

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.

and

ALEC, INC.

COMPLAINANTS

v.

BELLSOUTH TELECOMMUNICATIONS, INC.

DEFENDANT

CASE NO. 98-212

HYPERION TELECOMMUNICATIONS OF  
LOUISVILLE, INC.

COMPLAINANT

v.

BELLSOUTH TELECOMMUNICATIONS, INC.

DEFENDANT

CASE NO. 98-423

O R D E R

Hyperion Telecommunications of Louisville, Inc., f/k/a Louisville Lightwave  
("Hyperion") has filed a complaint against BellSouth Telecommunications, Inc.

("BellSouth") regarding inter-company reciprocal compensation for transport and termination of telephone exchange traffic for Internet Service Providers ("ISPs"). Hyperion seeks enforcement of certain provisions of its interconnection agreement with BellSouth.

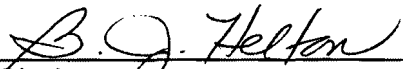
Hyperion has stated a *prima facie* case against BellSouth. Therefore, BellSouth should satisfy or answer this complaint with ten days of the date of this Order.

This complaint addresses the same issues as those which are the subject of Case No. 98-212, in which Hyperion has intervened. As this, and other complaints regarding compensation for ISP traffic cover common issues against the same defendant, they should be consolidated under Case No. 98-212 and styled "American Communications Services of Louisville, Inc. d/b/a e.spire Communications, Inc., American Communications Services of Lexington, Inc. d/b/a e.spire Communications, Inc., ALEC, Inc., and Hyperion Telecommunications of Louisville, Inc., Complainants, v. BellSouth Telecommunications, Inc., Defendant."

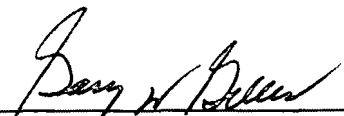
BE IT SO ORDERED.

Done at Frankfort, Kentucky, this 20th day of November, 1998.

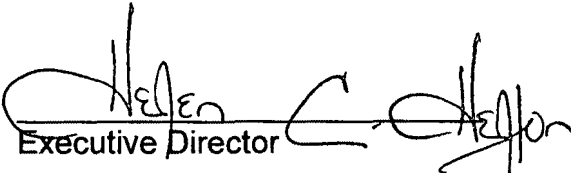
PUBLIC SERVICE COMMISSION

  
Chairman

  
Vice Chairman

  
Commissioner

ATTEST:

  
Executive Director

**COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of	)	
	)	
HYPERION TELECOMMUNICATIONS	)	
OF LOUISVILLE, INC. f/k/a LOUISVILLE	)	
LIGHTWAVE,	)	
	)	
COMPLAINANT,	)	
	)	
v.	)	
	)	
BELLSOUTH TELECOMMUNICATIONS,	)	
INC.,	)	
	)	
DEFENDANT.	)	
	)	

**RECEIVED**  
**AUG 11 1998**  
**PUBLIC SERVICE**  
**COMMISSION**

CASE NO. 98-423

**COMPLAINT OF HYPERION TELECOMMUNICATIONS  
OF LOUISVILLE, INC. AGAINST BELLSOUTH  
TELECOMMUNICATIONS, INC. TO ENFORCE RECIPROCAL  
COMPENSATION AND "MOST FAVORED NATION"  
PROVISIONS OF THE PARTIES INTERCONNECTION AGREEMENT**

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Bridgeville, Pa. 15017-2838

**Counsel for Hyperion Telecommunications Of  
Louisville, Inc.**

Dated: August 10, 1998

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## INTRODUCTION

Hyperion Telecommunications of Louisville, Inc., f/k/a Louisville Lightwave, L.P. (Kentucky) ("Hyperion")<sup>1/</sup> through its undersigned counsel, and pursuant to Ky. Rev. Stat. Sections 278.040 and 278.260, and Rule 12 of the Commission's Rules of Procedure, files this Complaint <sup>2/</sup> against BellSouth Telecommunications, Inc. ("BellSouth") seeking enforcement of the reciprocal compensation and "Most-Favored-Nation" ("MFN") provisions of that certain *Agreement between BellSouth Telecommunications, Inc. and Louisville Lightwave, L.P.* (the "Agreement"), effective as of April 1, 1997, and approved by the Commission on May 16, 1997, in Case No. 97-211.

BellSouth has taken the unilateral position that it refuses to make any payments to Hyperion, or to any other CLEC, as reciprocal compensation for the transport and termination of telephone exchange service traffic handed off by BellSouth to Hyperion for termination by Hyperion to its exchange service end users who are Internet Service Providers or Enhanced Service Providers (collectively "ISPs") despite the clear requirement in the Agreement that the parties will pay such compensation for the transport and termination of "Local Traffic" once a certain minutes-of-use threshold has been achieved. Accordingly, BellSouth is in breach of its Agreement by refusing to recognize ISP traffic as, by definition, local in nature. Hyperion is

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<sup>1/</sup> Hyperion Telecommunications of Louisville, Inc., is the successor in interest to Louisville Lightwave, L.P., a Kentucky limited partnership, of which Hyperion Telecommunications of Kentucky, Inc. was a general partner. Hyperion Telecommunications of Louisville, Inc. is a wholly-owned subsidiary of Hyperion Telecommunications of Kentucky, Inc.

<sup>2/</sup> On July 24, 1998, Hyperion was granted leave to intervene in the case against BellSouth brought by American Communications Services of Louisville, Inc. (and Lexington) d/b/a e•spire Communications, Inc. and ALEC, Inc. (Case No. 98-212). However, BellSouth's refusal to honor the terms of its Interconnection Agreement with Hyperion make it imperative for Hyperion to commence this separate proceeding to request that the Commission enforce the terms of that Agreement.

suffering severe and immediate financial harm from uncompensated transport and termination costs due to BellSouth's refusal to comply with the express terms of its Agreement.

BellSouth's position is legally untenable, as demonstrated by recent decisions of the North Carolina Utilities Commission<sup>3/</sup> and the Tennessee Regulatory Authority<sup>4/</sup> affirmatively rejecting the very same BellSouth arguments, and concluding that *all* local traffic, including traffic terminating at ISPs, is subject to the reciprocal compensation provisions of agreements such as the one at issue here. Indeed, in all material respects, including the definition of local traffic entitled to reciprocal compensation, the Hyperion/BellSouth Interconnection Agreement is virtually identical to the interconnection agreements between BellSouth and (1) Brooks Fiber in Tennessee and (2) US LEC in North Carolina.

Second, BellSouth has refused to modify the Agreement, as it expressly allows, to permit Hyperion to adopt and incorporate the "local interconnection service" (including reciprocal compensation provisions) from an interconnection agreement by and between BellSouth and KMC Telecom, Inc. (the "KMC Agreement"). The Agreement explicitly permits Hyperion to adopt any other, more favorable, terms, by "accepting" a "deemed offer" for the terms of other agreements either by accepting an entire agreement or a section of another agreement, such as

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<sup>3/</sup> *Petition of US LEC of North Carolina, L.L.C. To Enforce Interconnection Agreement, Order Concerning Reciprocal Compensation For ISP Traffic, Docket No. P-55 (N.C.U.C. February 26, 1998).*

<sup>4/</sup> *In re: Petition of Brooks Fiber to Enforce Interconnection Agreement and for Emergency Relief, Docket No. 98-00118, Initial Order of Hearing Officer (April 21, 1998), aff'd (June 2, 1998) (No written decision from the Authority adopting and affirming the Initial Order of the Hearing Officer has been received yet).*

"local interconnection."<sup>5/</sup> Indeed, one of the significant inducements for Hyperion to enter into the Agreement was BellSouth's obligation to offer other contract terms under this "MFN" clause.

In accordance with the rulings of the North Carolina Commission and the Tennessee Authority determining that local traffic terminated to ISPs is to be treated like all other local traffic, Hyperion requests that this Commission enter an order enforcing the Agreement and directing BellSouth to compensate Hyperion for the termination of all local traffic originated by BellSouth to Hyperion's end user customers, *including ISP customers*, pursuant to Sections IV.C. and/or XIX of the Agreement, together with interest thereon. Hyperion further requests that the Commission order BellSouth to amend the Agreement pursuant to Section XIX thereof to permit Hyperion to incorporate the reciprocal compensation provisions of the KMC Agreement, effective as of March 13, 1998, the date of Hyperion's initial request.

## **I. JURISDICTION**

1. Both Hyperion and BellSouth are authorized to provide local exchange services in the State of Kentucky pursuant to certificates issued by this Commission.

2. Pursuant to Section 252 of the Telecommunications Act of 1996 (the "Act"), Hyperion and BellSouth negotiated the Interconnection Agreement effective as of April 1, 1997. The Agreement was filed with the Commission on April 21, 1997 and was approved on May 16, 1997, in Case No. 97-211. A copy of relevant provisions of the Agreement are attached hereto as Exhibit 1.

3. The terms of the Agreement specifically provide for the right of either party to petition the Commission "[i]f the parties are unable to resolve issues related to a Dispute . . ."<sup>6/</sup>

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<sup>5/</sup> Agreement, Section XIX.B. and E.

<sup>6/</sup> Agreement at Section XXI.A.

Thus, the Commission has jurisdiction to enforce the Agreement under its own terms. Moreover, the United States Court of Appeals for the Eighth Circuit has held that a state commission has the jurisdiction to interpret and enforce an agreement which it previously approved. *Iowa Utilities Board v. Federal Communications Commission*, 120 F.3d 753, 803 (8th Cir. 1997), *cert. granted*, \_\_\_ U.S. \_\_\_, 118 S.Ct. 879 (1998).

4. In addition, the Commission has jurisdiction to consider the claims made herein and to grant the relief requested pursuant to Ky. Rev. Stat. Ann. 278.040 (Commission "shall regulate utilities and enforce the provisions of this chapter. . . . The commission shall have exclusive jurisdiction over the regulation of rates and services of utilities, . . ."), 278.260 (Commission "shall have original jurisdiction over complaints as to rates or service of any utility . . .") and 278.280 ("[C]ommission shall determine the just, reasonable, . . . rules, regulations, practices, . . . , service or methods to be observed, furnished, constructed, enforced or employed, and shall fix the same by its order, rule or regulation").

5. Correspondence regarding this Complaint should be sent to Hyperion at the following address:

Janet S. Livengood, Esq.  
Director, Legal and Regulatory Affairs  
HYPERION TELECOMMUNICATIONS, INC.  
DDI Plaza 2  
500 Thomas Street, Suite 400  
Bridgeville, Pa. 15017-2838

Correspondence regarding this Complaint also should be sent to Hyperion's attorneys as follows:

Dana Frix, Esq.  
Douglas G. Bonner, Esq.  
Michael L. Shor, Esq.  
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP.  
3000 K Street, N.W., Suite 300  
Washington, D.C. 20007



6. Correspondence regarding this Complaint should be sent to the defendant at:

BellSouth Telecommunications, Inc.  
Attn: OLEC Account Team  
3535 Colonnade Parkway  
Room E4E1  
Birmingham, Alabama 35243

7. Hyperion's interest in this proceeding, as stated elsewhere in this Complaint, is in the enforcement of the Agreement's terms with respect to the provision of local exchange services throughout those portions of the state of Kentucky served by BellSouth.

8. Hyperion hereby requests that the Commission commence a formal contested case to address the issues raised in this Complaint.

## II. STATEMENT OF FACTS

### A. BELLSOUTH REFUSES TO PAY RECIPROCAL COMPENSATION TO HYPERION FOR TERMINATING LOCAL CALLS TO ISPs AND REFUSES TO MODIFY THE INTERCONNECTION AGREEMENT AS REQUIRED BY ITS TERMS.

9. Section 251(a) of the Telecommunications Act of 1996 ("the Act")<sup>7/</sup> obligates all telecommunications carriers to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."

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

11. Both Hyperion and BellSouth provide tariffed local exchange services over their respective networks to end user customers, including certain business customers operating as

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<sup>7/</sup> Pub. L. 104-104, 100 Stat. 56 (1996) ("the Act").

ISPs. As the term suggests, ISPs provide information to their customers obtained from numerous sources, including sources accessed through the Internet and through databases. Typically, an ISP's customer connects to an ISP by means of a local, seven (7) digit, phone call using local exchange telephone service. The Agreement permits BellSouth's customers to place local calls to ISPs located on Hyperion's network, *just as they may to any other local telephone number*. Likewise, Hyperion's customers may place calls to the local numbers of ISPs served by BellSouth.

12. Section 251(b)(5) of Act obligates BellSouth and Hyperion, as local exchange carriers, "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." At the same time, Section 252(d) of the Act provides that a state commission may not find the terms and conditions of reciprocal compensation to be "just and reasonable" unless the terms "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier."

13. In accordance with Sections 251(b)(5) and 252(d) of the Act, Section IV.C. of the Agreement contemplates a "bill and keep arrangement" until such time as:

the difference in minutes of use for terminating local traffic exceeds three million (3,000,000) minutes per state on a monthly basis. . . . *[then] Hyperion may elect the terms of any compensation arrangement for local interconnection then in effect between BellSouth and any other telecommunications carrier, or in the absence of such an election, the parties will negotiate the specifics of a traffic exchange agreement which will apply on a going-forward basis.*

(Emphasis added). Thus, pursuant to Section IV.C. of the Agreement, Hyperion is entitled to adopt the reciprocal compensation terms of any other interconnection agreement once the

difference in minutes of use for terminating local traffic<sup>8/</sup> exceeds 3 million minutes in Kentucky, *without regard* to the identity of the end-users to whom local calls are terminating.

