to their ISP by making a local phone call. When a BellSouth exchange service customer places a call to an ISP within the caller's local calling area, BellSouth treats this as a local call pursuant to the terms of its local tariffs.

...

10. *Calls that terminate within a local calling area, regardless of the identity of the end user, are local calls under ... the Interconnection Agreement ... , and nothing in the Interconnection Agreement or applicable law or regulations creates a distinction pertaining to calls placed to telephone exchange service end users which happen to be ISPs.*

[Conclusions]

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<sup>13</sup> In all of the decisions quoted below, emphasis is added unless otherwise noted.

1. The Interconnection Agreement speaks of reciprocal compensation for local traffic. *There is no exception for traffic to an end user who happens to be an ISP. For the purposes of reciprocal compensation, the Commission concludes that the call terminates when it is delivered to the called local exchange telephone number of the end user ISP. ...*

2. BellSouth treats calls from its own end-user customers to ISPs it serves with telephone numbers in the same local calling area as local traffic. BellSouth charges its own ISP customers local business line rates for local telephone exchange service. When a BellSouth telephone exchange service customer places a call to an ISP within that caller's local calling area, BellSouth treats this as a local call pursuant to the terms of its local tariffs. BellSouth also treats the revenues associated with the local exchange traffic to its ISP customers as local for purposes of separations and ARMIS reporting.

*Interconnection Agreement Between BellSouth Telecommunications, Inc. and US LEC of North Carolina, LLC, Order Concerning Reciprocal Compensation for ISP Traffic, Docket No. P-55, SUB 1027 (N.C. Util. Com'n Feb. 26, 1998), slip op. at 4-6.<sup>14</sup>*

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

*To the extent that "calls" to ISPs are interstate, can such calls be considered "local" for the purpose of reciprocal compensation? (TWC-3)  
Does a "call" from an end user to an ISP "terminate" at the ISP location? (TWC-7)*

The Commission agrees with the [FCC] that the provision of Internet service via the traditional telecommunications network involves multiple components. One component is the information service — the content — which appears to consist of a significant amount of non-local traffic. *The network component, however, is the carrier-to-carrier and carrier-to-end-user telecommunications component, which in the case of a call between two end users in the same local calling area is local traffic.*

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

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

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

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

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

*Petition of Cox Virginia Telecom, Inc., for enforcement of interconnection agreement with Bell Atlantic-Virginia, Inc. and arbitration award for reciprocal compensation for the termination of local calls to Internet service providers*, Final Order, Case No. PUC970069 (Va. St. Corp. Com'n Oct. 24, 1997), slip op. at 2.

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

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



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

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

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

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

As recently as May of 1997 the FCC indicated that it considers Internet access as consisting of more than one element: "When a subscriber obtains a connection to an internet service provider via voice grade access to the public switched network, that connection is a telecommunications service and is distinguishable from the Internet service provider's offering." Based on these critical distinctions the FCC has determined that ISP traffic is not exchange access service, but rather, ISPs should be treated as "end users."

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

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

[A]s evidenced by the comments submitted by other participants in this proceeding, the overwhelming opinion is that local calls to ISPs should be subject to mutual compensation. The Department concurs.

*ISPs are business local exchange customers that purchase services from SNET, use the network in a similar manner to the Company's other end users and, therefore, should not be treated any differently than other business local exchange customers. ... The Department considers calls originating and terminating between these customers (ISPs and other SNET customers) within the same local calling area to be local and, therefore, should be subject to the mutual compensation provisions of [the DPU's local competition rules]. This is consistent with the FCC's position that ISPs may pay business line rates and the appropriate subscriber line charge, rather than interstate access rates, even for calls that appear to traverse state boundaries. Access Charge Order ¶342.*

The Department also concurs with the FCC that Internet access is composed of various components including the local voice grade connection to the PSN [public switched network] to which an ISP subscribes and the information service actually provided by the ISP. In its Access Charge Order, the FCC indicated that Internet access includes the network transmission component (the connection over an LEC network from a subscriber to an ISP) and the underlying information service. In its Access Charge Order, the FCC also stated that voice grade access to the PSN enabled customer access to the ISP and, ultimately, to the Internet. Access Charge Order ¶83. In the opinion of the Department, it is the local connection component and the traffic carried over it that should be subject to mutual compensation. *Subscription of a local voice grade connection to the PSN by ISPs, as well as its use of these connections, is no different than those subscribed to and utilized by other SNET business and*

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

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

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

*As a service matter, the calls terminate within the local calling area. The disputed calls are made from one local number to another in the local calling area, and the agreements do not distinguish between calls based on the nature of the customer receiving the call. As such, the calls are local traffic. Contrary to Ameritech Michigan's argument, calls placed to an ISP at a local number are not exchange access traffic because they do not relate to the origination or termination of toll service.*

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

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

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

A call to an ISP is no different from a call to any other large volume customer, such as a local bank or a radio call-in program. *These calls are all local calls.* They are billed at local rates and are treated as local calls for ARMIS Reporting and Separations. *The fact that a call may sometimes be handed off and routed within the ISP's computer network(s) or through the Internet backbone does not alter the jurisdictional nature of the call from the end user to the ISP.* Indeed, many intrastate communications ultimately connect to other networks. In any event, the 1996 Act reserves to the states authority to determine appropriate reciprocal compensation.

