BELLSOUTH TELECOMMUNICATIONS, INC.

DIRECT TESTIMONY OF ALBERT HALPRIN

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 981008-TP

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Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

A. Albert Halprin, 1100 New York Avenue, N.W., Washington, D.C., 20005.

Q. WHAT IS YOUR OCCUPATION?

A. I am a partner at the law firm of Halprin, Temple, Goodman & Sugrue, and an adjunct professor of telecommunications law in the graduate law program at Georgetown University Law Center.

Q. WHAT ARE YOUR CURRENT AND PAST PROFESSIONAL EXPERIENCES OF RELEVANCE TO THIS PROCEEDING?

A. From 1984 to 1987, I served as Chief of the Federal Communications Commission's ("FCC") Common Carrier Bureau, where I was responsible for the regulation of all interstate telecommunications services in the United States. Between 1980 and 1983, I was a Senior Attorney and Chief of the Bureau's Policy and Program Planning

Division. I have lectured extensively and advised numerous clients on regulatory issues related to the Internet and Internet access services. For instance, at the International Telecommunication Union's recent "Inter@ctive '97" conference, the first global policy forum on Internet issues, I chaired the panel on Internet legal issues, and I participated on another panel on Internet regulation.

In addition, I have testified as an expert witness in seven other state commission proceedings on the matters at issue in this proceeding.

Q. HAVE YOU PREPARED AN APPENDIX WHICH SUMMARIZES YOUR EDUCATIONAL BACKGROUND, WORK EXPERIENCE, AND PREVIOUS TESTIMONY?

A. Yes, Appendix A, which is attached to my testimony, summarizes my educational background, work experience, and previous testimony.

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. To describe in detail what occurs when an end user communicates over the Internet through an Internet Service Provider (ISP), and based on this description, explain why Internet communications that take place through an ISP ("ISP Internet communications" or "ISP Internet traffic") are jurisdictionally interstate in nature. I will also explain why ISP Internet communications that originate on one local exchange

carrier's ("LEC's") network facilities and traverse the network facilities of another LEC within the same local exchange do not "terminate" at the ISP's local server. I will also address the recent FCC Order regarding ISP traffic.

Q. TO WHAT ORDER ARE YOU REFERRING?

A. On October 30, 1998, the FCC issued an order that settles two core questions in this proceeding: the jurisdictional nature of ISP internet traffic and whether such traffic "terminates" at the ISP's local server or elsewhere. In permitting GTE to tariff its ADSL service at the interstate level, the FCC concluded that the ISP Internet communications at issue were jurisdictionally interstate on an end-to-end basis, "from the end user to a distant Internet site." The FCC declared that such communications "do not terminate at the ISP's local server." The agency also explicitly rejected the tortured and inaccurate readings of past FCC orders upon which e.spire Communications, Inc. ("e.spire") bases its contention that ISP Internet communications consist of "two calls" or two "components."[1]

While the FCC stated that its findings applied solely to GTE's ADSL service, the jurisdictional analysis and conclusions in the *GTE ADSL Tariff Order* necessarily apply equally to the ISP Internet traffic at issue

[1] *See GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148,* Memorandum Opinion and Order, CC Docket 98-79 (rel. Oct. 30, 1998) ("*GTE ADSL Tariff Order*")

in this proceeding. Because the two-call theory and every variation on it focus on what occurs after the communication reaches the ISP's local server, they have no bearing on the analysis of the nature of the portion of the communication between the end user and the ISP. There is no difference in the jurisdictional nature of ISP Internet traffic depending on whether such traffic is switched or dedicated, and no basis exists to distinguish the two types of traffic for purposes of jurisdictional analysis. Indeed, the precedents the FCC cited in concluding that it should "analyze ISP traffic as a continuous transmission from the end user to a distant Internet site" concerned circuit-switched, dial-up services.[2]

Because ISP Internet communications that originate on the local network facilities of one LEC and traverse the local network facilities of another LEC are interstate communications and do not terminate on the network of the second LEC, such communications are not, as a matter of law, subject to reciprocal compensation under Section 251 of the Communications Act. Nor are such communications subject to the reciprocal compensation provisions of the BellSouth Telecommunications, Inc.-e.spire interconnection agreement.[3] Those provisions require such compensation only for "local traffic", which is defined in the agreement as "telephone calls that originate in one

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[2] *Id.* at ¶¶ 17-20.

[3] *See* BellSouth Telecommunications, Inc. –e.spire Communications, Inc. Interconnection Agreement (July 25, 1996).

exchange and *terminate* in either the same exchange, or a corresponding Extended Service Area ("EAS") exchange."[4]

In a previous ruling on related complaints, the Florida Public Service Commission ("FPSC") noted that the FCC had not yet ruled on the jurisdictional nature of ISP Internet traffic.[5] The FCC has now done so. By permitting GTE to tariff ADSL service at the federal level and treating it as part of an end-to-end interstate communication, the FCC also has determined that ISP Internet traffic has always been interstate traffic. The FCC has thus clarified its "treatment of ISP traffic at the time the agreement" between BellSouth Telecommunications, Inc. ("BellSouth") and e.spire was executed. In light of the FCC's order, "current law weighs in favor" of, and indeed requires a finding that the FPSC lacks jurisdiction over ISP Internet traffic and that it may not require BellSouth to pay reciprocal compensation for such traffic.[6] In light of the FCC's order, there is no basis for the FPSC to reach any conclusion other than that ISP Internet communications at issue in this proceeding are jurisdictionally interstate traffic and are not subject to reciprocal compensation under Section 251 of the Communications Act or under the terms of the BellSouth-e.spire agreement.

