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RECORDS AND  
REPORTING

October 15, 1998

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

RE: Docket Nos. 971478-TP, 980184-TP, 980495-TP,  
and 980499-TP

Dear Mrs. Bayo:

Enclosed are an original and 15 copies of BellSouth Telecommunications, Inc.'s Motion for Stay Pending Appeal. Please file these documents in the captioned docket.

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

RECEIVED & FILED

Sincerely,

*Mary K. Keyer/BBR*  
Mary K. Keyer

WCK \_\_\_\_\_  
WFA \_\_\_\_\_  
IPP \_\_\_\_\_  
JAF \_\_\_\_\_  
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TH Leach dkt

FPSC-BUREAU OF RECORDS

Enclosures

cc: All Parties of Record  
A. M. Lombardo  
R. G. Beatty  
W. J. Ellenberg (w/o enclosures)

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of WorldCom Technologies, ) Docket No.: 971478-TP  
Inc. Against BellSouth Telecommunications, Inc.)  
and Request for Relief )  
\_\_\_\_\_ )

In re: Complaint of Teleport Communications ) Docket No.: 980184-TP  
Group, Inc./TCG South Florida for Enforcement )  
of Section IV.C of its Interconnection Agreement )  
with BellSouth Telecommunications, Inc. and )  
Request for Relief. )  
\_\_\_\_\_ )

In re: Complaint of Intermedia ) Docket No.: 980495-TP  
Communications, Inc. against )  
BellSouth Telecommunications, Inc. )  
for breach of terms of Florida )  
Partial Interconnection Agreement )  
under Sections 251 and 252 of the )  
Telecommunications Act of 1996, )  
and request for relief. )  
\_\_\_\_\_ )

In re: Complaint of MCImetro Access ) Docket No.: 980499-TP  
Transmission Services, Inc. against )  
BellSouth Telecommunications, Inc. )  
For Breach of Approved )  
Interconnection Agreement by Failure to )  
Pay Compensation for Certain Local )  
Traffic )  
\_\_\_\_\_ ) Filed: October 15, 1998

MOTION FOR STAY PENDING APPEAL

BellSouth Telecommunications, Inc. ("BellSouth"), by and through  
counsel, pursuant to Rule 25-22.061, Florida Administrative Code, hereby  
moves the Florida Public Service Commission ("Commission") to stay its Order  
No. PSC-98-1216-FOF-TP dated September 15, 1998, ("Order"), pending

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FPSC-RECORDS/REPORTING

judicial review of that Order to the United States District Court for the Northern District of Florida.

On this date, BellSouth has filed with the Commission a notice of its appeal of the Commission's Order with the United States District Court for the Northern District of Florida pursuant to 47 U.S.C. § 252(e)(6). BellSouth has further requested a declaratory ruling on the existing controversy between BellSouth and Complainants relative to the treatment of ISP traffic and the reciprocal compensation provisions of the Interconnection Agreements between the parties. A copy of BellSouth's Petition for Judicial Review and Complaint for Declaratory Judgment and Other Relief is attached hereto as Exhibit 1 (without exhibits). As such, BellSouth requests that the Commission enter a stay of its Order No. PSC-98-1216-FOF-TP pending appeal, as more fully set forth below.

### **I. BACKGROUND**

In accordance with the terms of the Telecommunications Act of 1996 ("the Act"), BellSouth executed interconnection agreements with MFS Communications Company, Inc. ("MFS"), affiliate of WorldCom Technologies, Inc. ("WorldCom"), on August 26, 1996; Teleport Communications Groups, Inc./TCG South Florida ("TCG") on July 15, 1996; MCI metro Access Transmission Services, Inc. ("MCI m") on April 4, 1997; and Intermedia Communications, Inc. ("Intermedia") on July 1, 1996, (hereinafter collectively referred to as "Complainants"). These Interconnection Agreements were approved respectively by the Commission on December 12, 1996, in Order No.

PSC-96-1508-FOF-TP; October 29, 1996, in Order No. PSC-96-1313-FOF-TP; June 19 and 26, 1997, in Order Nos. PSC-97-0723-FOF-TP and PSC-97-0723A-FOF-TP; and October 7, 1996, in Order No. PSC-96-1236-FOF-TP. Amendments to the MFS and Intermedia Agreements were approved respectively on July 1, 1997, in Order No. PSC-97-0772-FOF-TP and December 30, 1997, in Order No. PSC-97-1617-FOF-TP.

A dispute arose between the parties as to how calls made to Internet Service Providers ("ISPs") should be treated pursuant to the terms of the Interconnection Agreements in question. According to Complainants, these calls are local calls; BellSouth contends they are not.

By letter dated August 12, 1997, BellSouth notified Complainants that under its Interconnection Agreements BellSouth "will neither pay, nor bill, local interconnection charges for traffic terminated to an ISP" because "ISP traffic is jurisdictionally interstate," and "enjoys a unique status, especially [as to] call termination." (Emphasis added). Thereafter, BellSouth and Complainants exchanged letters outlining their opposing positions.

WorldCom filed a complaint with the Commission against BellSouth on November 12, 1997, alleging BellSouth failed to pay reciprocal compensation for local telephone exchange service traffic transported and terminated by its affiliate, MFS, to ISPs. See Docket No. 971478-TP. On February 4, 1998, TCG filed a similar complaint in Docket No. 980184-TP. On February 23, 1998, MCIIm also filed a similar complaint in Docket No. 980281-TP, as did Intermedia

on April 6, 1998, in Docket No. 980495-TP. These cases were consolidated into one docket on April 21, 1998, by Order No. PSC-98-0561-PCO-TP and were heard on June 11, 1998.

In their complaints, Complainants claimed BellSouth breached its Interconnection Agreement by withholding reciprocal compensation payments to Complainants for the transport and termination of ISP traffic. Complainants requested in their complaints that the Commission direct BellSouth to compensate them for the termination of ISP traffic originated by BellSouth to Complainants' ISP customers, pursuant to the Interconnection Agreements between the parties.

The Commission held a hearing on June 11, 1998, concerning these complaints. The questions presented separately for decision were whether the parties were required to compensate each other for transport and termination of traffic to Internet Service Providers under each of the Interconnection Agreements, and if so, what relief the Commission should grant. The parties filed testimony, presented witnesses at the hearing, and submitted briefs following the hearing to support their respective positions.