...

Calls to local telephone numbers of [ISPs] are intrastate in nature and will be treated as intrastate for the purpose of reciprocal compensation. Further, there is nothing unique about Internet traffic, or the way such traffic is routed in the public switched network, that would warrant a different compensation structure for this type of call. Carriers should continue to include calls to [ISPs] in calculations of reciprocal compensation payments. To the extent that the local exchange carriers have concerns about the adequacy of their networks to handle increasing volumes of Internet traffic, these should be addressed in the context of normal construction forecasting and budgeting.

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

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

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

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

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

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

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<sup>16</sup> See Exhibits B and C hereto.

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

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

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

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

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

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

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

<sup>21</sup> *Id.* at ¶ 105 (emphasis supplied).

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

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

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

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

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

<sup>23</sup> See Bush Letter, Exhibit B hereto.

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

WHEREAS, Calls from end users to ISPs which originate and terminate within the same local calling area are being charged as local calls pursuant to intrastate tariffs; and

WHEREAS, The FCC has waived application of interstate access charges to this traffic, which has resulted in these calls continuing to be charged under applicable local intrastate tariffs, and to be treated as local under separations procedures; and

WHEREAS, Incumbent local exchange companies treat such traffic as local pursuant to their local intrastate tariffs, ARMIS reports, rate case submissions, and in their local interconnection agreements with adjacent incumbent local exchange companies; and

WHEREAS, Each of the nine states that have take up the issue to date (Arizona, Colorado, Maryland, Minnesota, New York, Oregon, Virginia and Washington) continue to treat this traffic as subject to State jurisdiction; now, therefore, be it

RESOLVED, That [NARUC] advocates that at least as long as the FCC's current rule regarding ISP traffic remains in effect, such traffic should continue to be treated as subject to State jurisdiction in interconnection agreements or tariffs between incumbent local exchange companies and CLECs, and continue to be governed by the same legal authority of the applicable State commission that applies to all such interconnection agreements or tariffs between local exchange carriers.

NARUC Convention Floor Resolution No. 7, "Resolution Asserting State Authority Regarding ISP Reciprocal Compensation."<sup>24</sup>

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

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



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

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

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

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<sup>24</sup>(...continued)

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

(Citations omitted.)

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

end users use to connect to ISPs.<sup>26</sup> These signals are not merely "noise" on the line (although they sound to the human ear like static). Neither are these signals some type of amorphous communications "overhead." To the contrary, these signals are carefully crafted by the modem equipment, and are critical to the integrity of the connection.<sup>27</sup> Moreover, these signals continue constantly, even when higher-level information (computer files, emails, etc.) are not being transmitted. For the vast majority of the duration of an average "on line" session with an ISP, these purely "local" signals are the only traffic being sent over the call.<sup>28</sup>

28. **Higher-Level Data Traffic.** By far the most common higher-level data transmitted between an ISP and end users relates to one or more of three information services: email, newsgroups and lists, and the World Wide Web. As described below, a substantial fraction, and possibly a majority, of this high-level

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<sup>26</sup> Improved "intelligence" in modems, reflected in more complex encoding of information within the signals the modems send to each other, is what has allowed the rate of data transmission over an analog modem line to increase from 9600 bits per second in the early- to mid-1980s to nearly 30,000 bits per second today. This can be improved to a download rate of more than 50,000 bits per second if the ISP has a digital (as opposed to analog) link between its modems and the LEC switch providing the ISP's connections to the public switched network.

<sup>27</sup> Indeed, analog modems constitute a major cost item for ISPs, and one of the ways that retail ISPs compete with each other is in their ability to support the latest and most "intelligent" modem technology (which maximizes download speeds for end users). The signals that modems send to each other, therefore, are an integral part of the information services that ISPs offer.

<sup>28</sup> This occurs because end users typically take a certain amount of time to review the data they get before requesting more data. For example, the WordPerfect file representing this complaint comprises approximately 122,000 bytes, or about 976,000 bits, of information. At a download speed of 20,000 bits per second, downloading this Complaint would take less than a minute of "call time." (At higher download speeds available with the latest analog modem technology, it could take less than 20 seconds.) If it takes 30 minutes to read this Complaint, a minute of downloading would reflect a 30:1 ratio of "review time" to "download time." All of the end user's "review time" — in this example, roughly 97% of the total — is time during which all that is traversing the path from the end user to the ISP is the unequivocally, unambiguously *local* modem-to-modem communication.

information comes not from some unidentified distant location, but instead from computers located on the ISP's local premises.