14. Alternatively, Hyperion is independently entitled under the Agreement to exercise its "most-favored-nation" rights to adopt any more-favorable terms granted to another CLEC.

Section XIX.B. of the Agreement governs the circumstances under which Hyperion could opt in to the terms of another interconnection agreement, whether negotiated or arbitrated. That section states as follows:

In the event that BellSouth, either before or after the effective date of this Agreement, enters into an agreement with any other telecommunications carrier . . . which provides for any of the arrangements covered by this Agreement upon rates, terms or conditions that differ in any material respect from the rates, terms and conditions for such arrangements set forth in this Agreement ("Other Terms"), *then BellSouth shall be deemed thereby to have offered such arrangements to Hyperion upon such Other Terms, which Hyperion may accept as provided in Section XIX.E.* . . . In the event that Hyperion accepts such offer more than sixty (60) days after the Commission approves such Other Interconnection Agreement . . . such Other Terms shall be effective between BellSouth and Hyperion as of the date on which Hyperion accepts such offer.

(Emphasis added).

15. With respect to Hyperion's acceptance of such deemed offer, Section XIX.E. provides as follows:

In the event that BellSouth is deemed to have offered Hyperion the arrangements covered by this Agreement upon Other Terms, Hyperion *in its sole discretion*, may accept such offer either,

1. by accepting such Other Terms in their entirety; or
- 2.. by accepting the Other Terms that directly relate to any of the following as a whole:

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<sup>8/</sup>

*See, infra*, ¶ 28 for a discussion of the definition of local traffic.

a. *any local interconnection service.*<sup>9/</sup>

16. Finally, in the event Hyperion elects to accept such deemed offer, Section XIX.F. provides for a corrective payment, stating as follows:

In the event that . . . (2) Hyperion accepts a deemed offer of Other Terms pursuant to Section XIX.E, then BellSouth or Hyperion, as applicable, shall make a corrective payment to the other party to correct for the difference between the rates set forth herein and the rates in such revised agreement or Other Terms for substantially similar services for the period from the effective date of such revised agreement or Other Terms until the date that the parties execute such revised agreement or Hyperion accepts such Other Terms, plus simple interest at a rate [specified therein].

17. Thus, under *either* of the twin grounds of Section IV.C. and/or XIX of the Agreement,<sup>10/</sup> retroactive to the date of Hyperion's initial request (March 13, 1998), or whenever the difference in monthly minutes-of-use between the parties exceeded 3 million minutes, Hyperion is entitled to elect the reciprocal compensation terms of a separate interconnection agreement and, from that point on, is entitled to receive reciprocal compensation payments from BellSouth for local traffic originating at BellSouth customers and terminating at Hyperion customers.

18. Subsequent to the execution of the Hyperion Agreement, Hyperion learned that BellSouth had entered into an interconnection agreement with KMC which contained reciprocal

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<sup>9/</sup> Agreement, Section XIX.E. (emphasis added).

<sup>10/</sup> BellSouth argues erroneously in a letter dated July 23, 1998 (see, *infra*, ¶ 23) that Hyperion cannot rely on Section XIX to adopt the reciprocal compensation provisions of another interconnection agreement; suggesting, instead, that such a request is governed exclusively by Section IV.C. The Agreement does not support BellSouth's gloss. There is no such limitation or cross-reference in Section XIX or anywhere else in the Agreement. Further, BellSouth is estopped by Section XXXII, the "Entire Agreement" clause, from adding conditions or terms that are not found therein. ("[N]either party shall be bound by any definition, condition, provision, representation, warranty, covenant or promise other than as expressly stated in this Agreement . . .")

compensation terms more favorable to KMC than those offered to Hyperion in the Agreement at issue here.

19. By letter dated March 13, 1998, Hyperion, by counsel, advised BellSouth that, pursuant to Section XIX.E.2.a. of the Agreement, it

accept[ed] BellSouth's offer of the reciprocal compensation (or "local interconnection service") arrangements pertaining to the BellSouth/KMC Telecom, Inc., regionwide interconnection agreement. . . . Hyperion accepts the BellSouth/KMC Telecom, Inc. reciprocal compensation terms to replace the corresponding reciprocal compensation arrangement provided for in Section IV.C. of the existing Hyperion/BellSouth interconnection agreements in the states of Kentucky and Tennessee. Please forward a proposed revised agreement reflecting the parties' new reciprocal compensation arrangement.

A copy of the March 13, 1998 letter is attached as Exhibit 2.

20. BellSouth inexplicably and inexcusably refused, and continues to refuse, to provide the amendment to the Hyperion Agreement, despite several months of foot-dragging and several unanswered letters from Hyperion's counsel specifically requesting the amendment. In addition to numerous telephone conversations between the parties, by letter dated May 27, 1998, counsel for Hyperion reminded BellSouth that, despite representations to the contrary, it had not yet fulfilled its obligation under the Agreement to provide the amendment. (A copy of the May 27, 1998 letter is attached hereto as Exhibit 3.)

21. Similarly, despite additional telephone calls, BellSouth still declined to provide the required amendment. By letter dated June 24, 1998, counsel reiterated Hyperion's entitlement to the amendment and that, even in the absence of a formal amendment, Hyperion would begin billing BellSouth for terminating local traffic under the rates and terms of the KMC

Agreement effective as of March 13, 1998, the date Hyperion accepted BellSouth's deemed offer. (A copy of the June 24, 1998, letter is attached as Exhibit 4.)

22. By letter dated July 2, 1998, BellSouth finally responded to Hyperion's long-standing request. In open defiance of the North Carolina Commission's *US LEC* decision, and the Tennessee Authority's *Brooks Fiber* decision, however, BellSouth refused to amend the Agreement on grounds wholly unrelated to the initial request. Specifically, BellSouth claimed, for the very first time, that Hyperion was not entitled to amend the Agreement under Section IV.C. (even though Hyperion had not sought to amend the Agreement under this section), allegedly because the threshold difference of 3 million minutes-of-use for terminating local traffic had not been reached. BellSouth arrived at this result by arbitrarily and artificially **excluding** consideration of all local traffic it deems to have been terminated to Hyperion ISP customers. In violation of the terms of its Agreement with Hyperion, which does not distinguish between calls terminating to ISPs and other calls, and in the face of two decisions expressly rejecting its argument, BellSouth continues to treat traffic terminating to ISPs as non-local for reciprocal compensation purposes. (A copy of July 2, 1998 letter is attached as Exhibit 5).

23. By letter dated July 10, 1998, counsel for Hyperion clarified for BellSouth that it had not asked to amend the Agreement under Section IV.C (which imposes a minutes-of-use threshold before reciprocal compensation can be sought). Instead, Hyperion reiterated--for the third time--that it sought to adopt the KMC terms and conditions pursuant to Section XIX of the Hyperion Agreement, and under that provision, *no* minimum use threshold is required as a prerequisite to electing terms of another BellSouth Agreement.<sup>11/</sup> Regardless, however, of whether

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<sup>11/</sup> In its July 10 letter, Hyperion also brought to BellSouth's attention the Tennessee Regulatory Authority's *Brooks Fiber* decision insofar as it directly stated that calls terminating to ISPs were local traffic and undercut BellSouth's calculation of the minutes-of-use difference.

Section IV.C or Section XIX of the Agreement serves as the predicate for its request, Hyperion is undeniably entitled to reciprocal compensation for the termination of local calls.<sup>12/</sup> (A copy of the July 10, 1998 letter is attached hereto as Exhibit 6.)

24. By letter dated July 23, 1998, BellSouth finally responded to Hyperion's July 10 correspondence. BellSouth repeated its view that calls terminating to ISPs are not local, stating as follows:

Additionally, before BellSouth will be able to execute any amendments, *BellSouth will need to be assured the 3,000,000 minutes of use difference in terminating local traffic called for in Hyperion's agreements does not contain Information Service Provider ("ISP") traffic, since such traffic is not local in nature.* At that time, BellSouth will execute the appropriate amendments.

... BellSouth does not believe that the [Tennessee Regulatory Authority's] decision in the Brooks Fiber case addresses, let alone resolves, the proper interpretation of Hyperion's Interconnection Agreement.<sup>13/</sup>

To be sure, neither the *Brooks Fiber* nor *US LEC* decisions are binding upon this Commission. Nevertheless, Hyperion respectfully submits that those decisions, which expressly hold that local calls terminating to ISPs constitute local traffic, are strongly persuasive authority for the Commission involving substantially similar reciprocal compensation terms, and should be followed here as determinative of this identical dispute.

25. BellSouth's position is fundamentally at odds with the decisions of the North Carolina Commission and the Tennessee Authority. The anti-competitive impact of BellSouth's conduct is apparent: By forcing every CLEC to litigate the very same reciprocal compensation

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<sup>12/</sup> Indeed, BellSouth's own traffic figures confirm that the 3 million minute threshold has been met for the months of March, April and May, 1998 in Kentucky. *See*, Exhibit 5.

<sup>13/</sup> July 23, 1998 letter from Mr. Pat Finlen to Douglas G. Bonner, Esq. (emphasis added). A copy of BellSouth's July 23, 1998 letter is attached as Exhibit 7.

issue in every state in its service region, while not paying a single cent for the termination of calls to ISPs during the long course of that litigation, BellSouth is siphoning the life-blood of new entrants—their revenue—and thereby perpetuating its monopolistic position. This violates the letter and intent of the 1996 Act to promote the rapid entry of local exchange competition. *Iowa Utilities Board, supra*, 120 F.3d at 791.

26. For the period in question, *i.e.*, from March 13, 1998 through May 31, 1998, and using the reciprocal compensation rate from the KMC Agreement of \$0.009 per minute, BellSouth owes Hyperion approximately \$104,100 in reciprocal compensation, covering ISP/ESP as well as non-ISP/ESP traffic terminating in Kentucky. To date, no payments have been made. Additional amounts to be determined also will be owed to Hyperion for traffic terminating during the months of June and July 1998, and continuing, so the unpaid reciprocal compensation from BellSouth will increase.

27. In the absence of a negotiated resolution, the Agreement specifically provides for the right of either party to seek intervention from the Commission to resolve a dispute as to the interpretation or enforcement of this Agreement.<sup>14/</sup> In light of the parties' inability to resolve this dispute, Hyperion requests that the Commission rule on this issue.

28. BellSouth's refusal to pay reciprocal compensation for the ISP customer calls terminated by Hyperion is wholly inconsistent with (1) the *US LEC* decision of the North Carolina Commission, (2) the *Brooks Fiber* decision of the Tennessee Authority, (3) the recent decisions by the United States District Courts for the Western District of Texas and the Northern District of Illinois, (4) the Telecommunications Act of 1996, and (5) relevant FCC orders. Moreover, this attempt to withhold compensation from CLECs that terminate local traffic to ISPs

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<sup>14/</sup>

Agreement, Section XXI.



has been addressed by approximately 19 other state regulatory commissions, all of which have rejected the arguments made here by BellSouth.

29. The Hyperion Agreement defines "Local Traffic" in Section I.SS. as:

any telephone call that originates in one exchange and terminates in either the same exchange, or an associated 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.

The term "Local Traffic", as defined in the KMC and the Hyperion Agreements is virtually identical, in all material respects. Certainly, neither one carves out any exception from reciprocal compensation for calls terminating at ISPs.<sup>15/</sup>

30. The Reciprocal Compensation provisions in Section 5.8 of the KMC Agreement, which Hyperion is entitled to adopt, state:

Reciprocal Compensation applies for transport and termination of Local Traffic (including EAS and EAS-like traffic) billable by [BellSouth] or KMC which a Telephone Exchange Service Customer originates on [BellSouth]'s or KMC's network for termination on the other Party's network

The Parties shall compensate each other for transport and termination of Local Traffic (local call termination) at a single identical, reciprocal and equal rate as set forth in Exhibit 8.

(KMC Agreement, Sections 5.8.1 and 5.8.2).

31. Thus, given Hyperion's unrestricted right, under either Section IV.C or Section XIX.B of its Agreement, to adopt the reciprocal compensation provisions of the KMC Agreement, the parties owe each other reciprocal compensation for any "Local Traffic" terminated on the other's network, without regard for the identity of the terminating end-user.

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<sup>15/</sup> The definition is also virtually identical to the definitions of Local Traffic contained in the *Brooks Fiber* and *US LEC* interconnection agreements which were reviewed in Tennessee and North Carolina, respectively.

32. A call placed over the public switched telecommunications network is considered to be "terminated" when it is delivered to the local exchange service bearing the called telephone number. Nothing in the Agreement or applicable law or regulations create a distinction pertaining to calls placed to local exchange end users *who happen to be ISPs*. All calls that terminate within a local calling area, regardless of the identity of the end user, are local calls as defined in the Agreement, and reciprocal compensation is due for such calls. This includes local exchange service calls placed by BellSouth's customers to Hyperion's ISP customers, as well as calls placed by Hyperion's customers to BellSouth's ISP customers.

33. BellSouth, like all other ILECs, treats calls to ISPs as local traffic in all other contexts. BellSouth charges its own ISP customers local residential or business line rates for local exchange service. These services are provided pursuant to BellSouth's local exchange tariff. This practice thus enables customers of BellSouth's ISP customers to connect to their ISP by making a local phone call. When a BellSouth local exchange service customer places a call to an ISP within the caller's local calling area, BellSouth rates and bills such customer for a local call pursuant to the terms of BellSouth's local tariffs.