On September 15, 1998, the Commission found in Order No. 98-1216-FOF-TP ("Commission Order") that the Interconnection Agreements defined local traffic in such a way that ISP traffic is within the definition and, therefore, reciprocal compensation for termination is required. The Commission further concluded that the evidence and arguments presented at the hearing supported

that the parties intended to include ISP traffic as local traffic for purposes of reciprocal compensation under their agreements. The Commission further ordered BellSouth to pay Complainants reciprocal compensation for the transport and termination of telephone exchange service local traffic that is handed off by BellSouth to Complainants for termination with telephone exchange service end users that are Internet Service Providers or Enhanced Service Providers under the terms of the Interconnection Agreements and that BellSouth must compensate Complainants according to the parties' Interconnection Agreements, including interest, for the entire period the balance owed is outstanding. See Commission Order, p. 29. Millions of dollars are at issue.

## II. ARGUMENT

### A. **BellSouth Is Entitled to an Automatic Stay Pending Judicial Review Pursuant to Rule 25-22.061(1)(a) because the Commission Order Involves a "Refund of Moneys to Customers."**

As noted above, the Commission has ordered BellSouth to pay Complainants reciprocal compensation, including interest, for the entire period the balance owed is outstanding, for the transport and termination of telephone exchange service local traffic that is handed off by BellSouth to Complainants for termination with telephone exchange service end users that are Internet Service Providers or Enhanced Service Providers under the terms of the Interconnection Agreements. See Commission Order, p. 29.

Rule 25-22.061(1)(a), Florida Administrative Code, provides that “[w]hen the order being appealed involves the refund of moneys to customers . . . , the Commission shall, upon motion filed by the utility or company affected, grant a stay pending judicial proceedings.” (Emphasis added.) The Commission Order being appealed by BellSouth is effectively a “refund of moneys to customers” and, therefore, the Commission must grant BellSouth’s motion to stay its Order pending judicial review. Because an automatic stay is mandated by Rule 25-22.-061(1)(a) in this circumstance, BellSouth need not show it is likely to prevail on the merits of its appeal, that it is likely to suffer irreparable harm if the stay is not granted, or that the delay will not cause substantial harm or be contrary to the public interest. The Commission Order effectively orders a “refund of moneys to customers” as contemplated by Rule 25-22.061(1)(a) in the way of payments to Complainants for reciprocal compensation for transport and termination of ISP traffic. Based on the above, the Commission should grant BellSouth’s motion for a stay pending judicial review pursuant to Rule 25-22.061(1)(a), Florida Administrative Code.

**2. Alternatively, BellSouth Is Entitled to a Stay Pursuant to Rule 25-22.061(2).**

In the alternative, and only in the event the Commission finds that the Commission Order does not involve a “refund of moneys to customers” under Rule 25-22.061(1)(a), BellSouth seeks a stay pending judicial review in accordance with Rule 25-22.061(2), Florida Administrative Code. In determining whether to grant a stay under Rule 25-22.061(2), the Commission may consider

whether BellSouth is likely to prevail on appeal; whether BellSouth has demonstrated that it is likely to suffer irreparable harm if the stay is not granted; and whether the delay will cause substantial harm or is contrary to the public interest.

BellSouth has raised serious and substantial issues concerning the appropriate treatment of ISP traffic. As BellSouth stated in its Brief filed in this matter, ISP traffic is jurisdictionally interstate and not local traffic that is subject to the reciprocal compensation provisions contained in the Interconnection Agreements between BellSouth and Complainants. BellSouth believes the calls in question are exchange access and not local calls subject to the reciprocal compensation provisions contained in the Interconnection Agreements between BellSouth and Complainants. In the Commission Order, the Commission acknowledged that the "question of whether ISP traffic is local or interstate can be argued both ways." Commission Order, p. 23.

The Federal Communications Commission ("FCC") in a recent filing has revealed that it will resolve the "question [of] whether calls to the Internet through ISPs are subject to FCC jurisdiction" by October 30, 1998. See, "Response of Federal Communications Commission as Amicus Curiae to Motion for Referral of Issue," Civil Action No. 3:98CV170-MU, p. 6, (W.D.N.C. Aug. 28, 1998), attached hereto as Exhibit 2 ("FCC Response"). The FCC filed this pleading in the federal lawsuit brought by BellSouth to appeal the North Carolina



Public Utilities Commission's February 26, 1998, Order Concerning Reciprocal Compensation for ISP Traffic in Docket No. P-55, Sub 1027.

In its response pleading, the FCC advised the court that "the question whether calls to ISPs are subject to FCC jurisdiction already is before the FCC in ongoing proceedings and will be addressed by the agency promptly in those proceedings." See, FCC Response, p. 1. The FCC further stated:

Although the FCC has not yet expressly addressed the question whether calls to the Internet through ISPs are "local" calls, questions regarding the proper jurisdictional treatment of calls to the Internet have been raised in a number of proceedings currently pending before the FCC.

Id., pp. 4-5.

One of those proceedings involves the filing of an interstate access tariff by GTE to establish a new digital subscriber line (DSL) service offering that "provides a high speed access connection between an end user subscriber and an ISP." Id. The FCC concluded:

Several proceedings now pending before the agency pose the question whether calls to the Internet through ISPs are subject to FCC jurisdiction. The Commission will address this issue in the context of GTE's DSL tariff no later than October 30, 1998.

Id., p. 6 (emphasis added).

In its Order, this Commission stated: "Our decision does not address any generic questions about the ultimate nature of ISP traffic for reciprocal compensation purposes, or for any other purposes." See Commission Order, p. 4. The Commission further observed that "as recently as April, 1998, the FCC

itself indicated that a decision has not been made as to whether or not reciprocal compensation should apply." Id., p. 18. As noted by the attached FCC Response, the FCC has now committed to resolve the issue of "whether calls to the Internet through ISPs are subject to FCC jurisdiction" by October 30. FCC Order, p. 6.

BellSouth submits that such a resolution will be critical to BellSouth's appeal in this case and to the ultimate resolution of this issue. Complainants based their complaints upon the supposition that calls to the Internet through ISPs were undoubtedly local, not interstate and, therefore, are subject to reciprocal compensation. Obviously, if the FCC concludes in the GTE DSL case that such traffic is interstate in nature, then the traffic can neither be local nor subject to reciprocal compensation and BellSouth would prevail on its appeal.

In any event, given the FCC's announcement that it will soon rule on the jurisdictional nature of calls made to the Internet through ISPs, it makes little sense for the Commission Order not to be stayed pending judicial review.