a. **Email.** Essentially all ISPs (including ALEC's ISP customer) offer email service to their subscribers. Email is a "store and forward" service. When a customer receives email, the email message (including any attached files) is sent to the customer's ISP, who maintains a local "email server" — a computer on the ISP's premises that stores email messages. When a customer logs on to check his or her email, the messages the customer has received are downloaded *from the ISP's local email server* to the customer's computer. Emails from the customer to others are first uploaded to the email server, then sent out to the Internet (or stored for other local end users) as appropriate. These are entirely "local" data transmissions.<sup>29</sup>

b. **Newsgroups and lists.** In practical terms, newsgroups and lists are forms of group email. In a newsgroup or list, people with a common interest (*e.g.*, gardening, hockey, the stock market, WordPerfect software, Internet law) "post" notes and files to a list that all subscribers to the group may then read and respond to. The ISP receives newsgroup files once or twice per day from other computers attached to the Internet. These files are then downloaded to the end user *from the ISP's local newsgroup server* when end users log on and request those files. Messages posted by the ISP's users to the newsgroups are handled like email: locally stored on an ISP computer, then forwarded on to their destination.

c. **World Wide Web.** The World Wide Web is basically a system for identifying files of interest to end users and downloading them. When an end user clicks on the URL<sup>30</sup> of a Web page the end user wants to visit, what really happens is

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<sup>29</sup> Note that during the time that a customer is reading email that has been received, or composing email to send out, the customer's modem and the ISP's modem are busily sending purely local signals to each other in order to remain synchronized. See ¶ 27, *supra*.

<sup>30</sup> A URL is a "uniform resource locator," in the general form of "http://www.name.com."

that a short message is sent to the end user's ISP that says, in effect, "get me a copy of the files that make up this Web page." In many cases the ISP will need to send this message to "the Internet" in order to get the files. Increasingly, however, ISPs are implementing "Web caching." With Web caching, the ISP maintains a computer (called a "cache server") that has current copies of the Web pages that the ISP (aided by software) believes that its customers are most likely to request. If the ISP correctly anticipates these requests, it will already have on hand, locally, at least some of the Web pages that its customers want to visit.<sup>31</sup> When this occurs, the customer receives the requested Web page in an entirely local communication.<sup>32</sup>

29. The situation, in sum, is this: even if "the Internet" is somehow inherently interstate in nature, for all but a fraction of the time a typical end user is on line, the traffic between the end user and the ISP begins and ends within the local calling area. Even if BellSouth's legal theory is correct, therefore — and Section IV above shows that it is not — that theory applies, at most, to a tiny fraction of the minutes that its end users are on-line with ISPs. As a result, the most that BellSouth could claim in good faith is that it is entitled to some minor downward adjustment in its terminating compensation obligation to ALEC. Instead, while actually acknowledging that there is no contractual basis to exclude calls to ISPs from the

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<sup>31</sup> Web caching allows retail ISPs to cut the costs of their telecommunications connections (typically T1 lines for ISPs of any size) to Internet access "wholesalers" such as DIGEX and UUNet. The idea is that the ISP will download popular Web sites during periods of slack usage so that peak usage demands on the ISP-to-wholesaler connections will be lower. As an added benefit, Web caching often allows end users to receive the cached sites much more quickly than if the files representing the Web site have to be obtained over the Internet at the moment the end user requests them.

<sup>32</sup> Yet again, once the customer has received the files representing the Web page, the customer will typically review that information on the screen. During this review, as long as the customer remains on-line, the only communication taking place between the ISP and the end user is the modem-to-modem communications described above. See ¶ 27, *supra*.

calculation of the "Percentage *Local* Usage" factor,<sup>33</sup> BellSouth nonetheless arbitrarily refuses to pay for 90% of such calls.<sup>34</sup>

**VI. BellSouth's Refusal To Pay ALEC For Calls BellSouth Customers Make To ISPs Served By ALEC Is Anticompetitive And Abusive.**

30. BellSouth is not just a telecommunications company. Through an affiliate, BellSouth is also a major and growing regional ISP — bellsouth.net. This fact has a critical bearing on the Commission's review of this complaint.

a. First, BellSouth plainly is, and from the beginning of this process has been, able to confer with bellsouth.net to determine the manner in which ISPs operate, what proportion of the time customers are on-line without exchanging higher-level data, and what proportion of the remaining time they are downloading from or uploading to local ISP devices such as email servers and Web cache servers. In asserting that all traffic its end users exchange with ISPs is jurisdictionally interstate, and refusing to pay for 90% of such calls, BellSouth is either wilfully ignoring readily available information, or putting its head in the sand and refusing to obtain that information. Neither course of action is fair or reasonable.

b. Second, the Commission should consider the economic impact of sustaining BellSouth's position (since BellSouth has undoubtedly done so). If calls to ISPs — alone among entities classified as end users — are not subject to terminating compensation payments, then CLECs will have powerful financial incentives to avoid serving ISPs, since they will not receive payment for the terminating switching functions that they perform. The CLECs will not get paid even though BellSouth will continue to receive local exchange second line revenues, increased federal subscriber line charge

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<sup>33</sup> See Exhibit C hereto.

<sup>34</sup> See Exhibit D hereto.