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

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

35. The position advocated by BellSouth here and its RBOC colleagues around the country has been rejected by every state regulatory agency to have considered and decided the question--nineteen state regulatory agencies at this time--and by all three United States District Courts who have considered the issue on appeal. Indeed, BellSouth's position has been rejected by every state agency in its service area that has decided the issue--three so far--including the North Carolina Utilities Commission, the Tennessee Regulatory Authority and, most recently, the Florida Public Service Commission.<sup>16/</sup>

36. Thus, the North Carolina Utilities Commission unequivocally rejected BellSouth's efforts to carve out an exception for local calls to ISPs/ESPs from its reciprocal compensation obligations under an interconnection agreement with US LEC.<sup>17/</sup> In *US LEC*, the North Carolina Commission stated its conclusion as follows:

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<sup>16/</sup> *Complaint of WorldCom Technologies, Inc. Against BellSouth Telecommunications, Inc. for Breach of Terms of Florida Partial Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 and Request for Relief* Docket No. 971478-TP (F.P.S.C.) (first of four consolidated cases). The Commission voted in open session on August 4, 1998, to adopt the Staff recommendation, which had concluded that calls terminating to ISPs were local traffic for reciprocal compensation purposes. Petitions raising the very same issue are pending in three other BellSouth states. The matter already has been decided against BellSouth by a Hearing Officer in Georgia, and is now before the full Georgia Commission for consideration. *Complaint of MFS Intelenet of Georgia, Inc. Against BellSouth Telecommunications, Inc. and Request for Immediate Relief*, Docket No. 8196-U, Initial Decision of the Hearing Officer (G.P.S.C. May 29, 1998). A complaint recently was filed against BellSouth in Alabama and, on July 31, 1998, Hyperion filed a complaint against BellSouth in Tennessee addressing the identical issue presented here on an identical inter-connection agreement.

<sup>17/</sup> *Petition of US LEC of North Carolina, L.L.C. To Enforce Interconnection Agreement, Order Concerning Reciprocal Compensation For ISP Traffic*, Docket No. P-55 (N.C.U.C. February 26, 1998).

The Interconnection Agreement speaks of reciprocal compensation for local traffic. There is no exception for local traffic to an end user who happens to be an ISP. For the purposes of reciprocal compensation, the Commission concludes that the call terminates when it is delivered to the called local exchange number of the end-user ISP.<sup>18/</sup>

37. This is the very same result recently announced by the Tennessee Regulatory Authority.<sup>19/</sup> In Tennessee, the Authority affirmed the finding of its Hearing Officer that "the term 'Local Traffic' as used in the reciprocal compensation arrangement of the Interconnection Agreement at issue, includes, as a matter of law, calls to ISPs."<sup>20/</sup>

38. Of critical importance is that since the Tennessee Authority announced its decision on June 2, 1998, two United States District Courts, considering appeals of the very same issues from state regulatory authorities, have affirmed the underlying commission decisions and squarely held, as the Tennessee Authority found in *Brooks Fiber*, and the North Carolina Commission found in *US LEC*, that telephone calls terminating at ISPs, which otherwise meet the definition of local traffic in an interconnection agreement are local for purposes of the reciprocal compensation provisions of the interconnection agreements.

39. In Texas, the Public Utilities Commission totally rejected Southwestern Bell's arguments that calls to ISPs were interstate in nature.<sup>21/</sup> The Texas Commission based its

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<sup>18/</sup> *Id.* at 6.

<sup>19/</sup> *Petition of Brooks Fiber To Enforce Interconnection Agreement And For Emergency Relief*, Docket No. 98-00118, Order (Tenn. Regulatory Authority, June 2, 1998). The order was announced in open session; no written decision has been released as of this filing.

<sup>20/</sup> *Petition of Brooks Fiber To Enforce Interconnection Agreement And For Emergency Relief*, Docket No. 98-00118, Initial Order of Hearing Officer, at 19 (Tenn. Regulatory Authority, April 21, 1998).

<sup>21/</sup> *Petition and Request For Expedited Ruling of Time Warner Communications*, PUC Docket No. 18082, Order (Tex. P.U.C. February 27, 1998).

decision on the nature of the calls between the end-user and the ISP and stated its decision as follows:

The Commission agrees with the FCC's view 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 transmission component, which in the case of a call between two end users in the same local calling area is local traffic.<sup>22/</sup>

40. The Texas PUC's decision was affirmed by the United States District Court for the Western District of Texas. In an opinion issued on June 16, 1998, the Court agreed with the Texas PUC that calls to ISPs are local and subject to the reciprocal compensation provisions of the interconnection agreement at issue there.<sup>23/</sup> Reviewing FCC rulings, the Court concluded that ISPs are end-users who receive local calls that terminate within the local exchange network:

Thus, despite the ability to use the Internet for clearly interstate transactions which Congress may choose to regulate, the FCC recognizes that ISPs are not similar to interstate telephone services which are merely 'intermediate step[s] in a single end-to-end communication.'

In the FCC's eyes, ISPs are actually end-users that may lie within the local exchange in the same way residential customers or businesses are end-users in the local market for telephone service .

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<sup>22/</sup> *Id.* Order at 4.

<sup>23/</sup> *Southwestern Bell Telephone Company v. Public Utility Commission of Texas, et. al.*, Case No. MO-98-CA-43 (W.D. Tx., filed June 16, 1998). On July 20, 1998, the District Court denied a motion by Southwestern Bell to alter or amend the judgment. *Southwestern Bell Telephone Company v. Public Utility Commission of Texas, et. al.*, Case No. MO-98-CA-43 (W.D. Tx., July 20, 1998).

Thus, as end users, ISPs may receive *local calls* that *terminate* within the local exchange network.<sup>24/</sup>

41. Similarly, relying on established principles of contract interpretation, the Court held that the interconnection agreement at issue was unambiguous and "the PUC appropriately found that . . . 'the definition of 'local traffic' in the applicable interconnection agreements includes ISP traffic that otherwise conforms to the definition.'"<sup>25/</sup>

42. This is the very same result reached by the Illinois Commerce Commission<sup>26/</sup>, and upheld on appeal by the United States District Court for the Northern District of Illinois.<sup>27/</sup> Before the Illinois Commission, Ameritech Illinois made exactly the same arguments that Southwestern Bell made before the Texas PUC and which BellSouth made to the North Carolina Commission in *US LEC* and to the Tennessee Authority in *Brooks Fiber*. The Illinois Commission rejected the arguments and the Northern District Court affirmed. The Court upheld the ICC's decision on two separate grounds: First, the ICC properly concluded, based on its interpretation of industry practice, that a call "terminates" at the ISP, thus making it a local call subject to reciprocal compensation<sup>28/</sup> and, second, the Agreements themselves unambiguously provide that reciprocal compensation is applicable to local traffic billable by Ameritech, and Ameritech bills calls to ISPs as local calls.<sup>29/</sup>

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<sup>24/</sup> *Id.*, Slip Op. at 20-22 (citations and internal quotations omitted, emphasis in original).

<sup>25/</sup> *Id.*, Slip Op. at 26.

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

<sup>27/</sup> *Illinois Bell Telephone Company d/b/a Ameritech Illinois v. WorldCom Technologies, Inc., et. al.*, No. 98 C 1925 (N.D. Ill., July 21, 1998).

<sup>28/</sup> *Id.*, slip op. at 26-28.

<sup>29/</sup> *Id.* at 25.

43. Other state agencies, considering the identical arguments RBOCs have made elsewhere and BellSouth has made in North Carolina and Tennessee, have reached this same conclusion. For example, the New York Public Service Commission ordered New York Telephone to continue to pay reciprocal compensation for local exchange traffic delivered to ISPs served by MFS Intelenet of New York, Inc.<sup>30/</sup> The Maryland Public Service Commission also ruled that local exchange traffic to ISPs is eligible for reciprocal compensation,<sup>31/</sup> as did the Connecticut Department of Public Utility Control,<sup>32/</sup> the Michigan Public Service Commission,<sup>33/</sup> the Oklahoma Corporation Commission,<sup>34/</sup> Pennsylvania Utility Commission,<sup>35/</sup> the Virginia

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<sup>30/</sup> *Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic*, Case 97-C-1275, Order Denying Petition and Instituting Proceeding (NYPSC July 17, 1997). In its recent Order Closing Proceeding, the New York Public Service Commission reiterated its view that "[c]alls to local telephone numbers of ISPs are intrastate in nature and will be treated as intrastate for the purpose of reciprocal compensation." (NYPSC March 19, 1998).

<sup>31/</sup> Letter dated September 11, 1997 from Daniel P. Gahagan, Executive Secretary, Maryland Public Service Commission, to David K. Hall, Esq., Bell Atlantic-Maryland, Inc. On October 1, 1997, the Maryland Commission dismissed Bell Atlantic's Motion for Reconsideration. The Circuit Court for Montgomery County, Maryland affirmed the Public Service Commission's decision in an unreported decision. CA No. 17-8260.

<sup>32/</sup> *Petition of the Southern New England Telephone Company for a Declaratory Ruling Concerning Internet Services Provider Traffic*, Docket No. 97-05-22, Decision (Conn. D.P.U.C. September 17, 1997).

<sup>33/</sup> *In the matter of the application for approval of an interconnection agreement between Brooks Fiber Communications of Michigan, Inc., and Ameritech Information Industry Services on behalf of Ameritech Michigan*, Case No. U-11178 (first listed of four consolidated cases) (January 28, 1998).

<sup>34/</sup> *In the Matter of the Application of Brooks Fiber Communications of Oklahoma, Inc. and Brooks Fiber Communications of Tulsa, Inc. for an Order Concerning Traffic Terminating To Internet Service Providers and Enforcing Compensation Provisions of the Interconnection Agreement with Southwestern Bell Telephone Company*, Final Order, Cause No. PUD 970000548, Order No. 423626 (O.C.C., June 3, 1998).

<sup>35/</sup> *Petition for Declaratory Order of TCG Delaware Valley, Inc. for clarification of Section 5.7.2 of its Interconnection Agreement with Bell Atlantic-Pennsylvania, Inc.* Opinion and Order, Case No. P-00971256 (P.P.U.C., June 16, 1998).

State Corporation Commission,<sup>36/</sup> and the Public Service Commission of Wisconsin (in two separate cases).<sup>37/</sup>

44. Still other states have reached similar conclusions, albeit in the context of reviewing agreements reached through arbitration. Thus, when US West, in the course of its arbitration with MFS, asserted the identical arguments BellSouth will assert here, that traffic terminated to enhanced service providers should be exempted from reciprocal compensation arrangements under Interconnection Agreements, the WUTC declined to treat traffic to enhanced service providers, including ISPs, any differently than other local traffic<sup>38/</sup> and that conclusion has been upheld on appeal.<sup>39/</sup> Identical results were reached by commissions in Arizona,<sup>40/</sup> Colorado,<sup>41/</sup> Minnesota,<sup>42/</sup> Missouri,<sup>43/</sup> Oregon,<sup>44/</sup> and West Virginia.<sup>45/</sup>

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<sup>36/</sup> *Petition of Cox Virginia Telcom, Inc. for Enforcement of interconnection agreement with Bell Atlantic-Virginia, Inc. and arbitration award for reciprocal compensation for the termination of local calls to Internet service providers*, Final Order, Case No. PUC970069 (Va. S.C.C. October 24, 1997) at 2.

<sup>37/</sup> *Contractual Dispute About the Terms of an Interconnection Agreement Between Ameritech Wisconsin and TCG Milwaukee, Inc.*, Letter Order, Docket Nos. 5837-TD-100, 6720-TD-100 (P.S.C. of Wisconsin, May 13, 1998); *Contractual Dispute About the Terms of an Interconnection Agreement Between Ameritech Wisconsin and Time Warner Communications of Milwaukee, L.P.*, Letter Order, Docket No. 5912-TD-100 (W.P.S.C. June 10, 1998).

<sup>38/</sup> *Petition for Arbitration of an Interconnection Agreement Between MFS Communications Company, Inc. and US WEST Communications, Inc.*, Pursuant to 47 USC § 252, Arbitrator's Report and Decision, Docket No. UT-960323 (Wash. Utils. and Transp. Comm. Nov. 8, 1996) at 26, *aff'd* U.S. West Communications, Inc. v. MFS Intelenet, Inc. Case No. C97-222WD (W.D. Wash., filed January 7, 1998).

<sup>39/</sup> *U.S. West Communications, Inc. v. MFS Intelenet, Inc.* Case No. C97-222WD (W.D. Wash., filed January 7, 1998).

<sup>40/</sup> *Petition of MFS Communications Company, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions with US WEST Communications, Inc.*, Pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996, Opinion and Order, Decision No. 59872, Docket No. U-2752-96-362 *et al.*, 1996 WL 787940 (Arizona Corp. Comm. Oct. 29, 1996) at 7.

<sup>41/</sup> *Petition of MFS Communications Company, Inc., for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions with US WEST Communications, Inc.*, Decision Regarding Petition for Arbitration, Docket No. 96A-287T (Col. PUC Nov. 5, 1996) at 30. The Colorado



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

46. Nor can BellSouth find any solace in prior decisions of the FCC. Under its current rules, the FCC regards traffic to ISPs as local traffic. The FCC repeatedly has affirmed the rights of ISPs to employ local exchange services, under *intra-state* tariffs, to connect to the

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

<sup>42/</sup> *Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCI metro Access Transmission Services, Inc., and MFS Communications Company for Arbitration with US WEST Communications, Inc., Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996*, Order Resolving Arbitration Issues, Docket Nos. P-442, 421/M-96-855, P-5321, 421/M-96-909, P-3167, 421/M-96-729, 1996 Minn PUC LEXIS 188 (Minn. PUC Dec. 2, 1996) at 75-76.