Additionally, BellSouth will be irreparably harmed should the Commission Order not be stayed pending judicial review. If the FCC determines that the ISP calls are exchange access in nature and, therefore, within the exclusive jurisdiction of the FCC, it will mean that the Commission was without authority to order BellSouth to pay charges for transport and termination of telephone exchange service local traffic that is handed off by BellSouth to Complainants for termination with telephone exchange service end users that are Internet

Service Providers or Enhanced Service Providers under the terms of the Interconnection Agreements.

Unless the effectiveness of the Commission's Order is stayed, BellSouth will be required to pay several million dollars to Complainants, some of which it may not be able to recoup should BellSouth prevail on its appeal, which it believes it will. BellSouth may not be able to recover its losses if the Commission Order is eventually overturned.

BellSouth seeks to preserve the status quo pending appeal. BellSouth is currently escrowing, and will continue to escrow, the disputed amounts in reciprocal compensation payments for ISP traffic that WorldCom claims are owed it if a stay is granted. If the Order is not stayed, BellSouth would be irreparably harmed in having to pay money it may not owe should BellSouth prevail on appeal. BellSouth would then be placed in a position to pursue Complainants for reimbursement of moneys, which may no longer be available and recoverable.

Finally, the delay will not cause substantial harm to Complainants or be contrary to the public interest. The moneys allegedly due Complainants can be distributed appropriately, if necessary, upon an ultimate determination of this matter. Thus, neither Complainants nor the public will be harmed or prejudiced by the granting of a stay in this matter. The harm to the public if a stay is granted will be inconsequential in contrast to the harm to BellSouth if a stay is not granted.

**3. No Bond Should Be Required.**

Rule 25-22.061(1)(a) and Rule 25-22.061(2), Florida Administrative Code, permit the Commission to require BellSouth to post or issue some other corporate undertaking as a condition of the stay. BellSouth recommends that the bond should be set at zero. No bond is necessary because some of the moneys at issue have already been escrowed by BellSouth as in WorldCom's case and will be available for payment should BellSouth's appeal be unsuccessful. Any other amounts determined to be owing and due the other Complainants will also be available should BellSouth not prevail on appeal. Neither Complainants nor the public will be harmed by the lack of a bond.

For all the reasons discussed herein, BellSouth requests the Commission issue a stay of its Order No. PSC-98-1216-FOF-TP pending judicial review.

Respectfully submitted this 15th day of October, 1998.

BELLSOUTH TELECOMMUNICATIONS, INC.

  
\_\_\_\_\_  
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135553

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA

BELLSOUTH  
TELECOMMUNICATIONS, INC.,

CASE NO. \_\_\_\_\_

Plaintiff,

vs.

WORLDCOM TECHNOLOGIES, INC.,  
TELEPORT COMMUNICATIONS  
GROUP, INC./TCG SOUTH FLORIDA,  
INTERMEDIA COMMUNICATIONS,  
INC., MCI METRO ACCESS  
TRANSMISSION SERVICES, INC., THE  
FLORIDA PUBLIC SERVICE  
COMMISSION, JULIA L. JOHNSON, in  
her official capacity as chairman of the  
Florida Public Service Commission, J.  
TERRY DEASON, in his official capacity as  
a commissioner of the Florida Public Service  
Commission, SUSAN F. CLARK, in her  
official capacity as a commissioner of the  
Florida Public Service Commission, JOE  
GARCIA, in his official capacity as a  
commissioner of the Florida Public Service  
Commission, and E. LEON JACOBS, JR., in  
his official capacity as a commissioner of the  
Florida Public Service Commission,

Defendants.

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**PETITION FOR JUDICIAL REVIEW AND COMPLAINT  
FOR DECLARATORY JUDGMENT AND INJUNCTIVE  
RELIEF UNDER THE TELECOMMUNICATIONS ACT OF 1996**

Plaintiff, BellSouth Telecommunications, Inc., pursuant to the Telecommunications  
Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "Act"), and pursuant to 47 U.S.C.

§252(e)(6), brings this action for judicial review of a final order of the Florida Public Service Commission and for declaratory and injunctive relief, and alleges as follows:

**PARTIES**

1. Plaintiff, BellSouth Telecommunications, Inc. ("BellSouth"), is a corporation organized under the laws of the state of Georgia with its principal place of business in Atlanta, Georgia. BellSouth is a wholly-owned subsidiary of BellSouth Corporation and provides telecommunications services in nine southeastern states, including Florida.

2. BellSouth provides local exchange access and other telecommunications services in the state of Florida. Accordingly, BellSouth is a "telecommunications provider" within the meaning of the Act. As a local exchange carrier ("LEC"), BellSouth's Florida intrastate telecommunications services are subject to regulation by the Florida Public Service Commission.

3. Defendant WorldCom Technologies, Inc. ("WorldCom") is located at 1515 South Federal Highway, Suite 400, Boca Raton, Florida 33432. WorldCom is authorized to provide local exchange services within the state of Florida. Accordingly, WorldCom is a competitive local exchange carrier ("CLEC") within the meaning of the Act.

4. Defendant Teleport Communications Group, Inc./TCG South Florida ("TCG") is located at 1 East Broward Blvd., Suite 910, Ft. Lauderdale, Florida 33301. TCG is authorized to provide local exchange services within the state of Florida. Accordingly, TCG is a CLEC with the meaning of the Act.

5. Defendant Intermedia Communications, Inc. ("Intermedia") is located at 3625 Queen Palm Drive, Tampa, Florida 33619. Intermedia is authorized to provide local exchange services within the state of Florida. Accordingly, Intermedia is a CLEC within the meaning of the Act.

6. Defendant MCI Metro Access Transmission Services, Inc. ("MCI") is a Delaware corporation with its principal place of business in Leesburg Pike, Virginia. MCI is authorized to provide local exchange services within the state of Florida. Accordingly, MCI is a CLEC within the meaning of the Act.

7. Defendant Florida Public Service Commission ("PSC") is an agency of the State of Florida and has the authority to regulate intrastate telecommunications services offered within the state. Accordingly, the PSC is a "state commission" within the meaning of sections 153(41), 251 and 252 of the Act.

8. Defendant Julia L. Johnson is the chairman of the PSC. She is sued in her official capacity as the chairman of the PSC and as an arbitrator of this dispute, for declaratory and injunctive relief only.

9. Defendant J. Terry Deason is a commissioner of the PSC. He is sued in his official capacity as a commissioner of the PSC and as an arbitrator of this dispute, for declaratory and injunctive relief only.