("SLC") revenues, and any applicable usage charges when its customers call ISPs.<sup>35</sup> In practical terms, this means that the only LEC that will serve ISPs within BellSouth's Kentucky service territory will be BellSouth itself, because only BellSouth will receive any money for terminating calls to ISPs. It is unfair and anticompetitive to effectively deprive ISPs of the right to obtain service from CLECs on competitive terms. It is also unfair and anticompetitive to require ISPs to obtain their connections to the public switched network from an affiliate of a large competing ISP — bellsouth.net.

31. Moreover, there is nothing remotely unfair in requiring BellSouth to pay ALEC terminating compensation in accordance with the Agreement. BellSouth had a full and complete opportunity to try to protect itself against having to pay terminating compensation payments for calls to ISPs. All BellSouth needed to do was negotiate for bill-and-keep compensation for the exchange of traffic. BellSouth's decision to try to impose what amounts to bill-and-keep on ALEC now — only for the major class of end users that will cost BellSouth money — is nothing less than an attempt to renege on its bargain with ALEC. This is not good faith negotiation, or good faith contract administration. This is abuse of a small competitor by an entrenched monopolist who can afford to litigate endlessly while holding hostage payments to which ALEC is plainly entitled.<sup>36</sup>

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<sup>35</sup> In this regard, the FCC increased the maximum SLC on second residential lines in part in order to provide additional compensation to ILECs whose customers use such lines to call ISPs. *See Access Charge Order, supra* at ¶ 50. It is totally unreasonable for BellSouth to be permitted to collect these revenues from its end users while refusing to pay terminating compensation to a CLEC such as ALEC for actually completing the calls.

<sup>36</sup> In this regard, ALEC plainly incurs substantial costs — including, most notably, the cost of acquiring, maintaining, and operating its switch — to enable it to complete the calls that BellSouth's end users dial to reach ALEC's ISP customer. BellSouth's position, however, seems to be that it can force ALEC to complete these calls for BellSouth's customers without paying ALEC the contract price for these services. There is no possible public policy rationale for such a position.

32. In sum, BellSouth's competitive interests are served by its unfair and unreasonable refusal to pay for calls to ISPs. BellSouth's failure to pay inflicts harm on smaller competitors such as ALEC, who have undertaken the effort needed to install switches and other facilities to serve ISPs. Moreover, if BellSouth can force CLECs to view ISPs as unprofitable customers (because they receive a lot of calls for which compensation will not be paid) BellSouth can isolate ISPs from competition and force them to obtain network connections from BellSouth itself — even though, as noted above, BellSouth has its own large and growing ISP operation.

33. Considerations such as these have led regulators to conclude that it constitutes anticompetitive and abusive behavior for ILECs to fail to pay for calls to ISPs. For example, the Illinois Commerce Commission found, in the case of Ameritech's refusal to pay terminating compensation for calls to ISPs, that:

Ameritech Illinois' unilateral "remedy" is so ill-suited to its perceived problem *that it lends substantial credence to the complainants' allegations that Ameritech Illinois' conduct is intentionally anticompetitive.* Ameritech Illinois' local exchange competitors are obligated by law to terminate calls made by Ameritech Illinois' customers, they incur costs to do so, and they are entitled to be compensated for the use of their equipment and facilities. ...

[CLECs] are highly dependent upon reciprocal compensation payments to finance their operations. ... *The withholding of the payments caused and continues to cause complainants serious harm and has resulted in an anticompetitive impact which is contrary to the public interest.*

*Teleport Communications Group, Inc. vs. Illinois Bell Telephone Company, Ameritech Illinois: Complaint as to dispute over a contract definition, Opinion and Order, Docket No. 97-0404 (Ill. Comm. Com'n March 11, 1998), 1998 Ill. PUC LEXIS 161 at \*\*31-32 (emphasis added).*

**VII. Conclusion And Prayer For Relief.**

34. BellSouth has breached the Agreement by refusing to pay terminating compensation for all but a small fraction of the calls its end users make to ALEC's ISP customer. Its stated reason for this refusal is totally unsupported by either the law (including both state and FCC decisions) or the facts. The only logical conclusion is that BellSouth wishes to achieve the anticompetitive and abusive results that naturally flow from its actions.

35. For the reasons described above, therefore, it is now necessary for this Commission to join with NARUC and all other state commissions that have addressed this issue and (a) declare that BellSouth's failure to pay terminating compensation for calls to ISPs is unlawful, unreasonable, anticompetitive, and constitutes a breach of the Agreement; and (b) direct BellSouth to immediately pay all past due amounts owed to ALEC, and to make timely payments in the future.

WHEREFORE, ALEC asks that the Commission promptly issue an order declaring:

1. That calls BellSouth end users make to ISPs served by ALEC within the same local calling area as the dialed number are local calls subject to terminating compensation under the terms of the Agreement.

2. That calls BellSouth end users make to ISPs served by ALEC within the same local calling area as the dialed number are local calls subject to terminating compensation under the terms of Section 251(b)(5) and Section 252(d)(2) of the federal Communications Act.



3. That BellSouth's past failures to pay these amounts in full and when due, and any future such failures to pay, are unreasonable and anticompetitive acts designed to injure BellSouth's competitors in both the local exchange and ISP markets.