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[4] *Id.* at Attachment B.(emphasis added).

[5] *See Complaint of WorldCom Technologies, Inc., et al., v. BellSouth Telecommunications Inc.*, Final Order Resolving Complaints, Docket Nos. 980184-TP, 980495-TP, and 980499-TP (Sept. 15, 1998) ("*WorldCom v. BellSouth*").

[6] *Id.* at 18

Even if the FPSC were to assert jurisdiction over ISP Internet traffic, both policy and legal considerations weigh entirely against requiring reciprocal compensation for such traffic. Reciprocal compensation is not an appropriate or lawful means to recover costs that an alternative local exchange carrier (ALEC) may incur when an Internet communication through an ISP originates on another LEC network and traverses the ALEC's network. These costs should be recovered by the ALEC directly from the ISP, not from the originating carrier through reciprocal compensation. Requiring reciprocal compensation for ISP Internet traffic would result in the recovery of many times the actual costs incurred by the ALEC.

Q. PLEASE DESCRIBE, IN GENERAL, HOW THE INTERNET WORKS.

A. The Internet is perhaps best understood in comparison to the traditional, common carrier, public switched telephone network. In a circuit-switched network, each call originates in one location and terminates in another, and a single, circuit-switched connection is established between the points of origin and termination for the duration of the call.

The Internet is a packet-switched network environment. As the FCC has explained, the Internet is a

> distributed packet-switched network, which means that information is split up into small chunks or 'packets' that are individually routed through the most efficient path to their destination. Even two packets from the same message may travel over different physical paths through the network. Packet

> switching also enables users to invoke multiple Internet services simultaneously, and to access information with no knowledge of the physical location of the service where the information resides.[7]

When an end user connects to the Internet through an ISP, the call is carried over the public switched network to the ISP's "node," through which it is connected to the Internet. Once the connection to the Internet is established, no more circuit switching is involved.[8] The end user effectively becomes part of the Internet, a destination point that any other person connected to the Internet can reach. An Internet communication that takes place through an ISP can establish a clear, real-time communication between the caller and the destination point or points he or she is seeking to reach on or beyond the Internet. This communication can take the form, among other things, of audio (such as radio broadcasts), video, fax, and data (including "chat") applications.

Furthermore, the packet-switched nature of the Internet enables an end user to communicate with multiple destinations sequentially, or indeed simultaneously. In a single communication, for instance, a caller may access websites that reside on servers located in various states or in foreign countries; communicate directly with another Internet user by voice, video or electronic messaging; and "chat" online, in real-time,

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[7] *Federal-State Joint Board on Universal Service*, Report to Congress, CC Docket No. 96-45, FCC 98-67 (rel. April 10, 1998) at ¶ 62. ("*Report to Congress on Universal Service*").

[8] For regulatory purposes, the FCC has determined that basic packet-switched services are common carrier services. *See, e.g., Independent Data Communications Manufacturers Association*, Memorandum Opinion and Order, 10 FCC Rcd 13717 (1995).

with a group of Internet users located around the corner or around the world. Standard Internet "browsers" enable the end user to do all of these things simultaneously. Some of the destinations the end user communicates with may be located within the same local exchange, calling area, or state, and some may be located in another state or country. Because of the nature of the Internet, it is often impossible for a user to know the location from which he or she is retrieving information. Today, the contents of popular websites are stored in multiple servers throughout the Internet, based on techniques referred to as "caching" or website "mirroring." The use of these techniques is growing very rapidly. As a result, the precise location of the server may be unknown to the end user or even to the ISP he uses as part of accessing the Internet.

Q. PLEASE DESCRIBE PRECISELY WHAT OCCURS WHEN AN END USER PLACES AN INTERNET CALL THROUGH AN ISP.

A. At issue in this proceeding are situations in which an end user who receives local exchange service from BellSouth connects to the Internet through an ISP node located in the same local exchange as the end user, and the ISP receives local exchange service from an ALEC such as e.spire. In such a situation, the communication originates on the network facilities of BellSouth, traverses e.spire's network facilities, and is connected to the Internet through the ISP's node. A direct, unbroken, end-to-end stream of communication is

established between the end user and the destination point(s) he or she wishes to reach on or beyond the Internet. Internet connections established through an ISP do not involve two calls or a "two-step transaction." The ISP's network equipment performs the same function as an intermediate switch, routing the end-user's traffic to a destination.

Q. HOW IS THE JURISDICTION OF A CALL DETERMINED?

A. The Communications Act grants the FCC jurisdiction over "interstate and foreign communication by wire and radio," while assigning to the states jurisdiction over intrastate communication. [9] The well established standard for determining the jurisdictional classification of a communication is to analyze the communication on an end-to-end basis. In the *GTE ADSL Tariff Order*, the FCC explained that it

> traditionally has determined the jurisdictional nature of the communications by the end points of the communication and consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers.[10]

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[9] *See* 47 U.S.C. § 152(a). There are certain very minor exceptions to the FCC's jurisdiction, such as interstate local exchanges, which are not relevant here.

[10] *See GTE ADSL Tariff Order at ¶ 17. See* also *See Teleconnect Co. v. Bell Telephone Co. of Pennsylvania et al.* 10 FCC Rcd 1626, 1629-30 (1995) (*"Teleconnect Order"), aff'd, Southwestern Bell Telephone Co. v. FCC,* No. 95-119 (D.C. Cir. June 27, 1997)("We regulate an interstate wire communication under the Communications Act from its inception to its completion. Such an interstate communication does not end at an intermediate switch"). See also *Long Distance/USA, Inc.*, 10 FCC Rcd. 1634, 1638 ("[W]e regulate an interstate wire communication ... from its inception to its completion. ... [A] single interstate communications ... does not become two communications because it passes through intermediate switching facilities.")