<sup>43/</sup> *In the Matter of the Petition of Birch Telecom of Missouri, Inc. for Arbitration of the Rates, Terms, Conditions and Related Arrangements for Interconnection With Southwestern Bell Telephone Company*, Arbitration Order, Case No. TO-98-278 (M.P.S.C., April 23, 1998).

<sup>44/</sup> *Petition of MFS Communications Company, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to 47 U.S.C. Sec. 252(b) of the Telecommunications Act of 1996*, Commission Decision, Order No. 96-324, 1996 WL 786931 (Ore. PUC Dec. 9, 1996) at 13.

<sup>45/</sup> *MCI Telecommunications Corporation Petition for arbitration of unresolved issues for the interconnection negotiations between MCI and Bell Atlantic -- West Virginia, Inc.*, Case No. 97-1210-T-PC (W.V.P.S.C. January 13, 1998).

public switched telecommunications network.<sup>46/</sup> The mere fact that an ISP may enable a caller to access the Internet does not alter the legal status of the connection between the customer and the ISP as being a local call. The local call to an ISP is separate from any subsequent Internet connection enabled by the ISP. Once the end user ISP customer receives a local call, what that ISP chooses to do with that local transmission, in terms of its provision of information services, remains up to that customer, and has no effect on the nature or legal status of the local exchange call made to that customer, from another customer.

47. The FCC's recent Report and Order on Universal Service, and its First Report and Order on Access Charge Reform, affirm this fact.<sup>47/</sup> In the *Universal Service Order*, the FCC determined that Internet access consists of severable components: the connection to the Internet service provider via voice grade access to the public switched network, and the information service subsequently provided by the ISP.<sup>48/</sup> In other words, the first component is a simple local exchange telephone call. Such a call is eligible for reciprocal compensation under the Hyperion Agreement, as deemed amended by the terms of the KMC Agreement. In addition, while all providers of interstate telecommunications services must contribute to the Universal Service Fund, the FCC explicitly excludes ISPs from the obligation.<sup>49/</sup>

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<sup>46/</sup> *Amendments to Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631, para. 2 n.8 (1988). In its First Report and Order regarding Access Charge Reform, the Commission reaffirmed this position explicitly and declined to impose access charges on ISPs. *In the Matter of Access Charge Reform*, First Report and Order, CC Docket No. 96-262 (rel. May 17, 1997), ¶¶344-348.

<sup>47/</sup> *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45 (rel. May 8, 1997) ("*Universal Service Order*"). *In the Matter of Access Charge Reform*, First Report and Order, CC Docket No. 96-262 (rel. May 17, 1997) ("*Access Charge Reform Order*").

<sup>48/</sup> *Universal Service Order*, paras. 83, 788-789.

<sup>49/</sup> *Universal Service Order*, paras. 787-788.

48. In the *Access Charge Reform Order*, the FCC declined to allow LECs to assess interstate access charges on ISPs.<sup>50/</sup> Indeed, the FCC unambiguously characterized the connection from the end user to the ISP as local traffic: "To maximize the number of subscribers that can reach them *through a local call*, most ISPs have deployed points of presence."<sup>51/</sup>

49. In the FCC's *Non-Accounting Safeguards Order*, the Commission determined that a local call placed to an Information Service Provider was separate from the subsequent information service provided.<sup>52/</sup> The severability of these components was key to the Commission's conclusion that if each component was provided, purchased, or priced separately, the combined transmissions did not constitute a single interLATA transmission.<sup>53/</sup> Given the existence of these three significant Orders, there can be no doubt that, at the present time, the FCC does not consider a local exchange call to an ISP to be interstate or international communications.

50. Most important, the FCC just reaffirmed the conclusions of these earlier rulings in its Report to Congress. In the *Federal-State Joint Board on Universal Service*, Report to Congress<sup>54/</sup>, released on April 10, 1998, the FCC reiterated the distinct difference between the *telecommunications services* that customers use to connect to ISPs and the *information services*

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<sup>50/</sup> *Access Charge Reform Order*, paras. 344-348.

<sup>51/</sup> *Access Charge Reform Order*, n.502 (emphasis added).

<sup>52/</sup> *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-149 (rel. Dec. 24, 1996), para. 120.

<sup>53/</sup> *Id.*

<sup>54/</sup> *Federal-State Joint Board on Universal Service*, Report to Congress, CC Docket 96-45 (rel. April 10, 1998).

which the ISPs provide. The FCC further concluded that just because ISPs might provide their services via telecommunications, that did not make them subject to regulation.

51. The FCC currently is examining the issue of the use of the public switched network by Internet service providers, but, to date, has not altered the existing rules.<sup>55/</sup>

52. The totally untenable nature of BellSouth's position is underscored by the fact that if such traffic were deemed interstate rather than local, BellSouth in fact would violate Section 271 of the Act (which prohibits the provision of interLATA service by an RBOC) each and every time BellSouth connected its customers with BellSouth's own Internet service provider. Undoubtedly, BellSouth cannot intend for this result to occur, which only serves to make its current position all the more illogical and unreasonable.

53. BellSouth's current position on this issue also would have severe and far-reaching anti-competitive implications. This is because any carrier terminating calls to an ISP obviously incurs costs in terminating such calls--the same costs incurred in terminating calls to any other end user, and the same costs BellSouth would incur if it had to terminate the call. BellSouth's position effectively compels Hyperion and other new entrants to terminate the calls without compensation. The inevitable result will be that, practically speaking, no CLEC will be able to furnish service to an ISP, since providing that service would result in uncompensated termination costs. This would leave BellSouth with an unreasonable *de facto* monopoly over ISP end users, a state of affairs that was clearly not intended by Section 271 and other provisions of the 1996 Act.

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<sup>55/</sup> Notice of Inquiry, Usage of the Public Switched Network by Information Service and Internet Access Providers, F.C.C., CC Docket 96-263 (released Dec. 24, 1996) ("NOI Proceeding").

54. Indeed, the potential anticompetitive impact of BellSouth's conduct and position on the reciprocal compensation issue was noted by the Illinois Commerce Commission, which recently stated in examining the unilateral decision of Ameritech Illinois--another ILEC similar to BellSouth--to discontinue reciprocal compensation payments for the termination of calls to ISPs as BellSouth did here:

Ameritech Illinois' unilateral "remedy" is so ill tailored to its perceived problem that it lends credence to the complainants' allegations that Ameritech Illinois' conduct is intentionally anticompetitive. Ameritech Illinois' local exchange competitors are obligated by law to terminate calls made by Ameritech Illinois' customers, they incur substantial costs in order to do so, and they are entitled to be compensated for the use of their equipment and facilities.<sup>56/</sup>

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

56. When the FCC recently rejected Ameritech's application to provide in-region interLATA service for the state of Michigan pursuant to Section 271 of the Act, the FCC made numerous findings that clearly are applicable to the issue at hand. First, the FCC declared unambiguously that, in order for an RBOC's application under Section 271 to be granted, new entrants and BOCs must each be compensated for the use of the other's network for the transport

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<sup>56/</sup> *Teleport Communications Group, et al. vs. Illinois Bell Telephone Company*, Dkt. No. 97-0404, Illinois Commerce Commission Order at 14 (March 11, 1998).

and termination of traffic.<sup>57/</sup> The position taken by BellSouth here in Kentucky and throughout the region violates this requirement, thereby precluding BellSouth from obtaining Section 271 authority while its current policy remains in effect.<sup>58/</sup>

57. Second, the FCC has stated that, in its "public interest" review of an RBOC's Section 271 application, it would consider whether the RBOC has engaged in discriminatory or other anti-competitive conduct, or whether the RBOC has failed to comply with state and federal telecommunications regulations.<sup>59/</sup> Because an RBOC's good faith compliance with its obligations is essential to the development of local competition, any anti-competitive conduct by an RBOC would greatly diminish the likelihood of obtaining Section 271 authority. BellSouth plainly is negating its ability to obtain Section 271 authority by the unlawful and anti-competitive position that it has chosen to adopt regarding reciprocal compensation for local exchange traffic to end users who simply happen to be ISP or ESP end users.

### III. REQUEST FOR RELIEF

For all the reasons stated herein, Hyperion respectfully requests that the Commission follow the example of the North Carolina Commission and the Tennessee Authority and declare that the traffic exchange provisions contained in the Agreement between the parties are fully

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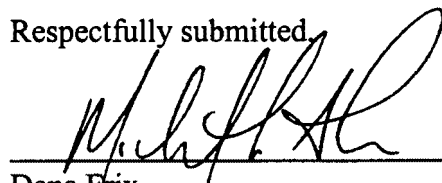
<sup>57/</sup> *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-region InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, ¶ 293 (F.C.C. released Aug. 19, 1997).

<sup>58/</sup> *See, e.g., Investigation of Southwestern Bell Telephone Company's Entry Into The Texas InterLATA Telecommunications Market*, P.U.C. Project No. 16251, Commission Recommendation at 8 (Public Utility Commission of Texas, June 3, 1998) (among other items, Southwestern Bell must comply with reciprocal compensation provisions of interconnection agreements with all CLECs as a condition precedent to the Commission being able to say that the local market is "irreversibly open").

<sup>59/</sup> *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-region InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, ¶ 293 (F.C.C. released Aug. 19, 1997).

applicable to local exchange calls that terminate to ISP customers. Hyperion further requests that the Commission direct BellSouth to amend the Agreement as requested and, finally, direct BellSouth to pay Hyperion for accrued reciprocal compensation on a per minute-of-use basis, together with interest thereon, as provided under Sections IV.C. and XIX.F. of the Agreement, from March 13, 1998, onward, together with such other and further relief, including reasonable attorneys fees to the extent permitted by law, as the Commission deems just and proper.

Respectfully submitted,



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Dated: August 10, 1998

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# **AGREEMENT**

**BETWEEN**

**BELLSOUTH TELECOMMUNICATIONS, INC.**

**AND**

**LOUISVILLE LIGHTWAVE, LP**

**EFFECTIVE DATE: APRIL 1, 1997**



## AGREEMENT

This Agreement is made by and between BellSouth Telecommunications, Inc., ("BellSouth"), a Georgia corporation, and Louisville Lightwave, LP, a Kentucky limited partnership between Hyperion Telecommunications of Kentucky, Inc., a Delaware corporation, and TKR Cable of Kentucky, Inc. a Delaware corporation, and shall be deemed effective as of April 1, 1997. This Agreement may refer to either BellSouth or Louisville Lightwave or both as a "party" or "parties."

### WITNESSETH

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

WHEREAS, Louisville Lightwave is an alternative local exchange company ("ALEC") that is or that may become authorized to provide telecommunications services in the state of Kentucky; and

WHEREAS, the parties wish to interconnect their facilities, purchase unbundled elements, and exchange traffic specifically for the purposes of fulfilling their respective 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 Louisville Lightwave agree as follows:

### I. Definitions

A. "Act" means the Communications Act of 1934 (47 U.S.C. 151 et seq.), as amended by the Telecommunications Act of 1996, and as from time to time interpreted in the duly authorized and Effective rules and regulations of the FCC or the Commission having authority to interpret the Act within its state of jurisdiction.

B. "ADSL" or "Asymmetrical Digital Subscriber Line" means a transmission technology which transmits an asymmetrical digital signal using one of a variety of line codes.

C. "Affiliate" is as defined in the Act.

D. "Switched Access Meet Point Billing" is as defined and described in this Agreement.

E. "As Defined in the Act" means as specifically defined by the Act and as from time to time interpreted in the duly authorized and Effective rules and regulations of the FCC or the Commission.

F. "As Described in the Act" means as described in or required by the Act and as from time to time interpreted in the duly authorized and Effective rules and regulations of the FCC or the Commission.

G. "Automatic Number Identification" or "ANI" means a Feature Group D signaling parameter which refers to the number transmitted through the network identifying the billing number of the calling party.

H. "BLV/BLVI Traffic" means an operator service call in which the caller inquires as to the busy status of or requests an interruption of a call on another Customer's Telephone Exchange Service line.

I. "Bona Fide Request" means the process described on Exhibit A that prescribes the terms and conditions relating to a Party's request that the other Party provide an Interconnection or Network Element not otherwise provided by the terms of this Agreement.

J. "Calling Party Number" or "CPN" is a Common Channel Interoffice Signaling ("CCIS") parameter which refers to the number transmitted through a network identifying the calling party.

K. "Central Office Switch" means a switch used to provide Telecommunications Services, including, but not limited to:

1. "End Office Switches" which are used to terminate Customer station Loops for the purpose of interconnection to each other and to trunks; and
2. "Tandem Office Switches" or "Tandems" which are used to connect and switch trunk circuits between and among other Central Office Switches.

A Central Office Switch may also be employed as a combination End Office/Tandem Office Switch.

L. "CCS" means one hundred (100) call seconds.

M. "CLASS Features" means certain CCIS-based features available to Customers including, but not limited to: Automatic Call Back; Call Trace; Caller Identification and related blocking features; Distinctive Ringing/Call Waiting; Selective Call Forward; and Selective Call Rejection.