10. Defendant Susan F. Clark is a commissioner of the PSC. She is sued in her official capacity as a commissioner of the PSC and as an arbitrator of this dispute, for declaratory and injunctive relief only.

11. Defendant Joe Garcia is a commissioner of the PSC. He is sued in his official capacity as a commissioner of the PSC and as an arbitrator of this dispute, for declaratory and injunctive relief only.

12. Defendant E. Leon Jacobs, Jr. is a commissioner of the PSC. He is sued in his official capacity as a commissioner of the PSC and as an arbitrator of this dispute, for declaratory and injunctive relief only.

#### JURISDICTION AND VENUE

13. This Court has federal question jurisdiction over the subject matter of this action pursuant to 47 U.S.C. section 252(e)(6) and 28 U.S.C. section 1331. In any case in which a State commission makes a determination under section 252 of the Act, any party aggrieved by such determination may bring an action in an appropriate United States district court to determine whether the agreement or statement meets the requirements of 47 U.S.C. sections 251 and 252. Pursuant to 28 U.S.C. sections 2201 and 2202, and 47 U.S.C. section 252(e)(6), the PSC order sought to be reviewed is subject to review in United States district court.

14. Because BellSouth has been ordered to pay sums alleged due and owing under agreements subject to the Act, BellSouth is a party aggrieved by the PSC's order within the

meaning of Section 252(e)(6) of the Act. This Court therefore has jurisdiction to hear this controversy.

15. Venue is proper in this district under 28 U.S.C. section 1391(b)(1) because the PSC is located in this district and because a substantial part of the events giving rise to these claims occurred in this district.

### **BACKGROUND**

16. Before 1996, local telephone companies such as BellSouth provided, pursuant to regulated monopolies, local telephone services to business and residential consumers within their designated service areas.

17. The Telecommunications Act of 1996 ended these monopolies and introduced competition into the local telephone market. The Act requires that LECs enter into interconnection agreements with CLECs, granting CLECs access to the local telecommunications infrastructure to provide local phone services. The resulting agreements are designed to allow new carriers to offer local telephone services by either purchasing the necessary components to create a service or buying the finished service from the LEC at wholesale prices in order to resell to local consumers.

18. Section 252 of the Act articulates a four-step process to guide the parties toward an interconnection agreement. First, the parties attempt to reach an agreement through negotiation or mediation. If no agreement can be reached, the state public service commission arbitrates any disputes. Once an agreement is executed, it must be submitted to

the state commission for approval. The United States district courts have exclusive jurisdiction to review a state commission's determinations under the Act.

19. Pursuant to the Act, BellSouth entered into interconnection agreements (collectively the "Agreements") with WorldCom, TCG, Intermedia, and MCI (the "CLECs"). Those agreements include provisions requiring the parties to pay reciprocal compensation to one another for local calls initiated by the customer of one party and terminated by a customer of the other party.

20. The Federal Communications Commission ("FCC") exercises jurisdiction over interstate and foreign communication by wire or radio.

21. The FCC defines a reciprocal compensation arrangement between two carriers as one in which each carrier receives compensation from the other for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network facilities of the other carrier.<sup>1</sup> For purposes of reciprocal compensation arrangements, "local telecommunications traffic" means traffic "that originates and terminates within a local service area established by the state commission."<sup>2</sup>

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<sup>1</sup> 47 C.F.R. § 51.701(e).

<sup>2</sup> 47 C.F.R. § 51.701(d).

## THE WORLDCOM AGREEMENT

22. BellSouth and MFS Communications Company, Inc.<sup>3</sup> executed a Partial Florida Interconnection Agreement ("WorldCom Agreement"). The PSC approved the WorldCom Agreement in Order No. PSC-96-1508-FOF-TP, issued December 12, 1996, in Docket No. 961053-TP. The PSC approved an amendment to the WorldCom Agreement in Order No. PSC-97-0772-FOF-TP, issued July 1, 1997, in Docket No. 970315-TP.

23. Section 1.40 of the WorldCom Agreement defines local traffic as:

[C]alls between two or more Telephone Exchange service users where both Telephone Exchange Services bear NPA-NXX designations associated with the same local calling area of the incumbent LEC or other authorized area [such as EAS]. Local traffic includes traffic type that have been traditionally referred to as "local calling" and as "extended area service (EAS)." All other traffic that originates and terminates between end users within the LATA is toll traffic. In no event shall the Local Traffic area for purpose of local call termination billing between the parties be decreased.

Section 5.8.1 provides that:

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

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<sup>3</sup> WorldCom, formerly known as MFS Intelenet of Florida, Inc. ("MFSI"), is the operating authority in Florida on behalf of its corporate parent MFS Communications Company, Inc. ("MFSC") and MFSC's parent, WorldCom, Inc. WorldCom will be used to collectively refer to WorldCom Technologies, Inc., WorldCom, Inc., MFSI, and MFSC.

## THE TCG AGREEMENT

24. TCG and BellSouth entered into an interconnection agreement pursuant to the Act on July 15, 1996 ("TCG Agreement"). The PSC approved the TCG Agreement in Order No. PSC-96-1313-FOF-TP, issued October 29, 1996, in Docket No. 960862-TP.

25. Local traffic is defined in Section 1.D. of the TCG Agreement as:

any telephone call that originates and terminates in the same LATA and is billed by the originating party as a local call, including any call terminating in an exchange outside of BellSouth's service area with respect to which BellSouth has a local interconnection arrangement with an independent LEC, with which TCG is not directly interconnected.

The TCG Agreement states in Section IV.B and part of I.C:

The delivery of local traffic between parties shall be reciprocal and compensation will be mutual according to the provisions of this Agreement.

Each party will pay the other for terminating its local traffic on the other's network the local interconnection rates as set forth in Attachment B-1, incorporated herein by this reference.

## THE INTERMEDIA AGREEMENT

26. Intermedia and BellSouth entered into an interconnection agreement pursuant to the Act on July 1, 1996 ("Intermedia Agreement"). The PSC approved the Intermedia Agreement in Order No. PSC-96-1236-FOF-TP, issued October 7, 1996, in Docket No. 960769TP. The PSC approved an amended Intermedia Agreement in Order No. PSC-97-1617-FOF-TP, issued on December 30, 1997, in Docket No. 971230-TP.

27. The Intermedia Agreement defines Local Traffic in Section 1(D) as:

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

The portion regarding reciprocal compensation, Section IV(A) states:

The delivery of local traffic between the parties shall be reciprocal and compensation will be mutual according to the provisions of this Agreement.