The FCC also has held that:

> the jurisdictional nature of a call is determined by its ultimate origination and termination, and not... its intermediate routing.[11]

The federal courts have confirmed that the jurisdictional classification of a communication depends on the "nature" of the communication and is to be analyzed from the point of inception to the point of completion. That the Communications Act contemplates the regulation of interstate wire communication from its inception to its completion is confirmed by the language of the statute and by judicial decisions.[12]

Moreover, to the extent that the local network facilities of one or more LECs are used to originate an interstate communication, such facilities are in interstate use and are subject to the FCC's exclusive jurisdiction. "This Commission has jurisdiction over, and regulates charges for the local network when it is used in conjunction with origination and termination of interstate calls".[13] Where an end user initiates an Internet communication by dialing into an ISP over the network facilities of one or more LECs, these network facilities are in interstate use.

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[11] *Southwestern Bell Tel. Co. Transmittal Nos. 1537 and 1560, Revisions to Tariff F.C.C. No. 68*, Order Designating Issues for Investigation, 3 FCC Rcd. 2339, 2341, (1988) . *See* also, *AT&T; Applicability of the ENFIA Tariff to Certain OCC Services*, 91 F.C.C. 2d 568, 576 (1982).

[12] *See United States v. AT&T*, 57 F. Supp. 451, 454 (S.D.N.Y.), *aff'd sub nom. Hotel Astor v. United States*, 325 U.S. 837 (1945)(*per curiam*).

[13] *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, 4 FCC Rcd 5660 (1989).

Nothing in the Telecommunications Act of 1996 altered the basis for determining the jurisdictional nature of traffic.

FCC precedents also establish that where a facility is used to provide both intrastate and interstate services, and it is not possible to "separate" the uses of the facility by jurisdiction, such "mixed-use" facilities are subject to the FCC's exclusive jurisdiction.[14]

For instance, private lines used to carry both intrastate and interstate traffic are a prime example of a mixed-use facility. Because no rational basis exists to allocate the costs of a dedicated circuit between the jurisdictions, the FCC determined that a private line that carries more than a *de minimis* amount of interstate traffic (*i.e.*, more than 10% of the total traffic carried on the line) will be treated for separations purposes as interstate.[15]

Q. APPLYING THESE STANDARDS, ARE INTERNET COMMUNICATIONS THAT TAKE PLACE THROUGH AN ISP JURISDICTIONALLY INTERSTATE OR INTRASTATE?

A. All Internet communications are inherently interstate in nature and, therefore, subject to the FCC's exclusive jurisdiction. The FCC exercises its jurisdiction over interstate communications on an end-to-

[14] *Id.*

[15] *Id.*

end basis, including the use of local network facilities to the extent of their interstate use.

In a traditional circuit-switched network, the jurisdictional status of a call is simple to determine: if the call originates and terminates in a single state, it is jurisdictionally intrastate. If the points of origin and termination are in different states (or different countries), the call is jurisdictionally interstate. In the packet-switched network environment of the Internet, the jurisdictional analysis is less straightforward. As the FCC noted in the *GTE ADSL Tariff Order,*

> "[a]n Internet communication does not necessarily have a point of "termination in the traditional sense. In a single Internet communication, an Internet user may, for example, access websites that reside on servers in various state (*sic*) or foreign countries, communicate directly with another Internet user, or chat on-line with a group of internet users located in the same local exchange or in another country, and may do so either sequentially of simultaneously." [16]

Given the nature and current uses of the Internet, it is not possible to identify or separate most ISP traffic by jurisdiction. It is not possible to separate the intrastate and interstate portions of a communication in which an end user communicates with multiple destinations, some of which may be within the same state, and some of which may be in other states or countries. It is not possible to separate the intrastate and interstate portions when the end user is simultaneously engaged in intrastate and interstate communication over the Internet. Forwarding

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[16] *GTE ADSL Tariff Order at ¶ 22.*

and framing technology itself prevents the originating ISP or router from knowing the ultimate "destination" of many communications. And it is not possible to determine whether the call is intrastate or interstate when the location of the destination point is unknown.

As the FCC's Office of Plans and Policy ("OPP") explained in a working paper issued last year,

> [B]ecause the Internet is a dynamically routed, packet-switched network, only the origination point of an Internet connection can be identified with clarity. Users generally do not open Internet connections to "call" a discreet recipient, but access various Internet sites during the course of a single conversation . . . One Internet "call" may connect the user to information both across the street and on the other side of the world. [17]

The OPP working paper concluded that Internet traffic has "no built-in jurisdictional divisions." [18]

For these reasons, the Internet is a mixed-use facility, and Internet communications are a paradigm case of jurisdictional inseverability. Jurisdictionally inseverable traffic is interstate traffic subject to the FCC's exclusive jurisdiction. Accordingly, all Internet communications

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[17] *See* Kevin Werbach, *Digital Tornado: The Internet and Telecommunications Policy*, FCC, OPP Working Paper No. 29 (March 1997) at 45; *See also Report to Congress on Universal Service* at ¶33 (The Internet is a "distributed packet-switched network, which means that information is split up into small chunks or `packets' that are individually routed through the most efficient path to their destination. Even two packets from the same message may travel over different physical paths through the network. Packet switching also enables users to invoke multiple Internet services simultaneously, and to access information with no knowledge of the physical location of the service where the information resides.")

[18] *Id.*

are subject to the FCC's exclusive jurisdiction.