4. That BellSouth is directed to immediately pay ALEC any and all amounts billed by ALEC (including any applicable interest) that BellSouth has withheld, disputed, or placed in escrow on the basis of claims that calls BellSouth end users make to ISPs served by ALEC are not subject to terminating compensation under the agreement.

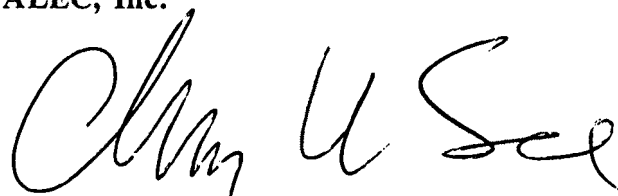
5. That BellSouth is directed to pay in full and when due all future terminating compensation amounts owed to ALEC for calls BellSouth's end users make to ISPs served by ALEC.

6. That ALEC receive such additional relief as may be just and reasonable, including reasonable attorneys' fees to the extent permitted by law.

Respectfully submitted,

ALEC, Inc.

By:



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Its Attorneys

Dated: May 5, 1998

Index to Exhibits

Exhibit A .....	Excerpts from BellSouth/ALEC Interconnection Agreement
Exhibit B .....	Letter from E. Bush (BellSouth) to all CLECs (August 12, 1997)
Exhibit C .....	Letter from R. McIntire (BellSouth) to J. Campbell (ALEC) (April 13, 1998)
Exhibit D .....	Letter from J. Campbell (ALEC) to R. McIntire (BellSouth) (April 30, 1998)

**EXHIBIT A**  
**EXCERPTS FROM BELL SOUTH/ALEC**  
**INTERCONNECTION AGREEMENT**

## **AGREEMENT**

**THIS AGREEMENT** is made by and between BellSouth Telecommunications, Inc., ("BellSouth"), a Georgia corporation, and ALEC, Inc., a Kentucky corporation and shall be deemed effective as of June 15, 1997. This agreement may refer to either BellSouth or ALEC, Inc. or both as a "party" or "parties. "

## **WITNESSETH**

**WHEREAS**, BellSouth is a local exchange telecommunications company authorized to provide telecommunications services in the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee; and

**WHEREAS**, ALEC, Inc. is an alternative local exchange telecommunications company ("ALEC") authorized to provide telecommunications services in the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee; and

**WHEREAS**, the parties wish to interconnect their facilities, purchase unbundled elements, and exchange traffic specifically for the purposes of fulfilling their obligations pursuant to sections 251, 252 and 271 of the Telecommunications Act of 1996; and

**NOW THEREFORE**, in consideration of the mutual agreements contained herein, BellSouth and ALEC, Inc. agree as follows:

### **I. Definitions**

**A.** Affiliate is defined as a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term "own" means to own an equity interest (or equivalent thereof) of more than 10 percent.

**B.** Commission is defined as the appropriate regulatory agency in each of BellSouth's nine state region, Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee.

**C.** Intermediary function is defined as the delivery of local traffic from a local exchange carrier other than BellSouth; an ALEC other than ALEC, Inc.; another telecommunications company such as a wireless telecommunications provider through the network of BellSouth or ALEC, Inc. to an end user of BellSouth or ALEC, Inc..

**D. Local Traffic** is defined as any telephone call that originates in one exchange and terminates in either the same exchange, or a corresponding Extended Area Service ("EAS") exchange. The terms Exchange, and EAS exchanges are defined and specified in Section A3. of BellSouth's General Subscriber Service Tariff.

**E. Local Interconnection** is defined as 1) the delivery of local traffic to be terminated on each party's local network so that end users of either party have the ability to reach end users of the other party without the use of any access code or substantial delay in the processing of the call; 2) the LEC unbundled network features, functions, and capabilities set forth in this Agreement; and 3) Service Provider Number Portability sometimes referred to as temporary telephone number portability to be implemented pursuant to the terms of this Agreement.

**F. Percent of Interstate Usage (PIU)** is defined as a factor to be applied to terminating access services minutes of use to obtain those minutes that should be rated as interstate access services minutes of use. The numerator includes all interstate "nonintermediary" minutes of use, including interstate minutes of use that are forwarded due to service provider number portability less any interstate minutes of use for Terminating Party Pays services, such as 800 Services. The denominator includes all "nonintermediary", local, interstate, intrastate, toll and access minutes of use adjusted for service provider number portability less all minutes attributable to terminating party pays services.

**G. Percent Local Usage (PLU)** is defined as a factor to be applied to intrastate terminating minutes of use. The numerator shall include all "nonintermediary" local minutes of use adjusted for those minutes of use that only apply local due to Service Provider Number Portability. The denominator is the total intrastate minutes of use including local, intrastate toll, and access, adjusted for Service Provider Number Portability less intrastate terminating party pays minutes of use.

**H. Telecommunications Act of 1996 ("Act")** means Public Law 104-104 of the United States Congress effective February 8, 1996. The Act amended the Communications Act of 1934 (47, U.S.C. Section 1 et. seq.).