N. "Collocation" means an arrangement whereby one Party's (the "Collocating Party") facilities are terminated in its equipment necessary for Interconnection or for access to Network Elements on an unbundled basis which has been installed and maintained at the premises of a second Party (the "Housing Party"). For purposes of Collocation, the "premises" of a Housing Party is limited to an occupied structure or portion thereof in which such Housing Party has the exclusive right of occupancy. Collocation may be "physical" or "virtual." In "Physical Collocation," the Collocating Party installs and maintains its own equipment in the Housing

Party's premises. In "Virtual Collocation," the Housing Party installs and maintains the Collocating Party's equipment in the Housing Party's premises.

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

P. "Common Channel Interoffice Signaling" or "CCIS" means the signaling system, developed for use between switching systems with stored program control, in which all of the signaling information for one or more groups of trunks is transmitted over a dedicated high speed data link rather than on a per trunk basis and, unless otherwise agreed by the Parties, the CCIS used by the Parties shall be SS7.

Q. "Cross Connection" means an intra-Wire Center channel connecting separate pieces of telecommunications equipment including a channel between separate collocation facilities.

R. "Customer" means a third-party residence or business that subscribes to Telecommunications Services provided by either of the Parties.

S. "Dialing Parity" is As Defined in the Act. As used in this Agreement, Dialing Parity refers to both Local Dialing Parity and Toll Dialing Parity. "Local Dialing Parity" means the ability of Telephone Exchange Service Customers of one LEC to place local calls to Telephone Exchange Service Customers of another LEC, without the use of any access code and with no unreasonable dialing delay.

T. "Digital Signal Level" means one of several transmission rates in the time division multiplex hierarchy.

U. "Digital Signal Level 0" or "DS0" means the 64 kbps zero level signal in the time division multiplex hierarchy.

V. "Digital Signal Level 1" or "DS1" means the 1.544 Mbps first level signal in the time division multiplex hierarchy. In the time division multiplexing hierarchy of the telephone network, DS1 is the initial level of multiplexing.

W. "Digital Signal Level 3" or "DS3" means the 44.736 Mbps third level in the time division multiplex hierarchy. In the time division multiplexing hierarchy of the telephone network, DS3 is defined as the third level of multiplexing.

X. "Effective," when used with reference to rules, regulations, or orders of the FCC or of a state Commission, means in effect and not stayed by the issuing agency or a reviewing court as of a given time during the term of this Agreement. In the event that any rule, regulation, or order ceases to be Effective, any change in the provisions of this Agreement or the practices of the parties resulting from such rule, regulation, or order shall revert to the provision or practice in effect prior to such rule, regulation, or order becoming Effective.

**Y.** "Exchange Message Record" or "EMR" means the standard used for exchange of Telecommunications message information among Telecommunications providers for billable, non-billable, sample, settlement and study data. EMR format is contained in Bellcore Practice BR-010-200-010 CRIS Exchange Message Record.

**Z.** "Exchange Access" is As Defined in the Act.

**AA.** "Exchange Area" means an area, defined by the Commission, for which a distinct local rate schedule is in effect.

**BB.** "FCC" means the Federal Communications Commission.

**CC.** "Fiber Meet" means an Interconnection architecture method whereby the Parties physically Interconnect their networks via an optical fiber interface (as opposed to an electrical interface) at a mutually agreed upon location.

**DD.** "HDSL" or "High-Bit Rate Digital Subscriber Line" means a transmission technology which transmits up to a DS1-level signal, using any one of the following line codes: 2 Binary / 1 Quaternary ("2B1Q"), Carrierless AM/PM, Discrete Multitone ("DMT"), or 3 Binary / 1 Octet ("3B1O").

**EE.** "Incumbent Local Exchange Carrier" or "ILEC" is As Defined in the Act.

**FF.** "Information Service Traffic" means Local Traffic or IntraLATA Toll Traffic which originates on a Telephone Exchange Service line and which is addressed to an information service provided over a Party's information services platform (e.g., 976).

**GG.** "Integrated Digital Loop Carrier" means a subscriber loop carrier system that is twenty-four (24) local Loop transmission paths combined into a 1.544 Mbps digital signal which integrates within the switch at a DS1 level without demultiplexing of the signal down to individual circuits outside the switch.

**HH.** "Integrated Services Digital Network" or "ISDN" means a switched network service that provides end to end digital connectivity for the simultaneous transmission of voice and data. Basic Rate Interface ISDN (BRI/ISDN) provides for a digital transmission of two 64 kbps bearer channels and one 16 kbps data channel (2B+D).

**II.** "Interconnection" is As Described in the Act.

**JJ.** "Interexchange Carrier" or "IXC" means a carrier that provides, directly or indirectly, interLATA or intraLATA Telephone Toll Services.

**KK.** "Interim Telecommunications Number Portability" or "INP" is As Described in the Act.

**LL.** "InterLATA" is As Defined in the Act.

**MM.** "Intermediary Function" is defined as the delivery of local traffic from or to a local exchange carrier other than BellSouth; an ALEC other than Louisville Lightwave; another telecommunications company such as a wireless telecommunications provider through the network of BellSouth or Louisville Lightwave to or from an end user of BellSouth or Louisville Lightwave.

**NN.** "IntraLATA Toll Traffic" means all intraLATA calls other than Local Traffic calls.

**OO.** "Local Access and Transport Area" or "LATA" is As Defined in the Act.

**PP.** "Local Exchange Carrier" or "LEC" is As Defined in the Act.

**QQ.** "Local Interconnection" includes 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 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.

**RR.** "Local Loop Transmission" "Loop" means the entire transmission path which extends from the network interface or demarcation point at a Customer's premises to the Main Distribution Frame or other designated frame or panel in a Party's Central Office which serves the Customer. Loops are defined by the electrical interface rather than the type of facility (e.g., 2-wire or 4-wire) used.

**SS.** "Local Traffic" is defined as any telephone call that originates in one exchange and terminates in either the same exchange, or an associated 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.

**TT.** "Losses" means any and all losses, costs (including court costs), claims, damages (including fines, penalties, and criminal or civil judgments and settlements), injuries, liabilities and expenses (including attorneys' fees).

**UU.** "Main Distribution Frame" means the distribution frame of the Party providing the Loop used to interconnect cable pairs and line and trunk equipment terminals on a switching system.

**VV.** "Meet Point Billing" means the process whereby each Party bills the appropriate tariffed rate for its portion of a jointly provided Switched Exchange Access Service as agreed to in the Agreement for Switched Access Meet Point Billing.

**WW.** "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.

**XX.** "Network Element" is As Defined in the Act.

**YY.** "North American Numbering Plan" or "NANP" means the numbering plan used in the United States that also serves Canada, Bermuda, Puerto Rico and certain Caribbean Islands. The NANP format is a 10 digit number that consists of a 3 digit NPA code (commonly referred to as the area code), followed by a 3 digit NXX code and 4 digit line number.

**ZZ.** "Number Portability" is As Defined in the Act.

**AAA.** "NXX" means the three digit code which appears as the first three digits of a seven digit telephone number.

**BBB.** "Party" means either BellSouth or Louisville Lightwave, and "Parties" means BellSouth and Louisville Lightwave.

**CCC.** "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.

**DDD.** "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.

**EEE.** "POI" means Point of Interface.

**FFF.** "Port" means a termination on a Central Office Switch and associated switching functionality that permits Customers to send or receive Telecommunications over the public switched network, but does not include switch features.

**GGG.** "Rate Center" means the specific geographic point and corresponding geographic area which have been identified by a given LEC as being associated with a particular NPA-NXX code which has been assigned to the LEC for its provision of Telephone Exchange Services. The "rate center point" is the finite geographic point identified by a specific V&H

coordinate, which is used to measure, for the purpose of billing for distance-sensitive traffic to/from Telephone Exchange Services bearing the particular NPA-NXX designation associated with the specific Rate Center. The "rate center area" is the exclusive geographic area which the LEC has identified as the area within which it will provide Telephone Exchange Services bearing the particular NPA-NXX designation associated with the specific Rate Center. The rate center point must be located within the rate center area. Notwithstanding the foregoing, either party may assign the same NXX to more than one Rate Center in accordance with accepted industry standards or as agreed by the parties to alleviate an actual or forecast shortage of NXX codes.

**HHH.** "Reciprocal Compensation" is As Described in the Act.

**III.** "Rating Point" or "Routing Point" means a location which a LEC has designated on its own network as the homing (routing) point for traffic inbound traffic to Telephone Exchange Services provided by the LEC which bear a certain NPA-NXX designation. The Routing Point is also used to calculate mileage measurements for the distance-sensitive transport element charges of Switched Exchange Access Services. Pursuant to Bell Communications Research, Inc. ("Bellcore") Practice BR 795-100-100, the Rating Point may be an "End Office" location, or a "LEC Consortium Point of Interconnection." Pursuant to that same Bellcore Practice, examples of the latter shall be designated by a common language location identifier (CLLI) code with (x)KD in positions 9, 10, 11, where (x) may be any alphanumeric A-Z or 0-9. The Rating Point/Routing Point must be located within the LATA in which the corresponding NPA-NXX is located. However, Rating Points/Routing Points associated with each NPA-NXX need not be the same as the corresponding Rate Center Point, nor must it be located within the corresponding Rate Center Area, nor must there be a unique and separate Rating Point/Routing Point corresponding to each unique and separate Rate Center. Notwithstanding the foregoing, either party may assign the same NXX to more than one Rate Center in accordance with accepted industry standards or as agreed by the parties to alleviate an actual or forecast shortage of NXX codes.

**JJJ.** "Service Control Point" or "SCP" means a signaling point, other than an STP, that acts as a database to provide information to another signaling point (i.e., Service Switching Point or another SCP) for processing or routing certain types of network calls. A query/response mechanism is typically used in communicating with an SCP.

**KKK.** "Signaling Transfer Point" or "STP" means a signaling point that performs message routing functions and provides information for the routing of messages between signaling points. An STP transmits, receives and processes CCIS messages.

**LLL.** "Switched Exchange Access Service" means the offering of transmission or switching services to Telecommunications Carriers for the purpose of the origination or termination of Telephone Toll Service. Switched Exchange Access Services include: Feature Group A, Feature Group B, Feature Group D, 800/888 access, and 900 access and their successors or similar Switched Exchange Access Services.

**MMM.** "Synchronous Optical Network" or "SONET" means an optical interface standard that allows inter-networking of transmission products from multiple vendors. The base rate is 51.84 Mbps (OC-1/STS-1) and higher rates are direct multiples of the base rate, up to 13.22 Gbps.

**NNN.** "Technically Feasible Point" is As Described in the Act.

**OOO.** "Telecommunications" is As Defined in the Act.

**PPP.** "Telecommunications Act of 1996" ("Act") means the Telecommunications Act of 1996 and any rules and regulations promulgated thereunder

**QQQ.** "Telecommunications Carrier" is As Defined in the Act.

**RRR.** "Telecommunications Service" is As Defined in the Act.

**SSS.** "Telephone Exchange Service" is As Defined in the Act.

**TTT.** "Telephone Toll Service" is As Defined in the Act.

**UUU.** "Wire Center" means a building or space within a building which serves as an aggregation point on a given carrier's network, where transmission facilities and circuits are connected or switched.

## **II. Purpose**

The parties desire to enter into this Agreement consistent with all applicable federal, state and local statutes, rules and regulations in effect as of the date of execution, including without limitation sections 251, 252 and 271 of the Act. The access and interconnection obligations contained herein enable Louisville Lightwave to provide competing telephone exchange service to subscribers within the territory of BellSouth.

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

**A.** The term of this Agreement shall be two years, beginning April 1, 1997.

**B.** The parties agree that by no later than April 1, 1998, they shall commence negotiations with regard to the terms, conditions and prices of local interconnection to be effective beginning April 1, 1999.

**C.** If, within 135 days of commencing the negotiation referred to in Section III.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 January 1, 1999. The parties further agree that in the event the Commission does not issue its order by April 1, 1999, or if the parties continue beyond April 1, 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 April 1, 1999. Until the revised local interconnection arrangements become effective, the terms and conditions of this Agreement shall remain in effect.

**D.** Rates and charges applicable in Kentucky are set forth in Attachment A. In the event of a conflict between Attachment A and any other Attachment, Attachment A controls. In the event that there is no rate set forth for a service or unbundled element in Attachment A, the rate for such service or unbundled element identified in Attachments B-1 through B-4 and C-1 through C-17 as applicable shall apply. Applicable wholesale discounts for resold services are set forth in Attachment D.

**E.** The rates set forth in this Agreement and the Attachments hereto are interim rates. The rates for each state shall be adjusted and trued up, retroactively to the Effective Date, in accordance with an Effective order of the applicable Commission establishing rates in accordance with 47 U.S.C. § 252(d). In the event and to the extent that in any state there is no such Effective order prior to April 1, 1999, then unless otherwise agreed in the negotiations pursuant to Section III.B, the rates set forth herein and in the Attachments hereto shall to such extent be the final rates for such state.

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

**A. Scope.** This Section describes the physical architecture for Interconnection of the Parties' facilities and equipment for the transmission and routing of Telephone Exchange Service traffic and Exchange Access traffic between the respective Customers of the Parties pursuant to Section 251(c)(2) of the Act. Each Party shall make available to the other Party the same Interconnection methods on the same rates, terms and conditions.