Q. DO INTERNET COMMUNICATIONS THAT ARE PLACED THROUGH AN ISP "TERMINATE" AT THE ISP?

A. No, they clearly do not. This question -- where calls to the Internet that are placed through an ISP "terminate" -- is obviously central and decisive to this proceeding, and has been authoritatively resolved by the FCC in the *GTE ADSL Tariff Order.* The determination of whether such calls are subject to reciprocal compensation under the reciprocal compensation requirements of the Communications Act of 1934, as amended ("the Communications Act"), hinges on this question. As e.spire states in its complaint, "if the originating and terminating locations of the call are within the same local calling area, the call is a local call subject to reciprocal compensation."[19] In the *GTE ADSL Tariff Order*, the FCC concluded that "the communications at issue here do not terminate at the ISP's local server, as some competitive LECs and ISPs contend, but continue to the ultimate destination or destinations, very often a distant Internet website accessed by the end user".[20] The same conclusion applies with respect to the issue of where the ISP Internet traffic at issue in this proceeding terminates. There is no technical or legal basis for any party to contend that ISP Internet traffic terminates at the ISP's local server when carried over a switched-

[19] e.spire Complaint at 11.

[20] *GTE ADSL Tariff Order at ¶19.*

circuit, dial-up service, but not if it is carried over a dedicated access service such as GTE's ADSL service. Such a distinction would be entirely spurious.

Section 251(b)(5) of the Communications Act requires all LECs "to establish reciprocal compensation arrangements for the transport and termination of telecommunications."[21] Section 252(d)(2) specifies that such reciprocal compensation arrangements must "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." [22] Thus, under the unambiguous language of the statute, Section 251(b)(5) reciprocal compensation obligations apply only to traffic that originates on the network facilities of one LEC and terminate on the network facilities of another LEC. Likewise, under the unambiguous terms of the BellSouth-e.spire Interconnection Agreement, only "local traffic" exchanged between the carriers is subject to reciprocal compensation. "Local traffic" is defined in the agreement as "telephone calls that originate in one exchange and *terminate* in either the same exchange, or a corresponding Extended Service Area ("EAS") exchange".[23]

The FCC *GTE ADSL Tariff Order* forecloses any finding by the FPSC

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[21] 47 U.S.C. § 251(b)(5).

[22] 47 U.S.C. § 252(d)(5).

[23] *See BellSouth-e.spire Interconnection Agreement, Attachment B(emphasis added).*

other than that the ISP Internet communications at issue in this proceeding do not terminate either in the same exchange in which they originate, or a corresponding EAS exchange. In the FCC's words, "the communications at issue here do not terminate at the ISP's local server, ... but continue to the ultimate destination or destinations, very often a distant Internet website accessed by the end user".

Q. DOES AN ISP INTERNET COMMUNICATION INVOLVE "TWO CALLS"?

A. No. In the *GTE ADSL Tariff Order,* the FCC rejected outright the view that ISP Internet communications consist of "two calls" or two "components". The Commission denied that

> for jurisdictional purposes, an end-to-end ADSL communication must be separated into two components: an intrastate telecommunications service, provided in this instance by GTE, and an interstate information service, provided by the ISP. ...[T]he Commission analyzes the totality of the communication when determining the jurisdictional nature of a communication.[24]

This conclusion is fully consistent with decades of FCC and court precedents, both in the context of enhanced or information services[25] and telecommunications services.[26] In rejecting the "two-call" theory with respect to ISP Internet traffic, the FCC cited, *inter alia,* its *MemoryCall* decision.[27]

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[24] *GTE ADSL Tariff Order at ¶20.*

[25] *See MemoryCall Order.*

An ISP Internet call can, and frequently does, establish a real-time communication between the end user who initiates the communication and the destination point or points he or she is seeking to reach on or beyond the Internet. Information travels in both directions over a so-called "clear pipe," without any change whatsoever, between the two parties communicating; or, in the case of so-called "broadcast" services, from a sender to a receiver. It is simply absurd to attempt to characterize such a real-time communication as involving two steps or two "interactions."

The fact that ISP Internet communications may consist of two "distinct components" or elements – a regulated "telecommunications service" (the "local call") and a separate, unregulated, information service – is essentially irrelevant for purposes of jurisdictional analysis and reciprocal compensation. As the FCC stated in the *GTE ADSL Tariff Order,*

> The Commission previously has distinguished between the "telecommunications services component" and the "information services component" of end-to-end Internet access for purposes of determining which entities are required to contribute to

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[26] *See Teleconnect Order.*

[27] In the MemoryCall case, the FCC was urged to find that "when the voice mail service is accessed from out-of-state, two jurisdictional transactions take place: one from the caller to the telephone company switch that routes the call to the intended recipient's location, which is interstate, and another from the switch forwarding the call to the voice mail apparatus and service, which is purely intrastate". The FCC rejected this argument, concluding that because "there is a continuous, two-way transmission path from the caller location to the voice mail service, there could be but a single call". *See MemoryCall Order* at 1620.

> universal service. Although the Commission concluded that ISPs do not appear to offer "telecommunications service", and thus are not "telecommunications carriers" that must contribute to the Universal Service Fund, it has never found that "telecommunications" ends where "enhanced" information service begins ... We, therefore, analyze ISP traffic as a continuous transmission from the end user to a distant Internet site.[28]

The fact that end users typically call into ISPs by dialing a seven-digit or ten-digit "local" telephone number proves nothing with respect to where the communication "terminates," the jurisdictional nature of the communication, and whether it is subject to reciprocal compensation. For instance, foreign exchange (FX) service involves the end user dialing a seven-digit or ten-digit telephone number. Nonetheless, FX service is not, and has never been, treated as terminating at the "called telephone number." The jurisdictional classification and regulatory treatment of FX calls is determined based on the point of "completion" of the call. Where FX service is used on an interstate basis, it is regulated by the FCC and treated as an interstate interexchange service. Interstate FX calls are not subject to reciprocal compensation under local interconnection agreements, even though the telephone number the end user calls to reach the FX service customer may be a seven-digit number. The same analysis applies to ISP Internet communications.

