

governments around the world."³⁴ The Telecommunications Act itself defines the Internet as "the international computer network of both Federal and non-Federal interoperable packet switched data networks."³⁵ Because the Internet is such an expansive "international system,"³⁶ a single Internet session over ADSL "may connect the user to information both across the street and on the other side of the world."³⁷

The Commission's Office of Plans and Policy has acknowledged that Internet traffic "has no built-in jurisdictional divisions."³⁸ This is due, in large part, to the fact that an individual Internet session usually does not have a single destination:

[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 discrete recipient, but access various Internet sites during the course of a single connection.³⁹

Thus, one Internet call may be intrastate, interstate, *and* international. But not only can an Internet session involve multiple sequential sites, the sites may also be accessed

³⁴ *ACLU v. Reno*, 929 F. Supp. 824, 830-49 (E.D. Pa. 1996), *aff'd*, 117 S.Ct. 2329 (1997). Even a cursory investigation reveals that the overwhelming majority of Internet traffic is interstate. See, e.g., *Internet Geography*, <<http://www.internet.org>> (setting forth the vast national geographic distribution of Internet domains). In addition, Exhibit B is a chart of the geographic location of the top 60 Internet sites demonstrating how widely dispersed these sites are.

³⁵ 47 U.S.C. § 230.

³⁶ *ACLU*, 929 F. Supp. at 831.

³⁷ Kevin Werbach, *Digital Tomado: The Internet and Telecommunications Policy*, OPP Working Paper No. 29, at 45 (Mar. 1997) ("*Digital Tomado*").

³⁸ *Id.*

³⁹ *Id.*

simultaneously. For example, an ADSL end user in Missouri may log onto the Internet to find out about the new Lewis and Clark Expedition exhibit at the City Museum. The Museum site in turn may have a hyperlink to the Washington State Historical Society to gather more information about the expedition. The subscriber then learns that the Historical Society has subsequent links to sites in Japan and Australia detailing exploration throughout the Pacific Rim. Thus even a single Internet communication cannot be definitively categorized as local, interstate or international.

Even if the Commission were determined to sort out the jurisdictional nature of each Internet communication, the traffic carried over an Internet access arrangement cannot be jurisdictionally identified as a technical matter.⁴⁰

Internet routers have also not been designed to record sufficient data about packets to support jurisdictional segregation of traffic.⁴¹

Absent the ability to segregate this Internet traffic,⁴² there is no basis for a broad finding that a dedicated access service carrying this traffic – such as an ADSL offering – is anything but an interstate service.⁴³

⁴⁰ In some ways, this situation is similar to the “leaky PBX” phenomenon, whereby interstate traffic from the local PBX cannot be specifically identified but is nonetheless subject to access charges because of the technical inability to segregate these calls. *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d 682, 868-70 (1983). The Commission has termed this decision a “pragmatic accommodation to measurement difficulties.” *Amendments of Part 69 of the Commission’s Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, 4 FCC Rcd 3983, 3989 (1989).

⁴¹ *Digital Tornado* at 45.

⁴² Obviously, where such traffic is severable, allocations between the state and federal jurisdictions may be performed. See, e.g., *Determination of Interstate and Intrastate*
(Continued...)

The Commission has long held that where it is technically impossible or impractical to segregate services between inter- and intra-state, federal regulation is appropriate.⁴⁴ Under the "inseparability doctrine," states "must stand aside when, as here, it is technically and practicably impossible to separate the two types of communications [interstate and intrastate] for tariff purposes."⁴⁵ In evaluating a national paging service that, like ADSL, was "predominantly [an] interstate service, which may also address intrastate demands," the Commission determined that federal regulation should apply.⁴⁶ Numerous Commission and Court cases have reached similar conclusions.⁴⁷ In satisfying the "inseparability doctrine," the Commission must show that state regulation over intrastate service would thwart or impede the

(...Continued)

Usage of Feature Group A and Feature Group B Access Service, 4 FCC Rcd 8448 (1989).

⁴³ Even if some Internet traffic is intrastate, that determination does not undermine the propriety of a federal tariff. The interstate traffic alone would justify a federal tariff.

⁴⁴ *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986); see also *California v. FCC*, 39 F.3d 919, 931-33 (9th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995); *Pub. Util. Comm'n of Texas v. FCC*, 886 F.2d 1325, 1331-34 (D.C. Cir. 1989).

⁴⁵ *Amendments of Part 2 and 22 of the Commission's Rules*, 93 FCC 2d 908, 922 (1983), *aff'd mem.*, *NARUC v. FCC*, 725 F.2d 125 (D.C. Cir. 1984).

⁴⁶ *Mobile Telecommunications Technologies Corp.*, 6 FCC Rcd 1938, 1939 (CCB 1991), *aff'd*, 7 FCC Rcd 4061 (1992).

⁴⁷ See also *Computer and Communications Industry Assoc. v. FCC*, 693 F.2d 198, 215 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); *North Carolina Utilities Comm'n v. FCC*, 537 F.2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976); *North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036 (4th Cir. 1977), *cert. denied*, 434 U.S. 874 (1977).

Commission's exercise of its lawful authority over interstate communications services.⁴⁸ Here it is clear that patchwork regulation of that small portion of all Internet traffic that, by happenstance, turns out to be intrastate would greatly inhibit the goals established by Congress and the Commission. Indeed, permitting fragmented regulation is fundamentally antithetical to the dynamic and seamless development of the Internet. Federal jurisdiction is therefore both necessary and appropriate.