Section IV(B) states:

Each party will pay the other party for terminating its local traffic on the other's network the local interconnection rates as set forth in Attachment B-1, by this reference incorporated herein.

### THE MCI AGREEMENT

28. MCI and BellSouth entered into an interconnection agreement pursuant to the Act on April 4, 1997 ("MCI Agreement"). The PSC approved the MCI Agreement in Order Nos. PSC-97-0723-FOF-TP, issued June 19, 1997, and PSC-970723A-FOF-TP, issued June 26, 1997, in Docket No. 960846-TP.

29. The MCI Agreement defines local traffic in Attachment IV, Subsection 2.2.1.

That subsection reads as follows:

The parties shall bill each other reciprocal compensation at the rates set forth for Local Interconnection in this Agreement and the Order of the PSC. Local Traffic is defined as any telephone call that originates in one exchange and terminates in either the

same exchange, or a corresponding Extended Area (EAS) exchange. The terms Exchange and EAS exchanges are defined and specified in Section A3 of BellSouth's General Subscriber Service Tariff.

### **INFORMATION SERVICE PROVIDERS DEFINED**

The Act defines "information service" as:

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

47 U.S.C. § 153(20). The industry term "ISP" refers to an Information Service Provider, of which an Internet Service Provider is a subset. "ISP traffic" means traffic originated by a residence or business end user to an ISP which provides that end user, via telecommunications, with the information services, including Internet access service.

### **NATURE OF THE DISPUTE AND PROCEDURAL HISTORY**

30. On August 12, 1997, BellSouth issued a memorandum to its CLEC customers reminding them that BellSouth's "interconnection agreement [with CLECs] applies only to local traffic" and that "traffic to and from [ISPs] remains jurisdictionally interstate." The memorandum continued: "BellSouth will neither pay, nor bill, local interconnection charges for traffic terminated to an [ISP]."

31. On November 12, 1997, WorldCom filed a Complaint with the PSC, Docket No. 970315-TP, alleging that BellSouth failed to pay reciprocal compensation for local telephone exchange service traffic transported and terminated by WorldCom's affiliate, MFS, to ISP customers.

32. On February 4, 1998, TCG filed a Complaint with the PSC, Docket No. 980164-TP, also alleging that BellSouth failed to pay reciprocal compensation for local telephone exchange service traffic transported and terminated by TCG to ISP customers.

33. On February 23, 1998, MCI filed a Complaint with the PSC, Docket No. 980281-TP, alleging, among other things, that BellSouth failed to pay reciprocal compensation for local telephone exchange service traffic transported and terminated by MCI to ISP customers.

34. On April 6, 1998, Intermedia filed a Complaint with the PSC, Docket No. 980495-TP, alleging that BellSouth failed to pay reciprocal compensation for local telephone exchange service traffic transported and terminated by Intermedia to ISP customers.

35. The four complaints each challenged the position on reciprocal compensation articulated in the BellSouth memorandum. Each complaint alleged that BellSouth's refusal to pay reciprocal compensation for calls terminated to ISPs constitutes a breach of contract. The four complaints were consolidated for purposes of hearing.

36. The question presented to the PSC was whether, under the respective Agreements, the parties intended to treat calls through which an end user obtains access to services offered by an ISP as local traffic subject to reciprocal compensation.



## THE PSC DECISION

37. On September 15, 1998, the PSC issued its Final Order Resolving Complaints, Order No. PSC-98-1216-FOF-TP, and determined that under the terms of the Agreements, BellSouth is required to pay the several CLECs reciprocal compensation for the transport and termination of telephone exchange service terminated with ISPs. The PSC ordered BellSouth to compensate the CLECs according to the Agreements, including interest, for the entire period the balance owed is outstanding.

38. The PSC determined that the case is primarily a contract dispute between the parties in which the PSC decided whose meaning was to be given to the term "Local Traffic" in the Agreements. Accordingly, the PSC only addressed the issue of whether ISP traffic should be treated as local or interstate for purposes of reciprocal compensation. The PSC expressly declined to address any questions about the ultimate nature of ISP traffic for reciprocal compensation purposes, or for any other purposes.

39. While there are four defendant CLECs in the consolidated case, BellSouth's position on each is the same, and the general allegations set forth herein address all four.

## DESCRIPTION OF INTERNET TRAFFIC

40. The FCC has classified internet services offered by ISPs as "enhanced services." As with other communications services, enhanced services have an interstate component.

To ascertain whether an enhanced service is jurisdictionally interstate, the same jurisdictional determinants applicable to basic services apply.

41. The FCC has always recognized that an interstate communication (on an end-to-end basis) occurs when a user connects a local exchange call to another service or facility over which the call is carried out of state. The FCC's jurisdiction under the Act extends from the inception of the interstate communication to its completion, regardless of any intermediate facilities.

42. The essence of Internet services is the ease with which a user can obtain access to information from any host connected to the Internet. The Internet enables information and Internet resources to be widely distributed and eliminates the need for the user and the information to be physically located in the same area. Hosts connected to the Internet can be located anywhere. Indeed, the fact that they are not tied to a particular geographic location represents one of the fundamental values of the Internet.

43. Calls made by an end user to gain access to the Internet or other services offered by an ISP do not constitute local traffic, but rather represent traffic that is jurisdictionally interstate, because the information service itself is interstate. One Internet call can reach computer databases in the same state, in other states, and in other countries, not merely at different times during the transmission, but at the same time.

44. The fact that a single Internet call may simultaneously be interstate, international and intrastate makes it inseverable for jurisdictional purposes, and it must be treated as

interstate, thus vesting jurisdiction with the FCC. Indeed, jurisdiction over ISP traffic has been and continues to be clearly vested with the FCC. Moreover, the FCC is presently considering the precise issue raised here, because of the ISP traffic's interstate nature.

### **FCC JURISDICTION**

45. The FCC's jurisdiction extends over interstate and foreign communication by wire or radio.<sup>4</sup>

46. The key to the FCC's jurisdiction is the nature of the communication rather than the physical location of technology. Facilities located within a single state perform an interstate communications service when they take part in the transmission of signals between different states.

47. The FCC's jurisdiction begins with the facilities at the originating end of a communication used to initiate a transmission and extends to the facilities used to complete the communication at the terminating end of the transmission.

48. The fact that the facilities and apparatus used to provide a service may be located within a single state neither limits the FCC's jurisdiction nor expands the state commission's jurisdiction. The FCC has jurisdiction over, and regulates charges for, the local network when it is used in conjunction with origination and termination of interstate calls.