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[28] *GTE ADSL Tariff Order at ¶20.* Even prior to the FCC's ruling on GTE's ADSL tariff, the federal district court in Illinois had noted the FCC's warning that "this distinction, although it does exist, is not the answer to whether the LEC is entitled to reciprocal compensation for terminating Internet traffic". *See Illinois Bell Telephone Co. v. WorldCom Technologies, Inc., et al.*, No. 98(1925), Slip op. at 24 (N.D. Ill., July 21, 1998)("Illinois Bell v. WorldCom").

Q. DOES THE FACT THAT THE FCC TREATS INFORMATION SERVICE PROVIDERS AS "END USERS" RATHER THAN "CARRIERS" FOR INTERSTATE ACCESS CHARGE PURPOSES MEAN THAT CALLS MADE TO ISPS ARE "LOCAL" AND, THEREFORE, SUBJECT TO RECIPROCAL COMPENSATION?

A. No. The FCC's Part 69 rules governing interstate access charges establish only two classes of entities for interstate access charge purposes: (1) interstate carriers and (2) end users. While the FCC periodically has examined the possibility of establishing other categories under Part 69, it has never done so. Given this dichotomy, the FCC in 1983, determined that interstate enhanced service providers (ESPs) should be treated as end users rather than interexchange carriers for interstate access charge purposes. In its recent Notice of Inquiry on the Internet, the FCC tentatively concluded that interstate ESPs, including ISPs, should continue to be exempted from interstate carrier access charges, as such charges currently are structured.[29]

However, the critical point here is that the FCC has never held that by virtue of the ESP exemption, interstate ESPs or ISPs are subject to state jurisdiction for any other purpose, including reciprocal compensation. Accordingly, there is no basis for the Commission to

[29] *Access Charge Reform,* Notice of Proposed Rulemaking, Third Report and Order and Notice of Inquiry, 11 FCC Rcd 21354 (1996).

conclude that the FCC's classification of ESPs as end users under the Part 69 regime in any way requires that calls to ISPs be subject to reciprocal compensation.

Again, the FCC's order addressing GTE's ADSL service tariff resolves any doubt about the meaning and implications of the ESP exemption. The FCC categorically rejected ALEC arguments that, "because the Commission has treated ISPs as end users for purposes of the ESP exemption, and Internet call must terminate at the ISP's point of presence".[30] The FCC added that

> the fact that ESPs are exempt from certain access charges and purchase their PSTN links through local tariffs does not transform the nature of traffic routed to ESPs ... We emphasize that the Commission's decision to treat ISPs as end users for access charge purposes does not affect the Commission's ability to exercise jurisdiction over such traffic.[31]

It should be noted that it is *because* ISP Internet traffic is jurisdictionally interstate that the FCC has the authority to exempt such traffic from interstate access charges. "That the FCC exempted ESPs from access charges indicates its understanding that they in fact use interstate access service; otherwise, the exemption would not be necessary".[32]

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[30] *GTE ADSL Tariff Order* at ¶ 21.

[31] *Id.*

[32] *Id.* (emphasis in original).

Q THE FLORIDA PSC AND A NUMBER OF OTHER STATE COMMISSIONS HAVE ORDERED INCUMBENT LECS TO PAY RECIPROCAL COMPENSATION TO CLECS FOR ISP INTERNET COMMUNICATIONS PLACED THROUGH ISPS THAT RECEIVE LOCAL EXCHANGE SERVICE FROM THE CLECS. PLEASE COMMENT ON THESE RULINGS.

A. Many of the state commissions that have examined this issue in the past year, including the Florida PSC, recognized that the question of whether ISP Internet traffic is subject to reciprocal compensation under the Communications Act was pending before the FCC. Like the Florida PSC, they indicated that their determinations were subject to change once the FCC issued a ruling on the jurisdictional nature of ISP Internet traffic. The FCC has now acted on the issue. The FCC's order permitting GTE to tariff its ADSL service at the interstate level constitutes a determination that ISP Internet traffic is jurisdictionally interstate on an end-to-end basis. That is, the local network facilities are in interstate use when an end user uses them to communicate over the Internet through an ISP.

The Florida PSC's previous ruling reflected its conclusion that "the current law" at the time of its decision "weigh(ed) in favor" of treating ISP Internet traffic as "local traffic" for reciprocal compensation purposes.[33] The law has now been clarified, and it ordains the opposite

[33] *WorldCom v. BellSouth* at 18.

conclusion. Similarly, the Michigan Public Service Commission stated that "[w]hen the FCC rules in the pending docket, the Commission can determine what action, if any, is required."[34] Likewise, the West Virginia Public Service Commission directed the parties appearing before it in a case similar to the present docket to "bring the FCC's final determination regarding this issue to the Commission's attention as soon as possible to allow the Commission to consider whether any further action is appropriate."[35] As these statements indicate, to the extent that these and other state commissions have made determinations regarding the applicability of reciprocal compensation to ISP Internet traffic, many of them acted in the absence of definitive guidance from the FCC. That guidance has now been provided. Inherent in the *GTE ADSL Tariff Order* is a finding that the traffic does not originate and terminate within a local exchange area.