**I. Multiple Exchange Carrier Access Billing ("MECAB")** means the document prepared by the Billing Committee of the Ordering and Billing Forum ("OBF"), which functions under the auspices of the Carrier Liaison Committee of the Alliance for Telecommunications Industry Solutions ("ATIS") and by BellCore as Special Report SR-BDS-000983, Containing the recommended guidelines for the billing of Exchange Service access provided by two or more LECs and/or ALECs or by one LEC in two or more states within a single LATA.

## **II. Purpose**

The parties agree that the rates, terms and conditions contained within this Agreement, including all Attachments, comply and conform with each parties' obligations under sections 251, 252 and 271 of the Act. The access and interconnection obligations contained herein enable ALEC, Inc. to provide competing telephone exchange service to residential and business subscribers within the territory of BellSouth. The parties agree that ALEC, Inc. will not be considered to have any state within BellSouth's region until such time as it has ordered interconnection facilities for the purposes of providing business and/or residential local exchange service to customers. At that time, this Agreement may be amended to include the other state or states. The term of this Agreement shall remain as set forth in Section III(A) even for any such additional states. To the extent the items in 47 U.S.C. § 271(c)(2)(B) are contained within this Agreement, the parties agree that with the execution of this Agreement, BellSouth has met the requirements of 47 U.S.C. § 271(c)(2)(B).

### **III. Term of the Agreement**

- A. The term of this Agreement shall be two years, beginning June 15, 1997.
- B. The parties agree that by no later than June 15, 1998, they shall commence negotiations with regard to the terms, conditions and prices of local interconnection to be effective beginning June 15, 1999.
- C. If, within 135 days of commencing the negotiation referred to in Section II (B) above, the parties are unable to satisfactorily negotiate new local interconnection terms, conditions and prices, either party may petition the Commission to establish appropriate local interconnection arrangements pursuant to 47 U.S.C. 252. The parties agree that, in such event, they shall encourage the Commission to issue its order regarding the appropriate local interconnection arrangements no later than March 15, 1997. The parties further agree that in the event the Commission does not issue its order prior to June 15, 1999 or if the parties continue beyond June 15, 1999 to negotiate the local interconnection arrangements without Commission intervention, the terms, conditions and prices ultimately ordered by the Commission, or negotiated by the parties, will be effective retroactive to June 15, 1999. Until the revised local interconnection arrangements become effective, the parties shall continue to exchange traffic pursuant to the terms and conditions of this Agreement.

### **IV. Local Interconnection (47 U.S.C. §251(c)(2), §252(d)(1),(2), §271(c)(2)(B)(i))**

- A. The parties intend that the interconnection of their equipment, facilities and networks pursuant to this section complies with the requirements of sections 251, 252 and 271 of the Act.

B. The delivery of local traffic between the parties shall be reciprocal and compensation will be mutual according to the provisions of this Agreement. The parties agree that the exchange of traffic on BellSouth's EAS routes shall be considered as local traffic and compensation for the termination of such traffic shall be pursuant to the terms of this section. EAS routes are those exchanges within an exchange's Basic Local Calling Area, as defined in Section A3 of BellSouth's General Subscriber Services Tariff.

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

D. Each party will report to the other a Percentage Local Usage ("PLU") and the application of the PLU will determine the amount of local minutes to be billed to the other party. Until such time as actual usage data is available or at the expiration of the first year after the execution of this Agreement, the parties agree to utilize a mutually acceptable surrogate for the PLU factor. For purposes of developing the PLU, each party shall consider every local call and every long distance call. Effective on the first of January, April, July and October of each year, the parties shall update their PLU.

E. The parties agree that there are three appropriate methods of interconnecting facilities: (1) virtual collocation where physical collocation is not practical for technical reasons or because of space limitations; (2) physical collocation; and (3) interconnection via purchase of facilities from either party by the other party. Rates and charges for collocation are set forth in Attachment C-13, incorporated herein by this reference. Facilities may be purchased at rates, terms and conditions set forth in BellSouth's intrastate Switched Access (Section E6) or Special Access (Section E7) services tariff or as contained in Attachment B-1 for local interconnection, incorporated herein by this reference.

F. The parties agree to accept and provide any of the preceding methods of interconnection. Reciprocal connectivity shall be established at each and every BellSouth access tandem within the local calling area ALEC, Inc. desires to serve for interconnection to those end offices that subtend the access tandem. In addition, ALEC, Inc. may elect to interconnect directly at the end offices for interconnection to end users served by that end office. BellSouth will connect at each end office or tandem inside the local calling area. Such interconnecting facilities shall conform, at a minimum, to the telecommunications industry standard of DS-1 pursuant to BellCore Standard No. TR-NWT-00499. Signal transfer point, Signaling System 7 ("SS7") connectivity is required at each interconnection point. BellSouth will provide out-of-band signaling using Common Channel Signaling Access Capability where technically and economically feasible, in accordance with the technical specifications set forth in the BellSouth Guidelines to Technical Publication, TR-TSV-000905. The parties agree that their facilities shall provide the necessary on-hook, off-hook answer and

7. Each party shall notify the other party in writing of any assessment, proposed assessment or other claim for any additional amount of such a tax or fee by a taxing authority; such notice to be provided, if possible, at least ten (10) days prior to the date by which a response, protest or other appeal must be filed, but in no event later than thirty (30) days after receipt of such assessment, proposed assessment or claim.