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<sup>4</sup> 47 U.S.C. § 152(a).

49. Calls bound for the Internet through an ISP's switch constitute interstate communications, not local traffic, because they terminate not on the CLEC's network, but rather at the Internet host computer containing the information sought by the calling party.

#### **FEDERAL JURISDICTION IS PRE-EMINENT**

50. Although the Act establishes distinct spheres of state and federal jurisdiction, there are nonetheless circumstances in which the state and interstate aspects of a communications service cannot be separated. Federal jurisdiction is pre-eminent where the jurisdictional components are inseparable, where more than 10 percent of the total use of the service is related to transmitting interstate traffic.

51. The inability to distinguish and sever the jurisdictional nature of each communication that traverses an Internet connection as purely local or interstate, coupled with the predominant interstate nature of Internet communications, lead to the inescapable conclusion that all Internet traffic must be considered jurisdictionally interstate.

52. ISP traffic is clearly interstate in nature, and charges paid with respect to such traffic by all parties should be resolved in the pending proceedings before the FCC.

#### **BELLSOUTH'S CONTRACTUAL INTENTIONS**

53. When BellSouth negotiated the Agreements, existing law reflected that the FCC considered ISP traffic to be interstate, not local, and that the FCC determined a call's jurisdiction by its end-to-end nature (its originating and terminating points).

54. BellSouth never agreed to subject ISP traffic to the reciprocal compensation obligations of the respective Agreements.

55. BellSouth's refusal to pay reciprocal compensation for ISP traffic, therefore, does not constitute a breach of contract.

56. BellSouth did not view ISP traffic to "terminate" within the local calling area. Accordingly, BellSouth never agreed to an essential element of the Agreements, i.e., the scope of the parties' reciprocal compensation obligations, and therefore BellSouth cannot have breached the Agreements when it refused to pay for reciprocal compensation for ISP traffic.

57. While each Agreement defines "local traffic," they did not specify whether ISP traffic was subject to this definition. Therefore, no meeting of the minds occurred between the parties that ISP traffic was included in the reciprocal compensation provisions.

**COUNT I**  
**JUDICIAL REVIEW OF PSC ORDER**

58. BellSouth realleges paragraphs 1 through 57 above.

59. Because the calls in question are interstate, and not local traffic, they are within the exclusive jurisdiction of the FCC. Therefore, the PSC exceeded its jurisdiction in issuing the order.

60. The PSC acted erroneously, arbitrarily and capriciously in ordering that the reciprocal compensation provisions of the Agreements apply to traffic transported by the CLECs to ISP customers, but not terminated on the CLEC's network.

WHEREFORE, BellSouth respectfully requests that the PSC's order be reversed, and that the Court further order that the PSC lacked jurisdiction over the dispute.

**COUNT II**  
**INJUNCTION AGAINST THE PSC AND THE COMMISSION DEFENDANTS**

61. BellSouth realleges paragraphs 1 through 57 above.

62. The PSC's order violates Sections 251 and 252 of the Act and adversely affects the opening of telecommunications markets in Florida.

63. The effect of the PSC's order unjustly skews reciprocal compensation arrangements in a manner that discourages competition in the local telecommunications market in this State, and thereby results in the unfair and inequitable treatment of telecommunications providers such as BellSouth.

64. BellSouth is entitled to an Order permanently enjoining the PSC from enforcing its Order.

65. BellSouth is aggrieved and will be irreparably harmed by the PSC's order in that: (1) it would be required to pay to the CLECs millions of dollars to which the CLECs are not entitled; and (2) the PSC's order unfairly and unjustly impedes BellSouth's ability to do business as an LEC in Florida, in violation of the Act.

66. The Order constitutes final agency action and BellSouth has no further remedy at law other than through this petition and complaint.

WHEREFORE, BellSouth respectfully requests that this Court enjoin the PSC and its members from ordering BellSouth to pay reciprocal compensation for calls delivered to ISP end users.

**COUNT III**  
**DECLARATORY JUDGMENT AGAINST WORLDCOM**

67. BellSouth realleges paragraphs 1 through 57 above.

68. BellSouth requests declaratory judgment and other relief pursuant to 28 U.S.C. sections 2201 and 2202, and 47 U.S.C. section 252(e)(6) for the purpose of determining a question of an actual controversy between the parties.

69. An immediate substantial controversy exists between BellSouth and WorldCom, who have adverse legal interests in the outcome of this controversy.

70. BellSouth has a personal stake in the outcome of the controversy, evidenced by the possibility of a distinct and palpable injury.

71. BellSouth is entitled to a declaratory judgment in its favor against WorldCom.

WHEREFORE, BellSouth respectfully requests a judgment declaring that the telecommunications traffic at issue is interstate in nature, and therefore not subject to the reciprocal compensation provisions of the WorldCom Agreement.

**COUNT IV**  
**DECLARATORY JUDGMENT AGAINST TCG**

72. BellSouth realleges paragraphs 1 through 57 above.

73. BellSouth requests declaratory judgment and other relief pursuant to 28 U.S.C. sections 2201 and 2202, and 47 U.S.C. section 252(e)(6) for the purpose of determining a question of an actual controversy between the parties.

74. An immediate substantial controversy exists between BellSouth and TCG, who have adverse legal interests in the outcome of this controversy.

75. BellSouth has a personal stake in the outcome of the controversy, evidenced by the possibility of a distinct and palpable injury.

76. BellSouth is entitled to a declaratory judgment in its favor against TCG.

WHEREFORE, BellSouth respectfully requests a judgment declaring that the telecommunications traffic at issue is interstate in nature, and therefore not subject to the reciprocal compensation provisions of the TCG Agreement.

**COUNT V**  
**DECLARATORY JUDGMENT AGAINST INTERMEDIA**

77. BellSouth realleges paragraphs 1 through 57 above.

78. BellSouth requests declaratory judgment and other relief pursuant to 28 U.S.C. sections 2201 and 2202, and 47 U.S.C. section 252(e)(6) for the purpose of determining a question of an actual controversy between the parties.



79. An immediate substantial controversy exists between BellSouth and Intermedia, who have adverse legal interests in the outcome of this controversy.

80. BellSouth has a personal stake in the outcome of the controversy, evidenced by the possibility of a distinct and palpable injury.

81. BellSouth is entitled to a declaratory judgment in its favor against Intermedia.

WHEREFORE, BellSouth respectfully requests a judgment declaring that the telecommunications traffic at issue is interstate in nature, and therefore not subject to the reciprocal compensation provisions of the Intermedia Agreement.