In several rulings issued before the FCC issued the *GTE ADSL Tariff Order,* the federal courts declined to intervene and reverse state

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[34] *See Application for Approval of an Interconnection Agreement between Brooks Fiber and Ameritech,* Opinion and Order, Case Nos. U-11178, *et al.,(* Jan. 28, 1998) at 14-15.

[35] *See Petition for Arbitration of Unresolved Issued for the Interconnection Negotiations Between MCI and Bell Atlantic, Case No. 97-1210*-T-PC, Order (Jan. 13, 1996) at 30 and 39-40; *See also Teleport Communications Group Inc. v. Illinois Bell; Complaint as to Dispute over a Contract Definition,* Docket Nos. 97-0404, *et al.,* Order (March 11, 1998) at 13 (Illinois Commerce Commission); *Complaint Against Bell Atlantic-Maryland, Inc. for Breach of Interconnection Terms, and Request for Immediate Relief by MFS Intelenet,* Letter to David E. Hall and Andrew D. Lipman by MD P.S.C., September 11, 1997 (Maryland Public Service Commission); *Petition of Birch Telecom for Arbitration of the Rates, Terms, Conditions and Related Arrangements for Interconnection With Southwestern Bell Telephone Company,* Case No. TO-98-278, Order, April 23, 1996 at 7 (Missouri Public Service Commission); and *Contractual Dispute About the Terms of Interconnection Agreement Between Ameritech and TCG,* Docket Nos. 5837-TD-100, et al. Letter to Ms. Rhonda Johnson and Mr. Mike Paulson by Wisconsin PSC Staff, March 31, 1998.

commission decisions on the reciprocal compensation issue. However, while upholding such state commission decisions, federal district courts in Texas and Illinois explicitly recognized the FCC's authority, in the first instance, to make jurisdictional determinations regarding the traffic at issue.[36] Notably, the federal district court in Illinois strongly signaled its displeasure with the Illinois Commerce Commission's (ICC's) reasoning in determining that Ameritech was required to pay reciprocal compensation for ISP Internet traffic pursuant to the terms of local interconnection agreements it had entered into with several Illinois CLECs. However, under the "substantial deference" standard for review of state commission decisions, the court determined that it could not reverse the ICC's order. The court pointedly stated that the ICC's order read "more like a selective review of FCC precedent than solid reasoning".[37] The court also noted that "[a]ny ruling by the FCC on [the jurisdictional] issue will no doubt affect future dealings between the parties on the instant case."[38]

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[36] *See Southwestern Bell Telephone Co. v. Public Util. Commission of Texas,* Case No. MO-98-CA-43 (W.D. Tex, June 16, 1998). The U.S. District Court for the Western District of Texas – Midland-Odessa Division upheld a Texas Public Utilities Commission order requiring Southwestern Bell Telephone Company (SWBT) to pay reciprocal compensation for "local" calls to ISPs that receive local exchange service from CLECs that compete with SWBT. The court relied heavily on the discussion of Internet access in the FCC's Universal Service Order and Report to Congress. The FCC subsequently informed the court, in an Amicus Curiae brief, that the court had erred, and that the FCC had not yet resolved the question of whether CLECs are entitled to reciprocal compensation for Internet calls that are routed through an ISP to which the CLEC provides local exchange service.

[37] *See Illinois Bell v. WorldCom,* slip op. at 24.

[38] *Id.* Slip op. At 18.

The U.S. Court of Appeals for the Eighth Circuit also recognized the FCC's right in the first instance to determine the jurisdictional nature of communications.[39] The court upheld the FCC's decision to continue exempting information service providers from interstate access charges as an appropriate exercise of the agency's discretion over interstate traffic, rather than because any portion of these calls was local.[40]

Q. IN THE *GTE ADSL TARIFF ORDER*, THE FCC STATED THAT ITS FINDINGS DID NOT CONSTITUTE A DETERMINATION CONCERNING THE ISSUE OF RECIPROCAL COMPENSATION FOR ISP INTERNET TRAFFIC. PLEASE COMMENT.

A. It is clear from the tenor of the *GTE ADSL Tariff Order* that the FCC wishes to ensure that incumbent LECs continue to subsidize alternative LECs ("ALECs"). The FCC implicitly recognizes that a logical consequence of its finding that ISP Internet traffic is interstate in nature – a finding the agency was compelled by the law and the facts to reach – will be a substantial reduction in one of the major sources of such ALEC subsidies: reciprocal compensation payments from incumbent LECs to competitive LECs. Having determined that such traffic is jurisdictionally interstate, it would be entirely appropriate for the FCC to consider adopting a new interstate charge to permit LECs to recover the costs they incur to carry calls to ISPs that originate on another

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[39] *See Southwestern Bell Telephone Co. v. FCC,* No. 97-2618 (8th Cir., Aug. 19, 1998).

[40] *Id.*

LEC's network. But in establishing such a new interstate charge, the FCC would be required to proceed in a manner consistent with its statutory ratemaking authority and its own rules. It could not, for instance, impose such a rate retroactively. Moreover, such a new interstate charge would have to provide a mechanism to collect the required revenues either in the form of a charge on the end users who connect to the Internet through the ISP, or in the alternative, as a subsidy collected from users in general.

The *GTE ADSL Tariff Order* seems to imply that the FCC believes it has the authority to dictate or affect state commission decisions interpreting interconnection agreements or arbitrating interconnection disputes under Section 251 and 252, including decisions regarding reciprocal compensation. Under the Communications Act, as interpreted by the federal courts, the FCC has no such authority. The FCC properly determined that it has jurisdiction over ISP Internet calls because such calls are part of an end-to-end interstate "communication by wire". But the FCC cannot leverage this finding into authority over interconnection agreements, including the reciprocal compensation provisions of such agreements. Nor does the FCC have authority to delegate to the state commissions, or indeed any other agency, the power to set or regulate rates for any interstate service.