#### **E. Mutual Cooperation**

1. In any contest of a tax or fee by one Party, the other Party shall cooperate fully by providing records, testimony and such additional information or assistance as may reasonably be necessary to pursue the contest. Further, the other Party shall be reimbursed for any reasonable and necessary out-of-pocket copying and travel expenses incurred in assisting in such contest.

#### **XXIV. Resolution of Disputes**

Except as otherwise stated in this Agreement, the parties agree that if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, the parties will petition the Commission for a resolution of the dispute. However, each party reserves any rights it may have to seek judicial review of any ruling made by the Commission concerning this Agreement.

#### **XXV. Limitation of Use**

The parties agree that this Agreement shall not be offered by either party in another jurisdiction as evidence of any concession or as a waiver of any position taken by the other party in that jurisdiction or for any other purpose.

#### **XXVI. Waivers**

Any failure by either party to insist upon the strict performance by the other party of any of the provisions of this Agreement shall not be deemed a waiver of any of the provisions of this Agreement, and each party, notwithstanding such failure, shall have the right thereafter to insist upon the specific performance of any and all of the provisions of this Agreement.

#### **XXVII. Governing Law**

This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of Georgia, without regard to its conflict of laws principles.



## XXVIII. Arm's Length Negotiations

This Agreement was executed after arm's length negotiations between the undersigned parties and reflects the conclusion of the undersigned that this Agreement is in the best interests of all parties.

## XXVIV. Notices

A. Every notice, consent, approval, or other communications required or contemplated by this Agreement shall be in writing and shall be delivered in person or given by postage prepaid mail, address to:

BellSouth Telecommunications, Inc.  
ALEC Account Team  
3535 Colonnade Parkway  
Birmingham, Alabama

ALEC, Inc.  
Jay Campbell  
1158 Jefferson St.  
Paducah, KY 42001

or at such other address as the intended recipient previously shall have designated by written notice to the other party.

B. Where specifically required, notices shall be by certified or registered mail. Unless otherwise provided in this Agreement, notice by mail shall be effective on the date it is officially recorded as delivered by return receipt or equivalent, and in the absence of such record of delivery, it shall be presumed to have been delivered the fifth day, or next business day after the fifth day, after it was deposited in the mails.

## XXVIII. Entire Agreement

This Agreement and its Attachments, incorporated herein by this reference, sets forth the entire understanding and supersedes prior agreements between the parties relating to the subject matter contained herein and merges all prior discussions between them, and neither party shall be bound by any definition, condition, provision, representation, warranty, covenant or promise other than as expressly stated in this Agreement or as is contemporaneously or subsequently set forth in writing and executed by a duly authorized officer or representative of the party to be bound thereby.

BellSouth Telecommunications, Inc.

Signature

DIRECTOR

Title

ALEC, Inc.

Signature

President

Title

**EXHIBIT B**  
**LETTER FROM E. BUSH (BELL SOUTH) TO**  
**ALL CLECs (AUGUST 12, 1997)**



BellSouth Telecommunications, Inc. 404 927-7150  
Room 4428 Fax 404 420-8281  
875 West Peachtree Street, N.E. Internet: Ernest.L.Bush  
Atlanta, Georgia 30375 @bridge.bellsouth.com

Ernest L. Bush  
Assistant Vice President -  
Regulatory Policy & Planning

SN91081223

August 12, 1997

To: All Competitive Local Exchange Carriers  
Subject: Enhanced Service Providers (ESPs) Traffic

The purpose of this letter is to call to your attention that our interconnection agreement applies only to local traffic. Although enhanced service providers (ESPs) have been exempted from paying interstate access charges, the traffic to and from ESPs remains jurisdictionally interstate. As a result, BellSouth will neither pay, nor bill, local interconnection charges for traffic terminated to an ESP. Every reasonable effort will be made to insure that ESP traffic does not appear on our bills and such traffic should not appear on your bills to us. We will work with you on a going forward basis to improve the accuracy of our reciprocal billing processes. The ESP category includes a variety of service providers such as information service providers (ISPs) and internet service providers, among others.

On December 24, 1996, the Federal Communications Commission (FCC) released a Notice of Proposed Rule Making (NPRM) on interstate access charge reform and a Notice of Inquiry (NOI) on the treatment of interstate information service providers and the Internet, Docket Nos. 96-262 and 96-263. Among other matters, the NPRM and NOI addressed the information service provider's exemption from paying access charges and the usage of the public switched network by information service providers and internet access providers.

Traffic originated by and terminated to information service providers and internet access providers enjoys a unique status, especially call termination. Information service providers and internet access providers have historically been subject to an access charge exemption by the FCC which permits the use of basic local exchange telecommunications services as a substitute for switched access service. The FCC will address this exemption in the above-captioned proceedings. Until any such reform affecting information service providers and internet access providers is accomplished, traffic originated to and terminated by information service providers and internet access providers is exempt from access charges. This fact, however, does not make this interstate traffic "local", or subject it to reciprocal compensation agreements.