**COUNT VI**  
**DECLARATORY JUDGMENT AGAINST MCI**

82. BellSouth realleges paragraphs 1 through 57 above.

83. BellSouth requests declaratory judgment and other relief pursuant to 28 U.S.C. sections 2201 and 2202, and 47 U.S.C. section 252(e)(6) for the purpose of determining a question of an actual controversy between the parties.

84. An immediate substantial controversy exists between BellSouth and MCI, who have adverse legal interests in the outcome of this controversy.

85. BellSouth has a personal stake in the outcome of the controversy, evidenced by the possibility of a distinct and palpable injury.

86. BellSouth is entitled to a declaratory judgment in its favor against MCI.


WHEREFORE, BellSouth respectfully requests a judgment declaring that the telecommunications traffic at issue is interstate in nature, and therefore not subject to the reciprocal compensation provisions of the MCI Agreement.

**ADDITIONAL RELIEF REQUESTED**

In addition to the relief requested above, as to all counts BellSouth requests that this Court award BellSouth its attorneys fees and costs incurred in bringing this action, and such other and further relief as the Court deems just and proper.

DATED this 14th day of October, 1998.

ADORNO & ZEDER, P.A.



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IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION

BellSouth Telecommunications, Inc. )  
Plaintiff, )  
v ) Civil Action No. 3:98CV170-MU  
US LEC of North Carolina, L.L.C., and The )  
North Carolina Utilities Commission, )  
Defendants. )

RESPONSE OF FEDERAL COMMUNICATIONS COMMISSION  
AS AMICUS CURIAE TO MOTION FOR REFERRAL OF ISSUE

The Federal Communications Commission respectfully submits this response as amicus curiae to the "Memorandum of Plaintiff BellSouth Telecommunications, Inc. in Support of Primary Jurisdiction Referral," filed with the Court on August 4, 1998. In its Memorandum, BellSouth asks this Court to refer to the FCC, under the doctrine of primary jurisdiction, two issues in this case: the proper jurisdictional treatment of calls made to the Internet through Internet service providers (ISPs), and whether such calls are subject to the reciprocal compensation requirements of section 251(b)(5) of the Communications Act of 1934 ("Act"), as amended by the Telecommunications Act of 1996, 47 U.S.C. § 251(b)(5). Without taking a position on BellSouth's request for referral of the jurisdictional issue, the FCC notes that the question whether calls to ISPs are subject to FCC jurisdiction already is before the FCC in ongoing proceedings and will be addressed by the agency promptly in those proceedings. In addition, the FCC does not seek referral of any issues relating to the enforcement of interconnection agreements negotiated or arbitrated pursuant to sections 251 and 252 of the Act, including whether calls to ISPs are "local" calls within the meaning of the reciprocal

"EXHIBIT 2"

compensation provisions in BellSouth's interconnection agreement with US LEC of North Carolina. See Iowa Utils. Bd. v. FCC, 120 F.3d 753, 804 (8th Cir. 1997) (holding that, except in limited circumstances, the FCC lacks jurisdiction to enforce the terms of interconnection agreements negotiated or arbitrated pursuant to sections 251 and 252), cert. granted, 118 S. Ct. 879 (1998).<sup>1</sup>

#### A. BACKGROUND.

Although the 1984 breakup of the Bell System helped spur the growth of competition in the long distance telephone market, the incumbent local exchange carriers ("LECs") retained monopoly control of local telephone markets. In almost every city or town in the United States, a single incumbent LEC, by virtue of its ownership of the local exchange network, controls local exchange service. Because that network also is the gateway to long distance service, the same incumbent LEC also has control over access by callers to that competitive market.

Congress addressed the competitive structure of telecommunications markets in the Telecommunications Act of 1996.<sup>2</sup> Congress sought to end the incumbent LECs' monopoly control over local and long distance access service markets, creating instead a "pro-competitive, de-regulatory national policy framework" with the goal of "opening all telecommunications markets to competition." S. Conf. Rep. No. 104-230, 104th Cong., 2d

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<sup>1</sup> The Commission and other parties petitioned the Supreme Court for a writ of *certiorari* to review the *Iowa* decision, and the Supreme Court granted those petitions. 118 S. Ct. 879 (1998). Argument before the Supreme Court will be held on October 13, 1998.

<sup>2</sup> P.L. 104-104, 110 Stat. 56, enacted February 8, 1996. The 1996 Act amends the Communications Act of 1934, which is codified at 47 U.S.C. § 151, *et seq.*

Sess. 1 (1996). As part of this framework, Congress required incumbent LECs to permit their competitors (competitive LECs, or "CLECs") to interconnect with the local network, to have the use of "unbundled" elements of the network, and to buy local service at wholesale rates for resale to end users. 47 U.S.C. § 251(c)(2)-(4). The CLECs were expected to compete with the ILECs for local as well as local exchange access business.

The 1996 Act also required all LECs (incumbents as well as CLECs) to establish "reciprocal compensation arrangements [with other LECs] for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). The FCC has interpreted this provision to apply only to the transport and termination of "local telecommunications traffic."<sup>3</sup> Although the United States Court of Appeals for the Eighth Circuit vacated in part the FCC's reciprocal compensation rules, see Iowa Utils. Bd. v. FCC, 120 F.3d 753, a number of state public utility commissions also have interpreted section 251(b)(5) to apply only to local telecommunications traffic. As required by the statute, carriers across the country (such as the parties to this

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<sup>3</sup> E.g., 47 C.F.R. § 51.701(e)(emphasis added):

[A] reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network facilities of the other carrier.

See also 47 C.F.R. § 51.703(a). The FCC defined "local telecommunications traffic" for this purpose as "[t]elecommunications traffic between a LEC and a telecommunications carrier ... that originates and terminates within a local service area established by a state commission ...". 47 C.F.R. § 51.701(b). Although these rules were among those vacated by the Eighth Circuit, they were not disturbed to the extent that they apply to Commercial Mobile Radio Service providers. 120 F.3d at 819 n.39.

case) have included provisions in their interconnection agreements providing for reciprocal compensation for local telecommunications traffic. See, e.g., BellSouth Memorandum at 2 (quoting BellSouth-US LEC Interconnection Agreement § IV.B)("[e]ach party will pay the other for terminating its local traffic on the other's network") (emphasis added).