Q. AS A MATTER OF PUBLIC POLICY, SHOULD ISP INTERNET TRAFFIC BE SUBJECT TO RECIPROCAL COMPENSATION UNDER

LOCAL INTERCONNECTION AGREEMENTS?

A. No, it should not. Even if lawful, requiring the payment of reciprocal compensation for ISP Internet traffic, pursuant to local interconnection agreements would be unsound public policy. It would hinder the development of competition in Florida's local exchange services market, cause significant economic distortions in the still-evolving information services industry, and create disincentives for investment and innovation in the underlying networks that support the Internet. Such negative consequences are already apparent in those markets where reciprocal compensation currently is being paid by incumbent LECs for such traffic.

First, where reciprocal compensation applies to ISP Internet communications, competition among LECs to serve a large class of local customers -- heavy Internet users who access the Internet through an ISP -- has been reduced or eliminated. There currently are in excess of 24 million households that subscribe to ISPs and other consumer "online" services, and the number of such subscribers is growing at an annual rate of 34 percent.[41] In a system where BellSouth, as the LEC that serves such a subscriber, is required to pay reciprocal compensation to e.spire or another ALEC that serves the subscriber's chosen ISP, such payments could, under BellSouth's

[41] *Interactive Services Report*, January 23, 1998, at 1 (citing online subscribership statistics as of December 31, 1997).

interconnection agreement with e.spire, easily reach almost $100 or more per subscriber, per month. e.spire, which has no "carrier of last resort" obligations in Florida, may simply refuse to serve subscribers who generate large reciprocal compensation outflows by remaining connected to the Internet for extended periods of time. Only BellSouth is required to serve such customers as a practical matter. In this environment, BellSouth has no market-based opportunity to generate inbound reciprocal compensation payments that would offset the payments it must make to e.spire. For instance, in Miami, BellSouth is allowed to collect no more than the monthly flat-rate charge of $10.65 (residential) or $29.10 (business) to provide local service to these end users. Yet, BellSouth is required to pay out up to $100 or more to e.spire to "compensate" the latter for the use of its network to carry ISP Internet calls from these end users. Under these conditions, no market to provide local exchange service to end-users who access the Internet intensively over the public switched network can possibly develop. In an economically rational policy framework, such high-volume users should be prime targets for competing LECs, not left out of competitive developments.

Second, if reciprocal compensation applied to ISP Internet calls, competition among LECs to provide local exchange service to ISPs would continue to be distorted. Instead of competing on the basis of service quality, technological improvements, or other sound bases, e.spire and other ALECs would continue to benefit from artificial

incentives to serve as the local exchange carrier for ISPs at uneconomic rates, and to establish or acquire their own ISP operations -- as, indeed, they have done -- simply to benefit from reciprocal compensation inflows.

It is "worth it" to the ALECs to give away service to ISPs, or price such service below cost, in order to generate windfall reciprocal compensation payments from BellSouth. For example, it was sufficiently advantageous for Intermedia Communications, Inc., an ALEC based in Florida, to own its own ISP that it was willing to purchase a majority interest in a money-losing ISP -- Digex -- for $150 million, a price equivalent to approximately 20 times Digex's *revenues*.[42] BellSouth has no comparable opportunity to generate similar windfalls from the ALECs.

The purpose of reciprocal compensation for local traffic is to ensure that a LEC is able to recover its actual costs of terminating local traffic that originates on another LEC's network, not to serve as a source of capital infusion for new entrants. Reciprocal compensation pursuant to local interconnection agreements is, as a matter of public policy, a totally inappropriate way to compensate an ALEC for carrying Internet communications that are placed through ISPs it serves.

[42] *See TR Daily,* June 5, 1997.

Q. SO WHO SHOULD BEAR RESPONSIBILITY TO PAY e.spire FOR THE COSTS IT INCURS TO CARRY ISP INTERNET TRAFFIC?

A. To the extent that any carrier incurs costs in carrying traffic to an ISP, it should be allowed to recover the reasonable costs involved in carrying such traffic. Such costs should be recovered either from the end user or the ISP, and not from other users who do not make calls to ISPs. The FCC has now belatedly recognized that it has jurisdiction over such traffic. Alternatively, the FCC has the authority to review tariffs filed by carriers proposing interstate charges to recover their cost of carrying this.[43] Neither e.spire nor any other ALEC, for example, is precluded from filing an interstate tariff proposing a charge on ISPs for carrying to them traffic that originates on another LEC's network. Indeed, the National Association of Regulatory Utility Commissioners (" NARUC") has suggested in a working paper that this is one of the approaches that could be considered for recovery of the cost of carrying ISP traffic.[44]

However, reciprocal compensation is neither a lawful nor appropriate means for compensating LECs for the cost of carrying ISP Internet traffic. Reciprocal compensation for ISP Internet traffic would result in

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[43] The FCC has been proposing for more than 10 years to address the compensation issues raised by its access charge waivers for enhanced services. Its failure to do so has hurt incumbent LECs and ALECs alike.

[44] *See* NARUC Internet Working Group, *Policies on Pricing and Universal Service for Internet Traffic on the Public Switched Network*, National Regulatory Research Institute (April 1998).

the recovery of many times the actual costs e.spire incurs to carry ISP Internet traffic that originates on BellSouth's network. In fact, reciprocal compensation for such traffic would produce a windfall gain for e.spire. Because of the major differences in Internet usage and usage of the public switched telephone network, a per-minute charge would not be appropriate if it were developed on the basis of the characteristics of local voice calling patterns.