Please contact your Account Manager or Marc Cathay (205-977-3311) should you wish to discuss this issue further. For a name or address change to the distribution of this letter, contact Ethelyn Pugh at 205-977-1124.

Sincerely,

**EXHIBIT C**  
**LETTER FROM R. MCINTIRE (BELL SOUTH)**  
**TO J. CAMPBELL (ALEC) (APRIL 13, 1998)**



BellSouth Telecommunications, Inc.  
600 North 19th Street  
Birmingham, Alabama 35203

Interconnection Purchasing Center

April 13, 1998

To: Alec, Inc./WTF  
Jay Campbell  
1158 Jefferson Street  
Paducah, KY 42001

From: Richard McIntire  
Operations Director - IPC  
13A1  
600 N. 19th Street  
Birmingham, AL 35203

Subject: Second Quarter 1998 Percent Local Usage (PLU) Notification Letter

This letter is notification, as required by our existing contract, that the second quarter 1998 PLU for BellSouth reciprocal facilities for those states where you are currently operating is listed below. This PLU is to be used for reciprocal compensation starting with April 1, 1998 usage invoices. The submission of this letter in no way represents a waiver of BellSouth's position regarding the inclusion or exclusion of information service/enhanced service provider traffic from any and all calculations associated with development of the PLU or BellSouth's position regarding the calculation of payment for the termination of local traffic on the network of a telecommunications carrier.

State	PLU%
Kentucky	99.9

If you have any questions concerning this letter, I can be reached at 205-714-0246.

A handwritten signature in cursive script that reads "Richard McIntire".

**EXHIBIT D**  
**LETTER FROM J. CAMPBELL (ALEC) TO**  
**R. MCINTIRE (BELL SOUTH) (APRIL 30, 1998)**

April 30, 1998

To: Richard McIntire  
Operations Director - IPC  
600 N. 19<sup>th</sup> Street, 13A1  
Birmingham, AL 35203

From: Jay Campbell  
ALEC, Inc.  
1158 Jefferson St.  
Paducah, KY 42001

Dear Mr. McIntire:

As you know, ALEC and BellSouth have been having discussions in an effort to resolve the problem of BellSouth's failure to pay ALEC's bills to BellSouth for terminating compensation under our interconnection agreement.

The heart of the dispute is that -- even though there is no basis in our contract for BellSouth's position -- BellSouth claims that when its end users make 7-digit local calls to an Internet Service Provider (ISP) served by ALEC, those local calls are really "interstate" in nature, and this "fact," in BellSouth's view, supposedly exempts BellSouth from having to pay ALEC for terminating the calls that BellSouth's end users make.

When I received your letter of April 13, 1998, I had hoped that BellSouth had chosen either to rethink its position or at least to defer the dispute for another day. I reached that conclusion because your letter stated that it would apply a 99.9% "Percent Local Usage" factor to ALEC's bills. Your letter also stated that BellSouth was not waiving its views on calls to ISPs, but it seemed sensible to conclude that a 99.9% "local" factor indicated that BellSouth would actually treat essentially all of the calls its end users make to ALEC's customers as "local," perhaps subject to further disputes later.

In order to confirm this understanding, I called you, and we spoke earlier today by telephone. I was disappointed to learn that your letter did not accurately set out BellSouth's intended practice on this issue. Despite the 99.9% "PLU" factor, and despite the fact that BellSouth's actual intended practice is not mentioned anywhere in the letter, you told me that instead of paying its bills to ALEC as they become due, BellSouth would treat 90% of the minutes that BellSouth's customers generate for ALEC to terminate as "disputed" and "in escrow."


In practical economic terms, this is the same as BellSouth declaring that the terminating compensation rate that BellSouth agreed to pay ALEC in our contract is unilaterally reduced by 90%. BellSouth has no contractual right to make such an adjustment. Nothing in our contract suggests that local calls to ISPs are to be treated any differently than local calls to any other business customers. In this regard, I am sure you are aware that every time any incumbent LEC anywhere in the country has tried to sustain the claim that it does not have to pay for local calls to ISPs, the incumbent LEC has lost -- including BellSouth itself in North Carolina.

In this regard, I am particularly concerned that BellSouth has appeared to be reluctant to put its actual practice into writing. It seems peculiar that your letter would suggest that all of our bills would actually be paid when in fact BellSouth's intention is to pay only a small fraction of the amounts due.

Be that as it may, our conversation left no room for doubt that BellSouth will indeed refuse to pay 90% of ALEC's legitimate bills. ALEC considers this behavior by BellSouth to be a totally unjustified breach of our agreement, and expects to pursue all available remedies for that breach.

Please feel free to call me if you would like to discuss this matter further. I can be reached on 502-442-5363.

Very truly yours,

A handwritten signature in dark ink, appearing to read 'Jay Campbell', is written above the printed name.

Jay Campbell  
ALEC, Inc.