**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 for purposes of determining compensation between the parties, the exchange of traffic on BellSouth's EAS routes shall be considered as local traffic by BellSouth and compensation for the termination of such traffic shall be pursuant to the terms of this section, but that Louisville Lightwave may establish different local calling areas for purposes of billing its retail customers. 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.** With the exception of the local traffic specifically identified in Section IV.H, for purposes of this Agreement, the parties agree that there will be no cash compensation for local interconnection minutes of use exchanged by the parties during the term of this Agreement unless the difference in minutes of use for terminating local traffic exceeds three million (3,000,000) minutes per state on a monthly basis. In such event, Louisville Lightwave may elect the terms of

any compensation arrangement for local interconnection then in effect between BellSouth and any other telecommunications carrier, or in the absence of such an election, the parties will negotiate the specifics of a traffic exchange agreement which will apply on a going-forward basis.

D. The parties agree that there are three appropriate methods of interconnecting facilities: (1) virtual collocation where physical collocation is excused under the Act; (2) physical collocation; and (3) interconnection via facilities purchased from either party by the other party. Rates and charges for collocation are set forth in Attachment C-13, incorporated herein by this reference. Louisville Lightwave may purchase facilities from BellSouth at rates, terms and conditions set forth in BellSouth's intrastate Switched Access (Section E6) or Special Access (Section E7) services tariff.

E. 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 Louisville Lightwave desires to serve for interconnection to those end offices that subtend the access tandem. In addition, Louisville Lightwave 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 disconnect supervision and shall hand off calling party number ID when technically feasible. The parties further agree that in the event a party interconnects via the purchase of facilities and/or services from the other party, the appropriate BellSouth intrastate access tariff, as amended from time to time, will apply.

F. The parties agree to establish one-way trunk groups from the interconnecting facilities of Section IV.D such that each party provides a reciprocal of each trunk group established by the other party for the first six months of this Agreement in any LATA where the parties may interconnect. The parties recognize, however, that the use of shared two-way trunk groups generally would be more efficient than separate one-way trunk groups. In the event that the parties have not adopted a plan within six months after the Effective Date for transitioning to the use of two-way trunk groups in accordance with standard industry practices, they shall meet and discuss the need to offset the continuing inefficiencies of using one-way trunk groups after nine months after the Effective Date. Either party reserves the right to order one-way trunk groups after that time should the balance of traffic justify it. Consistent with the foregoing, each party may construct its network, including the interconnecting facilities, to achieve optimum cost effectiveness and network efficiency.

G. In the event BellSouth delivers traffic to Louisville Lightwave for termination on Louisville Lightwave's network and as a result of the call the caller could be billed by Louisville Lightwave, if BellSouth cannot determine, because of the manner in which Louisville Lightwave has utilized its NXX codes, whether the traffic is local or toll BellSouth will rely on the PLU to

B. In the event that either party receives a complaint alleging an unauthorized change in local service provider by the other party, the party receiving the complaint will promptly contact the other party and notify it of the complaint. The party alleged to be providing local service without customer authorization shall have three (3) business days to produce a Letter of Authorization from the applicable customer. In the event that the party is unable to produce a Letter of Authorization within three (3) business days, it shall pay the applicable non-recurring charges to reestablish the customer's service with the appropriate local service provider and an investigation fee of \$19.41 per line or trunk for residence or business customers.

C. BellSouth may designate BellSouth as the preferred provider of local exchange service for its own pay telephones.

### **XVIII. Implementation of Agreement, Installation, Maintenance, Testing and Repair**

Louisville Lightwave and BellSouth will jointly develop and agree on a Joint Interconnection Grooming Plan (the "Grooming Plan") which shall define and detail, inter alia, prescribing standards to ensure that BellSouth Interconnection Wire Center ("BIWC") and Louisville Lightwave Interconnection Wire Center ("IWC") trunk groups experience a consistent P.01 or better grade of service, and other appropriate, relevant, industry-accepted quality, reliability and availability standards. Such plan shall also include mutually agreed upon default standards for the configuration of segregated BIWC trunk groups and segregated IWC trunk groups. In addition, the plan shall also include standards and procedures for notification of trunk disconnections and discoveries of trunk disconnections. The plan shall include definitive parameters which define under what circumstances the parties may transition trunk groups to two-way trunk groups. The parties will use their best collective good faith efforts to complete and agree upon such plan at the earliest practicable date, but not less than 90 days following execution of this Agreement. Furthermore, the plan should include maintenance of the SONET transmission system, disaster recovery provision escalations, and such other matters as the parties may agree. The Parties will use their best collective good faith efforts to implement the Grooming Plan in the initial LATAs pursuant to the plan. The parties agree to install the initial interconnection trunks in each LATA requested by Louisville Lightwave as specified in Section IV.M prior to completion of the Grooming Plan.

### **XIX. Adjustments to Terms**

A. The parties agree that if,

1. the FCC or a Commission finds that the terms of this Agreement are inconsistent in one or more material respects with any of its or their respective decisions, rules or regulations,
2. the FCC or a Commission preempts the effect of this Agreement, or
3. the FCC or a Commission duly promulgates a rule or regulation that, subject to the Dispute Resolution provisions of Section XXI.A, the parties agree is inconsistent with any

one or more of the provisions of this Agreement and requires modification of this Agreement,

then, in any such case, upon such occurrence becoming final and no longer subject to administrative or judicial review, the parties shall immediately commence good faith negotiations to conform this Agreement to the requirements of any such decision, rule, regulation or preemption. The revised agreement shall have an effective date that coincides with the effective date of the original FCC or Commission action giving rise to such negotiations. The parties agree that the rates, terms and conditions of any new agreement shall not be applied retroactively to any period prior to such effective date except to the extent that such retroactive effect is expressly required by such FCC or Commission decision, rule, regulation or preemption.

B. In the event that BellSouth, either before or after the effective date of this Agreement, enters into an agreement with any other telecommunications carrier, including, without limitation, an agreement resulting from an arbitration pursuant to 47 U.S.C. § 252(b), (an "Other Interconnection Agreement") which provides for any of the arrangements covered by this Agreement upon rates, terms or conditions that differ in any material respect from the rates, terms and conditions for such arrangements set forth in this Agreement ("Other Terms"), then BellSouth shall be deemed thereby to have offered such arrangements to Louisville Lightwave upon such Other Terms, which Louisville Lightwave may accept as provided in Section XIX.E. In the event that Louisville Lightwave accepts such offer within sixty (60) days after the Commission approves such Other Interconnection Agreement pursuant to 47 U.S.C. § 252, such Other Terms shall be effective between BellSouth and Louisville Lightwave as of the effective date of such Other Interconnection Agreement. In the event that Louisville Lightwave accepts such offer more than sixty (60) days after the Commission approves such Other Interconnection Agreement pursuant to 47 U.S.C. § 252, such Other Terms shall be effective between BellSouth and Louisville Lightwave as of the date on which Louisville Lightwave accepts such offer.

C. In the event that after the effective date of this Agreement the FCC or a Commission enters an order (an "Interconnection Order") requiring BellSouth to provide any of the arrangements covered by this Agreement upon Other Terms, then upon such Interconnection Order becoming final and not subject to further administrative or judicial review, BellSouth shall be deemed to have offered such arrangements to Louisville Lightwave upon such Other Terms, which Louisville Lightwave may accept as provided in Section XIX.E. In the event that Louisville Lightwave accepts such offer within sixty (60) days after the date on which such Interconnection Order becomes final and not subject to further administrative or judicial review, such Other Terms shall be effective between BellSouth and Louisville Lightwave as of the effective date of such Interconnection Order. In the event that Louisville Lightwave accepts such offer more than sixty (60) days after the date on which such Interconnection Order becomes final and not subject to further administrative or judicial review, such Other Terms shall be effective between BellSouth and Louisville Lightwave as of the date on which Louisville Lightwave accepts such offer.

D. In the event that after the effective date of this Agreement BellSouth files and subsequently receives approval for one or more intrastate or interstate tariffs (each, an "Interconnection Tariff") offering to provide any of the arrangements covered by this Agreement upon Other Terms, then upon such Interconnection Tariff becoming effective, BellSouth shall be

deemed thereby to have offered such arrangements to Louisville Lightwave upon such Other Terms, which Louisville Lightwave may accept as provided in Section XIX.E. In the event that Louisville Lightwave accepts such offer within sixty (60) days after the date on which such Interconnection Tariff becomes effective, such Other Terms shall be effective between BellSouth and Louisville Lightwave as of the effective date of such Interconnection Tariff. In the event that Louisville Lightwave accepts such offer more than sixty (60) days after the date on which such Interconnection Tariff becomes effective, such Other Terms shall be effective between BellSouth and Louisville Lightwave as of the date on which Louisville Lightwave accepts such offer.

E. In the event that BellSouth is deemed to have offered Louisville Lightwave the arrangements covered by this Agreement upon Other Terms, Louisville Lightwave in its sole discretion may accept such offer either,

1. by accepting such Other Terms in their entirety; or
2. by accepting the Other Terms that directly relate to any of the following as a whole:
  - a. any local interconnection service,
  - b. any interLATA and intraLATA toll traffic interconnection service,
  - c. any Number Portability service,
  - d. access to any unbundled network elements, including local loops, network interface devices, switching capability, interoffice transmission facilities, signaling networks and call-related databases, operations support systems functions, operator services, directory assistance, directory listings, and any elements that result from subsequent bona fide requests,
  - e. access to poles, ducts, conduits and rights-of-way,
  - f. access to 911/E911 emergency network,
  - g. any resale services, or
  - h. access to telephone numbers.

The terms of this Agreement, other than those affected by the Other Terms accepted by Louisville Lightwave, shall remain in full force and effect.

F. In the event that,

1. BellSouth and Louisville Lightwave revise this Agreement pursuant to Section XIX.A, or
2. Louisville Lightwave accepts a deemed offer of Other Terms pursuant to Section XIX.E,

then BellSouth or Louisville Lightwave, as applicable, shall make a corrective payment to the other party to correct for the difference between the rates set forth herein and the rates in such

revised agreement or Other Terms for substantially similar services for the period from the effective date of such revised agreement or Other Terms until the date that the parties execute such revised agreement or Louisville Lightwave accepts such Other Terms, plus simple interest at a rate equal to the thirty day commercial paper rate for high grade, unsecured notes sold through dealers by major corporations in multiples of \$1,000.00 as regularly published in THE WALL STREET JOURNAL.

## **XX. Network Protection**

A. Each Party may use protective network traffic management controls such as 7-digit and 10-digit code gaps on traffic toward the other Party's network, when required to protect the public switched network from congestion due to facility failures, switch congestion or failure or focused overload. Each Party shall immediately notify the other Party of any protective control action planned or executed.

B. Where the capability exists, originating or terminating traffic reroutes may be implemented by either Party to temporarily relieve network congestion due to facility failures or abnormal calling patterns. Reroutes shall not be used to circumvent normal trunk servicing. Expansive controls shall be used only when mutually agreed to by the Parties.

C. The Parties shall cooperate and share pre-planning information regarding cross-network call-ins expected to generate large or focused temporary increases in call volumes, to prevent or mitigate the impact of these events on the public switched network.

D. Neither Party shall use any service related to or using any of the services provided in this Agreement in any manner that interferes with third parties in the use of their service, prevents third parties from using their service, impairs the quality of service to other carriers or to either Party's Customers; causes electrical hazards to either Party's personnel, damage to either Party's equipment or malfunction of either Party's billing equipment (individually and collectively, a "Network Harm"). If a Network Harm shall occur or if a Party reasonably determines that a Network Harm is imminent, such Party shall, where practicable, notify the other Party that temporary discontinuance or refusal of service may be required; provided, however, wherever prior notice is not practicable, such Party may temporarily discontinue or refuse service forthwith, if such action is reasonable under the circumstances. In case of such temporary discontinuance or refusal, such Party shall:

1. Promptly notify the other Party of such temporary discontinuance or refusal; and
2. Afford the other Party the opportunity to correct the situation which gave rise to such temporary discontinuance or refusal.

E. Each party assumes the responsibility of notifying the other regarding less than standard operations with respect to services provided by it.

F. Each party shall notify the other in accordance with Effective FCC or Commission requirements of any changes in the operation of its network that may be likely to affect the other party.

G. BellSouth agrees to notify Louisville Lightwave electronically of any changes in the terms and conditions under which it offers Telecommunications Services to subscribers who are non-telecommunications carriers, including, but not limited to, the introduction or discontinuance of any features, functions, services or promotions, at least 45 days prior to the effective date of any such change or concurrent with BellSouth's internal notification process for such change, whichever is earlier. Louisville Lightwave recognizes that certain revisions may occur between the time BellSouth notifies Louisville Lightwave of a change pursuant to this Section and BellSouth's tariff filing of such change. BellSouth shall notify Louisville Lightwave of such revisions consistent with BellSouth's internal notification process but Louisville Lightwave accepts the consequences of such mid-stream changes as an uncertainty of doing business and, therefore, will not hold BellSouth responsible for any resulting inconvenience or cost incurred by Louisville Lightwave unless caused by the intentional misconduct of BellSouth for the purposes of this section. The notification given pursuant to this section will not be used by the parties to market their offering of such service in the retail market externally in advance of BellSouth filings.

## **XXI. Dispute Resolution**

A. **Dispute Escalation and Resolution.** Except as otherwise provided herein, any dispute, controversy or claim (individually and collectively, a "Dispute") arising under this Agreement shall be resolved in accordance with the procedures set forth in this Section. In the event of a Dispute between the Parties relating to this Agreement and upon the written request of either Party, each of the parties shall appoint a designated representative who has authority to settle the dispute. The designated representatives shall meet as often as they reasonably deem necessary in order to discuss the Dispute and negotiate in good faith in an effort to resolve such Dispute. The specific format for such discussions will be left to the discretion of the designated representatives, however, all reasonable requests for relevant information made by one party to the other party shall be honored. If the parties are unable to resolve issues related to a Dispute within thirty (30) days after the parties' appointment of designated representatives as set forth above, then either party may file a complaint with the FCC or applicable Commission in accordance with the procedures applicable to the resolution of disputes among carriers in the applicable state.