Call set-up represents a significant portion of the total costs a LEC incurs to terminate a call that originates on another LEC's network. However, the per-minute reciprocal compensation rate is the same for each minute of a call. The rate represents the average of the call set-up and other costs over the duration of a call, and is set on the basis of the average measured duration of a call. Thus, on average, the terminating LEC recovers its actual costs. But because the average Internet communication that is placed through an ISP lasts far longer than the average voice call, application of the reciprocal compensation rate to such traffic would result in a significant over-recovery of the ALEC's costs.

Section 252(d)(2)(A)(i) states that a State commission shall not consider the terms and conditions for reciprocal compensation just and reasonable unless they provide for the "recovery by each carrier of costs associated with transport and termination" of calls that originate

on another carrier's network.[45] The application of reciprocal compensation to ISP traffic would be unjust and unreasonable because it would, for the reasons explained above, result in the over-recovery of the costs a LEC incurs when such traffic traverses its network.

Q. HOW WOULD YOU SUMMARIZE YOUR TESTIMONY?

A. The Florida PSC should not require the payment of reciprocal compensation for ISP Internet traffic. The FCC's recent Order addressing GTE's ADSL tariff reaffirms that Internet communications are jurisdictionally interstate and that local network facilities used in Internet communications are in interstate use. Because all Internet communications are jurisdictionally interstate in nature, they are subject to the FCC's exclusive jurisdiction. As a matter of law, such interstate communications cannot be subject to reciprocal compensation under Section 251(b)(5) of the Communications Act. Even if the FPSC had jurisdiction to require reciprocal compensation for ISP Internet traffic, it should not do so for public policy reasons. The market distortions and inefficiencies that would result from such a requirement are fundamentally inconsistent with sound public policymaking.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes, it does.

[45] 47 U.S.C. § 252(d)(2)(A)(i).

ALBERT HALPRIN

EDUCATIONAL BACKGROUND AND WORK EXPERIENCE

Q. WHAT IS YOUR EDUCATIONAL BACKGROUND?

A. I earned a law degree from The Harvard Law School in 1974. Prior to that, I graduated from Western Washington State College with a Bachelor of Arts degree in 1971.

Q. PLEASE OUTLINE YOUR WORK EXPERIENCE.

A. I am a partner at the law firm of Halprin, Temple, Goodman & Sugrue, located in Washington, D.C., and an adjunct professor of telecommunications law in the graduate law program at Georgetown University Law Center.

Since 1987, I have been engaged in the practice of law and consulting in the telecommunications field. From 1984 to 1987, I served as Chief of the Federal Communications Commission's Common Carrier Bureau, where I was responsible for the regulation of all interstate telecommunications services in the United States. Between 1980 and 1983, I was a Senior Attorney and Chief of the Bureau's Policy and Program Planning Division.

I have lectured extensively and advised numerous clients on regulatory issues related to the Internet and Internet access services. For instance, at the International Telecommunication Union's recent "Inter@ctive '97" conference, the first global policy forum on Internet issues, I chaired the panel on Internet legal issues, and I participated on another panel on Internet regulation.

Q: HAVE YOU PREVIOUSLY FILED TESTIMONY AND/OR APPEARED AS A WITNESS WITH THIS COMMISSION?

A: No. I have filed testimony with and appeared as a witness before the U.S. Congress, the Federal Communications Commission, Canada Radio-television and Telecommunications Commission (CRTC), and numerous courts and panels.

Among other cases, I have testified in seven other state commission proceedings regarding reciprocal compensation for ISP Internet traffic: Complaint of AVR of Tennessee, L.P., d/b/a Hyperion of Tennessee, L.P. Against BellSouth Telecommunications, Inc., to Enforce Reciprocal Compensation and "Most Favored nation" Provision of the Parties' Interconnection Agreement, Docket No. 98-00530 (Tennessee); Complaint of MFS Intelenet of Georgia, Inc., Against BellSouth Telecommunications, Inc. and Request for Immediate Relief, Docket

No. 8196-U (Georgia); Emergency Petitions of ICG Telecom Group Inc., and ITC DeltaCom Communications, Inc., for a Declaratory Ruling, Docket No. 26619 (Alabama); Connect Communications Corp. v. Southwestern Bell Telephone Co., Docket No. 98-167-C (Arkansas); Application of Brooks Fiber for an Order Concerning Internet Traffic, Cause No. PUD 970000548 (Oklahoma); Complaint and Request for Expedited Ruling of Time Warner, Docket No. 18082 (Texas); and Petition of Birch Telecom for Arbitration of the Rates, Terms, Conditions and Related Arrangements for Interconnection With Southwestern Bell Telephone Company, Case No. TO-98-278 (Missouri).

In addition, I have been deposed as an expert witness in the following: Public Hearing: CCB 80-286(Amendment to Part 36 of the Commission's Rules), FCC (9/8/97); Clifford S. Heinz v. Catherine E. Havelock, *et al.*, O.C.S.C. Case X635521: Teleconnect Company v. U S West Communication, Inc. *et al.*, LA 16330 (Iowa Dist. Ct.); Interferometrics, Inc. v. Mobile Communications Holdings, Inc., *et al.*, C.A. No. 92-1211-A; Public Hearing: TPN CRTC 92-78, APT CRTC 92-78, Review of Regulatory Framework, CRTC (11/18/93); and Linda Davis et al. v. Southern Bell Telephone & Telegraph Company, Case No. 89-2839-CIV-NESBITT (S.D. Fl.).