This case arises out of a dispute between BellSouth and US LEC over the application of the reciprocal compensation provision in their agreement in North Carolina. That agreement requires each party to pay "reciprocal compensation" to the other "for terminating its local traffic on the other's network." Interconnection Agreement, § IV.B. BellSouth and US LEC disagree about whether calls made from a customer of one of the carriers to the Internet through an Internet Service Provider ("ISP") that is served by the other carrier are local calls subject to reciprocal compensation. The North Carolina Utilities Commission ("NCUC"), acting in an enforcement action brought by US LEC to obtain payment from BellSouth for these calls, ruled that calls to ISPs are local calls and that US LEC is entitled to reciprocal compensation for that traffic under the agreement. See Order Concerning Reciprocal Compensation for ISP Traffic, Docket P-55, Sub. 1027, at 6-7 (N.C. Util. Comm'n, Feb. 26, 1998). BellSouth filed a petition for review of the NCUC ruling in this Court. It later filed a motion to stay the proceeding "to permit referral of the controlling legal issue" to the FCC under the doctrine of primary jurisdiction.

#### **B. PENDING FCC PROCEEDINGS.**

Although the FCC has not yet expressly addressed the question whether calls to the Internet through ISPs are "local" calls, questions regarding the proper jurisdictional treatment of calls to the Internet have been raised in a number of proceedings currently pending before

the FCC. On May 15, 1998, GTE filed an interstate access tariff with the FCC to establish a new digital subscriber line (DSL) service offering that provides a high speed access connection between an end user subscriber and an ISP.<sup>4</sup> The Common Carrier Bureau has issued an order designating for investigation the threshold issue whether GTE's DSL service is properly tariffed at the federal level.<sup>5</sup> The FCC will issue an order concluding this investigation no later than October 30, 1998.<sup>6</sup> Also pending before the agency are requests filed by MFS Communications Company, Inc. ("MFS"), a CLEC, and the Association for Local Telecommunications Services ("ALTS"), a trade association that represents CLECs, that the FCC clarify whether the reciprocal compensation obligations of section 251(b)(5) of the Act apply to calls made to CLEC subscribers that are ISPs, in response to which the FCC must resolve the threshold question whether calls to ISPs are subject to FCC jurisdiction.<sup>7</sup>

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<sup>4</sup> In re GTE Telephone Operations, GTOC Tariff No. 1, GTOC Transmittal No. 1148 (filed May 15, 1998, to become effective May 30, 1998).

<sup>5</sup> In re GTE Telephone Operations, GTOC Tariff No. 1, GTOC Transmittal No. 1148, CC Docket No. 98-79, Order Designating Issues for Investigation, DA 98-1667 (released August 20, 1998).

<sup>6</sup> See 47 U.S.C. § 204(a)(2)(A) (five-month statutory deadline for orders concluding tariff investigations).

<sup>7</sup> See Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings, 61 Fed. Reg. 53,922 (1996); Pleading Cycle Established for Comments on Request by ALTS for Clarification, Public Notice, FCC Common Carrier Bureau/CPD 97-30, 12 FCC Rcd 9715 (released July 2, 1997). Although ALTS recently filed a letter with the Common Carrier Bureau seeking to withdraw its request for clarification, the issue ALTS raised remains pending before the Commission pursuant to the MFS petition and the agency's authority on its own motion to "issue a declaratory ruling terminating a controversy or removing uncertainty." 47 C.F.R. § 1.2. See also 5 U.S.C. § 554(e).

**C. APPROPRIATE ACTION IN THIS CASE.**

Several proceedings now pending before the agency pose the question whether calls to the Internet through ISPs are subject to FCC jurisdiction. The Commission will address this issue in the context of GTE's DSL tariff no later than October 30, 1998. It is unclear whether, or the extent to which, the FCC's resolution of the jurisdictional issue in the GTE tariff proceeding will be relevant to the proper treatment of ISP traffic under the terms of the interconnection agreement between BellSouth and US LEC. The FCC notes that the jurisdictional issue before it in the tariff proceeding does not involve application of the reciprocal compensation provisions of section 251(b)(5) or interpretation of the terms of an interconnection agreement.<sup>8</sup> Moreover, the proper construction of the specific compensation agreement previously entered into between the parties would not necessarily turn on a subsequent determination by the FCC with respect to its jurisdiction over ISP traffic.

Accordingly, the FCC takes no position on BellSouth's motion for a primary jurisdiction referral of the jurisdictional question and also does not seek referral of questions relating to the enforcement of particular provisions of BellSouth's interconnection agreement with US LEC, including whether calls to ISPs are "local" calls within the meaning of the reciprocal compensation provisions of that agreement. See Iowa Utils. Bd., 120 F.3d at 804.

Respectfully submitted.

PHILIP D. BARTZ  
Acting Assistant Attorney General  
Civil Division

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<sup>8</sup> See Iowa Utils. Bd., 120 F.3d at 804 (FCC lacks jurisdiction, except in limited circumstances, to enforce interconnection agreements under section 251 and 252).



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"EXHIBIT 2"

CERTIFICATE OF SERVICE

I, Brian G. Kennedy, hereby certify that on this 27<sup>th</sup> day of August, 1998, I caused the foregoing Response Of Federal Communications Commission as Amicus Curiae to Motion For Referral Of Issue, to be served via postage prepaid mailing to:

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"EXHIBIT 2"



State of North Carolina

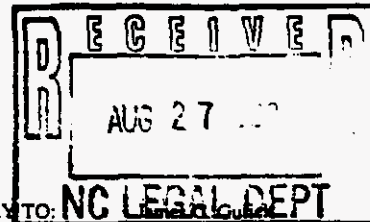
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August 26, 1998

VIA FEDERAL EXPRESS

Honorable Frank G. Johns  
Clerk, United States District Court  
210 Charles R. Jonas Building, Room 218  
401 West Trade Street  
Charlotte, NC 28202

Re: BellSouth Telecommunications v US LEC and NC Utilities Commission  
Civil Action No: 3:98 CV 170 MU

Dear Sir:

Enclosed please find an original and two copies of defendant North Carolina Utilities Commission's Response to BellSouth's Motion for Stay and Referral to FCC. Please file stamp the extra copy of the notice and return it to our office in the enclosed, self-addressed envelope.

Thank you for your attention to this matter. I am

Sincerely,

*James C. Gulick*  
James C. Gulick  
Special Deputy Attorney General

Enclosures

cc: All counsel of record  
Robert Bennink

"EXHIBIT 2"



**CERTIFICATE OF SERVICE**  
**Docket Nos. 971478-TP, 980184-TP, 980495-TP and 980499-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Federal Express this 15th day of October, 1998 to the following:

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