### **B. Disputed Amounts**

If any portion of an amount due to a party (the "Billing party") under this Agreement is subject to a bona fide dispute between the parties, the party billed (the "Non-Paying party") shall within sixty (60) days of its receipt of the invoice containing such disputed amount give notice to the Billing party of the amounts it disputes ("Disputed Amounts") and include in such notice the specific details and reasons for disputing each item. The Non-Paying party shall pay when due (i) all undisputed amounts to the Billing party and (ii) all Disputed Amounts into an interest bearing escrow account with a third party escrow agent mutually agreed upon by the parties.

If the parties are unable to resolve the issues related to the Disputed Amounts in the normal course of business within sixty (60) days after delivery to the Billing party of notice of the Disputed Amounts, each of the parties shall appoint a designated representative who has authority to settle the dispute and who is at a higher level of management than the persons with direct responsibility for administration of this Agreement. The designated representatives shall meet as often as they reasonably deem necessary in order to discuss the dispute and negotiate in good faith in an effort to resolve such dispute. The specific format for such discussions will be left to the discretion of the designated representatives, however, all reasonable requests for relevant information made by one party to the other party shall be honored.

If the parties are unable to resolve issues related to the Disputed Amounts within forty-five (45) days after the parties' appointment of designated representatives pursuant to this Section, then either party may file a complaint with the Commission or the FCC to resolve such issues or proceed with any other remedy pursuant to law or equity. The Commission or the FCC may direct release of any or all funds (including any accrued interest) in the escrow account, plus applicable late fees, to be paid to either party.

The parties agree that all negotiations pursuant to this Section shall remain confidential and shall be treated as compromise and settlement negotiations for purposes of the Federal Rules of Evidence and state rules of evidence; provided, however, that a party may disclose the substance of such negotiations to the FCC or the Commission pursuant to this Section for purposes other than to determine liability.

Any undisputed amounts not paid when due shall accrue interest from the date such amounts were due at the lesser of (i) one percent (1%) per month and (ii) the highest rate of interest that may be charged under applicable law.

Notwithstanding anything to the contrary in this Section XXI.B, each party shall have the right to contest any amounts paid to the other party hereunder for a period of one (1) year after such amounts were paid. The party contesting such amounts shall deliver written notice to such other party within one (1) year of its payment and include in such notice the specific details and reasons for disputing such amounts. If the parties are unable to resolve such contested amounts in the normal course of business within thirty (30) days after delivery of notice of the contested amounts, such dispute shall be handled in accordance with Section XXI.A.

C. Each party reserves any rights it may have to seek judicial review of any ruling made by the FCC or a Commission concerning this Agreement.

## **XXII. Performance Standards for Specified Activities**

A. **Certain Definitions** When used in this Section XXII, the following terms shall have the meanings indicated:



Receiving Party shall use all commercially reasonable efforts to cooperate with the Disclosing Party in attempting to obtain any protective relief which such Disclosing Party chooses to obtain.

C. In the event of the expiration or termination of this Agreement for any reason whatsoever, each Party shall return to the other Party or destroy all Proprietary Information and other documents, work papers and other material (including all copies thereof) obtained from the other Party in connection with this Agreement and shall use all reasonable efforts, including instructing its employees and others who have had access to such information, to keep confidential and not to use any such information, unless such information is now, or is hereafter disclosed, through no act, omission or fault of such Party, in any manner making it available to the general public.

## **XXVII. Limitation of Use**

The parties agree that this Agreement shall not be proffered 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.

## **XXVIII. 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.

## **XXIX. Governing Law**

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

## **XXX. 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.

## **XXXI. 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.  
3535 Colonnade Parkway  
Room E4E1  
Birmingham, Alabama 35243  
Attn: OLEC Account Team

Louisville Lightwave Telecommunications,  
Inc  
Vice President, Regulatory and Legal Affairs  
2670 Boyce Plaza Road  
Pittsburgh, PA 15241  
Facsimile: 412/221-6642

with a copy to:

BellSouth Telecommunications, Inc.  
675 West Peachtree Street, N.E.  
Room 4300  
Atlanta, Georgia 30375  
Attn: COU General Counsel -  
Interconnection

with a copy to:

Swidler & Berlin, Chartered  
Attn: Douglas G. Bonner, Esq.  
Dana Frix, Esq.  
3000 K Street, NW  
Suite 300  
Washington, DC 20007-5116  
Facsimile: 202/424-7645

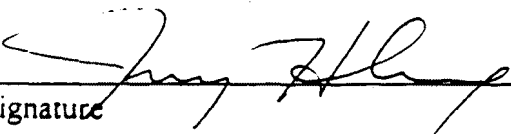
or at such other address as the intended recipient previously shall have designated by written notice to the other party.

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.

## **XXXII. 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.

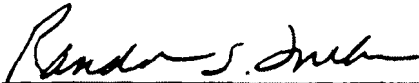
BellSouth Telecommunications, Inc.

  
Signature

Director  
Title

4/15/97  
Date

Louisville Lightwave, LP

  
Signature

Sr. Vice President  
Hyperion Telecommunications of Kentucky  
General Partner  
Title

4/9/97  
Date

March 13, 1998

**VIA OVERNIGHT MAIL**

BellSouth Telecommunications, Inc.  
3535 Colonnade Parkway  
Room E4E1  
Birmingham, AL. 35243  
ATTN: OLEC Account Team

**Re: BellSouth Telecommunications Inc. Interconnection Agreements with: (1)  
Hyperion Telecommunications of Louisville, Inc. f/k/a Louisville Lightwave  
(Kentucky), and (2) AVR of Tennessee, L.P. d/b/a Hyperion of Tennessee, L.P.  
(Tennessee)**

Dear Sir or Madam:

This is to notify you that AVR of Tennessee, L.P. d/b/a Hyperion of Tennessee, L.P. and Hyperion Telecommunications of Louisville, Inc. f/k/a Louisville Lightwave, and (collectively "Hyperion"), accept BellSouth's offer of the reciprocal compensation (or "local interconnection service") arrangements pertaining to the BellSouth/KMC Telecom, Inc. nationwide interconnection agreement. See, para. XIX.E.2.a. of BellSouth/Hyperion agreements (both of which mirror the BellSouth/ICG interconnection agreement). Hyperion accepts the BellSouth/KMC Telecom, Inc. reciprocal compensation terms to replace the corresponding reciprocal compensation arrangement provided for in Section IV.C. of the existing Hyperion/BellSouth interconnection agreements in the states of Kentucky and Tennessee. Please forward a proposed revised agreement reflecting the parties' new reciprocal compensation arrangement.

Furthermore, if one is due, a corrective payment is required under Section XIX.F.2. for services provided "for the period from the effective date of such revised agreement...until the date that the parties execute such revised agreement or Hyperion accepts such Other Terms, plus simple interest at a rate equal to the thirty day commercial paper rate for high grade, unsecured notes sold through dealers by major corporations in multiples of \$1,000.00 as regularly published in THE WALL STREET JOURNAL."

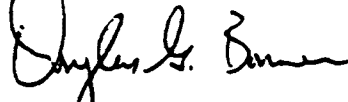
BellSouth Telecommunications

March 13, 1998

Page 2

Finally, please be advised that henceforth Louisville Lightwave's entire interest in this interconnection agreement has been assigned to Hyperion Telecommunications of Louisville, Inc., the wholly owned subsidiary of Louisville Lightwave's general partner, Hyperion Telecommunications of Kentucky, Inc.

Sincerely,



Douglas G. Bonner

cc: BellSouth Telecommunications, Inc.  
675 West Peachtree Street, N.E., Room 4300  
Atlanta, GA. 30375  
Attn: COU General Counsel - Interconnection  
(via overnight mail)

Robert Wiegand, Esq.  
Dana Frix, Esq.

3

DOUGLAS G. BONNER  
ATTORNEY-AT-LAW

SWIDLER  
&  
BERLIN  
CHARTERED

FILE COPY

DIRECT DIAL  
(202)424-7701  
DGBONNER@SWIDLAW.COM

May 27, 1998

**VIA FACSIMILE (404) 529-7839 and U.S. MAIL**

Mr. Pat Finlen  
BellSouth Interconnection Services  
34P70 BellSouth Center  
675 West Peachtree Street  
Atlanta, GA. 30375

**Re: BellSouth Telecommunications Inc. Interconnection Agreements with: (1) Hyperion Telecommunications of Kentucky, Inc. f/k/a Louisville Lightwave (Kentucky), and (2) AVR of Tennessee, L.P. d/b/a Hyperion of Tennessee, L.P. (Tennessee)**

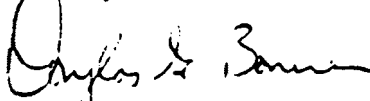
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Dear Pat:

This is to request the BellSouth document responding to our March 13, 1998 request on behalf of AVR of Tennessee, L.P. d/b/a Hyperion of Tennessee, L.P. and Hyperion Telecommunications of Kentucky, Inc. f/k/a Louisville Lightwave (collectively "Hyperion"), pursuant to para. XIX.E.2.a. of the BellSouth/Hyperion agreements, to adopt the reciprocal compensation arrangements pertaining to the BellSouth/KMC Telecom, Inc. interconnection agreement. The amendment to the Hyperion interconnection agreements should clearly reflect the reciprocal compensation rates and terms of the KMC Telecom, Inc./BellSouth interconnection agreement.

We last discussed this amendment on May 7<sup>th</sup>, but I have not heard further from you. It has also been ten weeks since we made this written request under the terms of the Hyperion agreements. Please provide the reciprocal compensation amendment to me as soon as possible. Hyperion is reviewing the physical collocation amendment that you have already forwarded, and will respond to you about that shortly. Thank you.

Sincerely,



Douglas G. Bonner

cc: Janet Livengood, Esq.  
Robert Wiegand, Esq.

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**SWIDLER  
&  
BERLIN**  
CHARTERED

DOUGLAS G. BONNER  
ATTORNEY-AT-LAW

DIRECT DIAL  
(202) 424-7701  
DGBONNER@SWIDLAW.COM

June 24, 1998

**VIA FACSIMILE (404) 529-7839 and U.S. MAIL**

Mr. Pat Finlen  
BellSouth Interconnection Services  
34P70 BellSouth Center  
675 West Peachtree Street  
Atlanta, GA. 30375

**FILE COPY**

**Re: BellSouth Telecommunications Inc. Interconnection Agreements with: (1) Hyperion Telecommunications of Kentucky, Inc. f/k/a Louisville Lightwave (Kentucky), and (2) AVR of Tennessee, L.P. d/b/a Hyperion of Tennessee, L.P. (Tennessee) (collectively "Hyperion")**

---

Dear Pat:

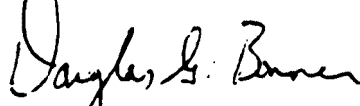
This will confirm the results of the telephone conversation that you, Bob Wiegand of Hyperion Telecommunications, Inc. and I had last Wednesday, June 17, 1998. As you recall, we inquired about the status of BellSouth's preparation of the requested reciprocal compensation (or local interconnection) amendment from the KMC Telecom, Inc. interconnection agreement in accordance with our March 13, 1998 letter. As you know, Hyperion is entitled to such an amendment under the terms of each of the above-referenced agreements, and BellSouth has previously agreed to prepare such an amendment. We pointed out that it has been more than three (3) months since Hyperion initially requested this amendment, though this amendment is not a particularly complex one. I also sent you a subsequent letter dated May 27, 1998 to which we have received no response. You indicated that you have been unable to respond before because of staffing limitations, but you would be able to do so now due to additional staffing you recently received. You stated that we could expect the amendment "early next week." As of close of business today, we still await the requested amendment to the above agreements.

As we stated during our telephone conversation, there is no reason for billing of reciprocal compensation to await BellSouth's preparation of this overdue amendment, particularly since any traffic imbalance that exists means immediate unrecovered costs to the carrier terminating more than 50% of the parties' exchanged traffic. Hyperion therefore intends to bill BellSouth for local traffic minutes of use pursuant in accordance with the reciprocal compensation/local interconnection terms of the KMC Telecom, Inc. agreement beginning March 13, 1998, the date of our initial letter to you.

Mr. Pat Finlen  
June 24, 1998  
Page Two

In the meantime, we hope to receive the contractual amendment from you very soon.  
Please feel free to contact me to discuss this matter further.

Sincerely,

A handwritten signature in cursive script, appearing to read "Douglas G. Bonner".

Douglas G. Bonner

cc: Janet Livengood, Esq.  
Robert Wiegand, Esq.





BellSouth Telecommunications, Inc.  
675 West Peachtree Street, N.E.  
Atlanta, Georgia 30375

July 2, 1998

Mr. Douglas G. Bonner  
Swidler & Berlin  
3000 K Street , N.W. Suite 300  
Washington , D.C. 20007-5116

Dear Mr. Bonner:

This is in response to your letters dated March 13, 1998, and May 27, 1998 on behalf of AVR of Tennessee, L.P., d/b/a Hyperion of Tennessee, and Hyperion Telecommunications of Louisville, Inc., f/k/a Louisville Lighwave (collectively "Hyperion") requesting an Amendment to their respective Interconnection Agreements with BellSouth. This Amendment would modify the current agreements for reciprocal compensation rates, and terms and conditions for terminating local interconnection traffic between our two companies. The proposed rates, and terms and conditions would be from the BellSouth/KMC Telecom Interconnection Agreement.

