

more of the underlying traffic is actually interstate.

Fourth, in order for the "single call" theory proposed by the incumbents to oust the states of jurisdiction, it not only requires application the "10% rule," it also requires a finding by the Commission that the "inseparability" doctrine applies (GTE Direct Case at 15-20). The "inseparability" doctrine, as explained in the Supreme Court's Louisiana Public Service decision,<sup>21</sup> prevents the Commission from preempting state regulation unless separate state regulation is utterly impractical. GTE and the RBOCs maintain that is the situation with dedicated DSL services to ISPs because "Internet traffic involves multiple parties throughout the nation and the world ... and it is not technologically possible to segregate and measure Internet traffic based on the geographic location of the parties" (GTE Direct Case at 15).

This naked claim is certainly unsupported by any facts. Little separations information is currently gathered at a call-by-call level, and many separations inputs are collected via statistical techniques. None of the ILECs come anywhere close to showing that quantification is so impractical as to require application of the inseparability doctrine. Furthermore, the intrastate portion of information services (assuming solely for the purpose of argument that such a concept has meaning) is obviously significant, given the Eighth Circuit's recent

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<sup>21</sup> Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986).

statement in affirming the Access Charge Reform Order, relying upon the Commission's own finding, that "at least some ISP services are purely intrastate and not susceptible to FCC regulation".<sup>22</sup>

Thus, the ILECs have failed to show that DSL services to ISPs are any more "inseparable" than, for example, ordinary long distance calls over analog loops. And just like analog loops and ISDN loops, they should continue to remain in the states' jurisdiction.

\* \* \*

Given the flaws of the ILECs' expanded "single call" jurisdictional theory in comparison with the simplicity and precision that could be achieved through reliance on the Commission's basic authority over information services, why are the ILECs so wedded to the first approach? The answer is simple. The ILECs want the Commission to adopt a theory in the current dedicated DSL investigations that advances their reciprocal compensation litigation efforts in other separate forums, despite GTE's coy insistence that (Direct Case at 7):

"... whether a CLEC which receives 'dial up' internet access traffic from an ILEC customer is entitled to reciprocal compensation for terminating traffic from the ILEC need not be decided here.\*

\*Of course, the Commission's jurisdictional analysis here may provide guidance in future cases address related issues."

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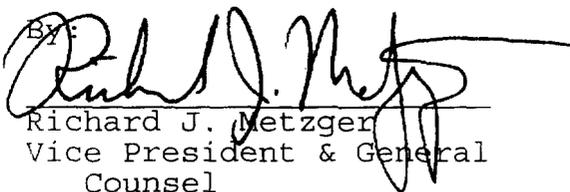
<sup>22</sup> Southwestern Bell Telephone Co. V. FCC, 8th Cir. No. 97-2618, slip opinion released August 19, 1998, at 41.

Obviously, the Commission should not adopt a defective theory of jurisdiction that is being offered solely to advance a goal which is not at issue in this proceeding. If the Commission does conclude that it should assert jurisdiction, it should base that assertion on its authority to guide the development of information services, and expressly limit that finding to dedicated DSL services to ISPs, while preserving current state authority over dial-up calls and carrier-to-carrier compensation.

**CONCLUSION**

For the foregoing reasons, ALTS respectfully requests the Commission to rule that the three DSL tariffs under investigation carry intrastate traffic. If the Commission declines to make this finding, and concludes instead that they do carry interstate traffic, ALTS urgently requests that the Commission also find that: (1) DSL traffic to ISPs do not constitute access service; and (2) the Commission's assertion of jurisdiction over DSL service to ISPs has no effect on the long-standing state supervision of dial-up calls to ISPs, and carrier-to-carrier compensation for such traffic.

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September 18, 1998

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Opposition to Direct Case by the Association for Local Telecommunications Services was served September 18, 1998, on the following persons by first-class mail or hand service, as indicated.

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