As you know the current Interconnection Agreement advises that there will be "no cash compensation for local interconnection minutes of use exchanged by the parties during the term of this Agreement unless the difference in minutes of use for terminating local traffic exceeds three million (3,000,000) minutes per state on a monthly basis." As can be seen in the tables below this threshold has not been reached. Therefore, we do not find it necessary to amend the Interconnection Agreement for local interconnection compensation.

**Kentucky**

	Total Minutes of Use Terminating to Hyperion-KY	ISP Minutes of Use	Total Local Minutes of Use Terminating to Hyperion-KY	Total Local Minutes of Use Terminating to BellSouth	Difference in Terminating Local Minutes of Use
Jan-98	NA	NA	NA	NA	NA
Feb-98	1,367,982	1,249,184	138,798	0	138,798
Mar-98	3,470,999	3,123,899	347,100	0	347,100
Apr-98	3,988,741	3,589,867	398,874	0	398,874
May-98	4,108,588	3,697,729	410,859	582,422	(171,563)

**Tennessee**

	Total Minutes of Use Terminating to Hyperion-TN	ISP Minutes of Use	Total Local Minutes of Use Terminating to Hyperion-TN	Total Local Minutes of Use Terminating to BellSouth	Difference in Terminating Local Minutes of Use
Jan-98	241,050	216,945	24,105	0	24,105
Feb-98	1,358,067	1,222,260	135,807	243,587	(107,780)
Mar-98	2,727,133	2,454,420	272,713	224,949	47,764
Apr-98	3,398,718	3,058,846	339,872	361,719	(21,847)
May-98	4,159,959	3,743,963	415,996	443,234	(27,238)

Please call me at (404) 927-8389 should you wish to discuss this issue further.

Sincerely,



Pat Finlen  
Manager - Interconnection Services

Enclosures

cc: Mary Jo Peed, General Attorney  
Jerry Hendrix, Director Interconnection Services

(6)

SWIDLER  
&  
BERLIN

CHARTERED

DOUGLAS G. BONNER  
ATTORNEY-AT-LAW

DIRECT DIAL  
(202) 424-7701  
DGBONNER@SWIDLAW.COM

July 10, 1998

**VIA FACSIMILE (404) 529-7839 AND U.S. MAIL**

Mr. Pat Finlen  
BellSouth Interconnection Services  
34P70 BellSouth Center  
675 West Peachtree Street  
Atlanta, GA. 30375

**Re: BellSouth Telecommunications Inc. Interconnection Agreements with: (1) Hyperion Telecommunications of Louisville, Inc. f/k/a Louisville Lightwave (Kentucky), and (2) AVR of Tennessee, L.P. d/b/a Hyperion of Tennessee, L.P. (Tennessee) (collectively "Hyperion")**

Dear Mr. Finlen:

I have received your July 2, 1998 letter responding to my letters of March 13, May 27, and June 24, 1998. There may be some confusion or misunderstanding concerning the nature of Hyperion's request. Hyperion's March 13, 1998 request and subsequent letters did not request reciprocal compensation payments from BellSouth in accordance with Section IV.C. of the interconnection agreement.<sup>1/</sup> On the contrary, Hyperion has exercised its rights under Section XIX.

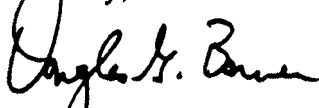
<sup>1/</sup> Nevertheless, it appears clear from BellSouth's own traffic figures that cash compensation is due Hyperion under the terms of the existing agreements. The difference in total minutes of local traffic between BellSouth- and Hyperion-terminated minutes (comparing columns 1 and 4 in your letter) exceeds 3 million minutes per month in Kentucky for the months of March, April and May 1998, and exceeds 3 million minutes per month in Tennessee for the months of April and May 1998. BellSouth artificially excludes what it characterizes as "ISP minutes of use" from consideration as local traffic. Although your chart is not entirely self-explanatory, we understand that these "ISP minutes of use" refer to calls that BellSouth has somehow determined were calls made to ISP customers of Hyperion (as opposed to a bank or a local pizza delivery business, for example) by BellSouth customers, and they were made using a local seven-digit number. Importantly, there is no exclusion of ISP traffic from the definition of "local traffic" under the parties' interconnection agreement. Therefore, BellSouth's exclusion of this traffic from consideration as local traffic is without legal basis. As you know, the TRA has specifically concluded that ISPs are end users, and that "internet service provider traffic is 'Local Traffic'", as similarly defined in another BellSouth Tennessee interconnection agreement. See Initial Order of Hearing Officer, *Petition of Brooks Fiber to Enforce Interconnection Agreement and for Emergency Relief*, Docket No. 98-00118 (Tenn. Reg. Auth. April 21, 1998). The Hearing Officer's Initial Order was affirmed by the T.R.A. on June 2, (continued...)

Mr. Pat Finlen  
July 10, 1998  
Page 2

**Adjustments to Terms**, subsection E.2.a., and Section 252(i) of the Telecommunications Act of 1996, to accept BellSouth's offer of the local interconnection rates, terms and conditions of the BellSouth/KMC Telecom, Inc. interconnection agreement. Therefore, your analysis of whether a 3 million minute difference in monthly traffic threshold has been met in either Kentucky or Tennessee, while interesting, does not respond to Hyperion's longstanding request under Section XIX of the agreements. Nevertheless, clearly cash compensation would also be due under Section IV.C. of the parties' interconnection agreements as discussed above.

As it has been several months since Hyperion submitted this request before receiving your initial written response on July 2, we request a written response by Monday, July 13, 1998 confirming whether BellSouth agrees to promptly prepare and execute the requested amendment. As you can appreciate, your July 2, 1998 letter comes as a great surprise to Hyperion, given our several prior conversations<sup>2/</sup> in which you consistently agreed to prepare and provide Hyperion with a reciprocal compensation amendment in accordance with Section XIX of the the existing agreements. If we do not receive an affirmative written response from BellSouth by July 13, Hyperion will file formal complaints against BellSouth with the Tennessee Regulatory Authority and with the Kentucky Public Service Commission to enforce the terms of BellSouth's negotiated interconnection agreements. We hope not to have to pursue such emergency regulatory relief, but Hyperion is prepared to do what is necessary to enforce its undisputed rights under its negotiated BellSouth agreements.

Sincerely,



Douglas G. Bonner

cc: Mary Jo Peed, Esq. (BellSouth) (via facsimile)  
Mr. Jerry Hendrix (BellSouth) (via facsimile)  
Guy M. Hicks, Esq. (BellSouth - Tn.) (via facsimile)  
Creighton Mershon, Esq. (BellSouth - Ky.) (via facsimile)  
Janet Livengood, Esq.  
Dana Frix, Esq.

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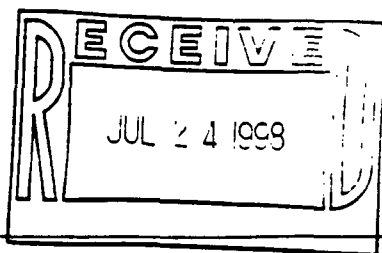
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<sup>1/</sup>(...continued)

1998. Therefore, BellSouth's exclusion of internet service provider traffic from consideration as "local traffic" under the Hyperion agreement contravenes a standing, unstayed order of the TRA.

<sup>2/</sup> The most recent of our conversations, on June 17, 1998, included Hyperion regulatory personnel, referenced in my June 24, 1998 letter to you.

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© **BELLSOUTH**

BellSouth Telecommunications, Inc.  
675 West Peachtree Street, N.E.  
Atlanta, Georgia 30375

RECEIVED

AUG 11 1998

PUBLIC SERVICE  
COMMISSION

July 23, 1998

Mr. Douglas G. Bonner  
Swidler & Berlin  
3000 K Street, N.W. Suite 300  
Washington, D.C. 20007-5116

Dear Mr. Bonner:

This is in response to your letter dated July 10, 1998. As I pointed out in my July 2, 1998 letter, the provisions contained in Section IV.C. of the Hyperion Telecommunications of Louisville, Inc., f/k/a Louisville Lightwave, and AVR of Tennessee L.P., d/b/a Hyperion-Tennessee (collectively "Hyperion") make it very clear that "there will be no cash compensation for *local interconnection minutes of use* exchanged by the parties during the term of this Agreement unless the difference in minutes of use for *terminating local traffic* exceeds three million (3,000,000) minutes per state on a monthly basis" [Emphasis added]. However, once this threshold has been reached, Hyperion may either "elect the terms of any compensation arrangement for local interconnection then in effect between BellSouth and any other telecommunications carrier, or in the absence of such an election, the parties will negotiate the specifics of a traffic exchange agreement which will apply on a going-forward basis."

As demonstrated in the tables contained in my July 2, 1998 letter, Hyperion has not reached the three million minute threshold for **Local Traffic**. Therefore, it is not appropriate to amend the Interconnection Agreement at this time. Additionally, before BellSouth will be able to execute any amendments, BellSouth will need to be assured the 3,000,000 minutes of use difference in terminating local traffic called for in Hyperion's agreements does not contain Information Service Provider ("ISP") traffic, since such traffic is not local in nature. At that time, BellSouth will execute the appropriate amendments.

I am not sure why my July 2, 1998 letter should come "as a great surprise to Hyperion," since BellSouth has consistently taken the position that ISP traffic is not local traffic and is not subject to the payment of reciprocal compensation. When Hyperion originally requested to amend its existing Interconnection Agreement, I was unaware of the language in Section IV.C. BellSouth has never agreed that the three million minute requirement in that section has been satisfied, and I apologize if I ever said anything that may have led you to believe otherwise.

BellSouth does not agree that Hyperion is entitled to "exercise its rights under Section XIX" in seeking the payment of reciprocal compensation from BellSouth. Hyperion's position that it can obtain reciprocal compensation under Section XIX would render superfluous the language in Section IV.C, which clearly establishes the parties' intention that reciprocal compensation would be paid only on a going forward basis pursuant to a traffic exchange agreement that was negotiated only after the three million minute requirement had been met.

Finally, BellSouth adamantly denies Hyperion's suggestion that BellSouth is violating a "standing, unstayed order of the TRA" by excluding ISP traffic for the purposes of the three million minute requirement in its agreement with Hyperion. As you correctly point out, the Hearing Officer entered an order in a complaint case brought by Brooks Fiber, which was affirmed by the Tennessee Regulatory Authority. However, a written order has not been entered by the TRA. Furthermore, the Hearing Officer's initial decision construed BellSouth's Interconnection Agreement with Brooks Fiber and the relief ordered by the Hearing Officer applies only to Brooks Fiber. BellSouth takes very seriously its obligation to comply with binding decisions of the various regulatory agencies, but BellSouth does not believe that the TRA's decision in the Brooks Fiber case addresses, let alone resolves, the proper interpretation of Hyperion's Interconnection Agreement.

Please call me at (404) 927-8389 should you wish to discuss this issue further.

Sincerely,



Pat Finlen  
Manager - Interconnection Services

cc: Creighton Mershon, General Attorney - KY  
Guy Hicks, General Attorney - TN  
Mary Jo Peed, General Attorney  
Jerry Hendrix, Director Interconnection Services

("BellSouth") regarding inter-company reciprocal compensation for transport and termination of telephone exchange traffic for Internet Service Providers ("ISPs"). Hyperion seeks enforcement of certain provisions of its interconnection agreement with BellSouth.

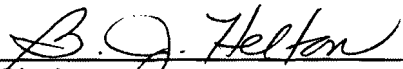
Hyperion has stated a *prima facie* case against BellSouth. Therefore, BellSouth should satisfy or answer this complaint with ten days of the date of this Order.

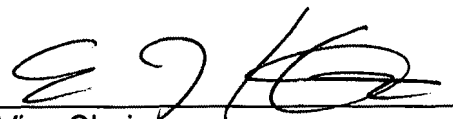
This complaint addresses the same issues as those which are the subject of Case No. 98-212, in which Hyperion has intervened. As this, and other complaints regarding compensation for ISP traffic cover common issues against the same defendant, they should be consolidated under Case No. 98-212 and styled "American Communications Services of Louisville, Inc. d/b/a e.spire Communications, Inc., American Communications Services of Lexington, Inc. d/b/a e.spire Communications, Inc., ALEC, Inc., and Hyperion Telecommunications of Louisville, Inc., Complainants, v. BellSouth Telecommunications, Inc., Defendant."

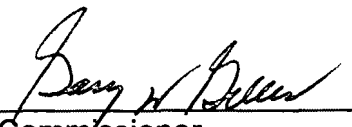
BE IT SO ORDERED.

Done at Frankfort, Kentucky, this 20th day of November, 1998.

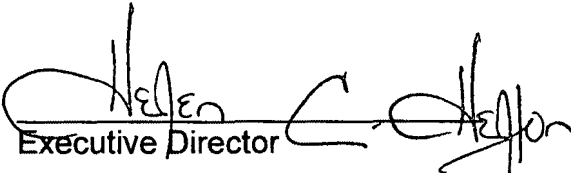
PUBLIC SERVICE COMMISSION

  
Chairman

  
Vice Chairman

  
Commissioner

ATTEST:

  
Executive Director