Even if the law on the inseparability doctrine were less clear, GTE's ADSL service – as a dedicated access offering – warrants federal regulation because ADSL's interstate traffic vastly exceeds the ten percent threshold set for interstate regulation of analogous special access services.⁴⁹ In adopting the Joint Board's recommendation for a ten percent *de minimis* threshold for federal regulation of mixed use special access lines, the Commission acknowledged that as a result of its decision "some intrastate traffic may be carried over federally assigned and tariffed special access lines and some interstate traffic may be carried over state assigned and tariffed special access lines."⁵⁰ Thus, the minimal intrastate traffic that may be carried by ADSL does not warrant a departure from this federal tariffing principle. As discussed above, there is

⁴⁸ *Public Util. Comm'n of Texas v. FCC*, 886 F.2d 1325 (D.C. Cir. 1989); *NARUC v. FCC*, 880 F.2d 422 (D.C. Cir. 1989); *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104 (D.C. Cir. 1989); *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990).

⁴⁹ "Mixed use special access lines" are defined as "special access lines (including WATS access lines) carrying both state and interstate traffic." *MTS and WATS Market Structure*, Decision and Order, 4 FCC Rcd 5660, 5661 n.1 (1989); see also *id.* at 5660 (setting ten percent threshold).

⁵⁰ *Id.*

little doubt that ADSL will be handling more than the *de minimis* level of interstate calls required for analogous services to be federally tariffed.

III. Federal Jurisdiction is Consistent with the Commission's Internet Precedent.

The Commission repeatedly has classified Internet traffic as predominately interstate, since its first order creating the ESP exemption and continuing through the present – reiterating the conclusion most recently in its Report to Congress on Universal Service. Interstate tariffing of ADSL-provided service is consistent with these prior regulatory pronouncements.

More than fifteen years ago, in the *MTS and WATS Market Structure* order, the Commission found that ESPs use “local exchange services or facilities . . . for the purpose of completing interstate calls” and “exchange service for jurisdictionally interstate communications.”⁵¹ Four years later, in amending Part 69 of its Rules, the Commission observed that ESPs “use the local network to provide interstate services.”⁵² After passage of the 1996 Act, the Commission continued to recognize the role of ESPs in interstate communications, noting that “(ESPs) may use incumbent LEC facilities to originate and terminate interstate calls.”⁵³ Similarly the Universal Service Report to Congress acknowledged that ESPs use “local exchange networks to originate and

⁵¹ *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d 682, 711-15 (1983).

⁵² *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 2 FCC Rcd 4305, 4306 (1987).

⁵³ *In re Access Charge Reform*, 11 FCC Rcd 21354, 21478 (1996).

terminate interstate services."⁵⁴ The Report also noted that "[t]he provision of leased [access] lines to Internet service providers. . . constitutes the provision of interstate communications" and "entities providing pure transmission capacity to Internet access or backbone providers provide interstate telecommunications."⁵⁵

The FCC's so-called ESP (or ISP) access exemption confirms this analysis. In maintaining the exception, the Commission reiterated the common understanding that Internet traffic is interstate; "[i]n recent years, usage of *interstate* information services, and in particular the Internet and other interactive computer networks, has increased significantly."⁵⁶ The Commission nonetheless concluded that, "although information service providers (ISPs) may use incumbent LEC facilities to originate and terminate *interstate* calls, ISPs should not be required to pay interstate access charges."⁵⁷ The continued exemption was designed to prevent the "disrupt[ion] [of] the still-evolving information services industry."⁵⁸ Thus, the exemption was based on economic policy factors, and not any suggestion that the traffic is "local" rather than "interstate." Indeed, no such "exemption" would be necessary if the traffic were not jurisdictionally interstate.

⁵⁴ *Federal-State Joint Board on Universal Service*, Report to Congress, CC Docket No. 96-45, at 52 (April 10, 1998).

⁵⁵ *Id.* at 28, 33.

⁵⁶ *First Report and Order Concerning Access Charge Reform*, CC Docket No. 96-262, at 154 (rel. May 16, 1997) (emphasis added).

⁵⁷ *Id.* at 153-54 (emphasis added).

⁵⁸ *Id.* at 155.

Nor does the Commission's designation of ISPs as "end users" warrant a two-call analysis. The Commission has only stated that "enhanced service providers are treated as end users for purposes of applying access charges."⁵⁹ That does not mean that ISPs are end users for purposes of defining the end of an end-to-end communication. In any event, even if ISPs are end users for all purposes, that fact would not alter the traditional test of this Commission's jurisdiction. Indeed, the Commission has determined that, even when an entity is an "end user," the Commission will analyze the totality of the underlying communication in determining the proper regulatory treatment.⁶⁰ For instance, in its "leaky PBX" order, the Commission levied an interstate access charge on physically intrastate private lines between a customer's premises and a customer's PBX because the PBX could route a call into the interstate network. Therefore, whether the "communication from its inception to its completion"⁶¹ is interstate will determine the jurisdiction of the service, regardless of any party's status as an "end user." In sum, the ESP Exemption merely determined for policy reasons that a certain class of interstate traffic should be exempted from payment of federal switched access charges – nothing more and nothing less.

⁵⁹ *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631 at n.8 (1988) ("ESP Exemption Order") (emphasis added).

⁶⁰ See, e.g., *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d at 868-870.

⁶¹ *United States v. AT&T*, 57 F. Supp. 451, 453-5 (S.D.N.Y. 1944), *aff'd*, 325 U.S. 837 (1945).

Furthermore, as a policy matter, federal tariffing of ADSL-provided services does not undermine the FCC's access charge "exemption" for information service providers. The Commission has confirmed that, while information service providers are entitled to obtain access charge exempt interstate access through business lines, they must pay rates associated with access arrangements if they opt instead to utilize alternative access tariffs. In the *Open Network Architecture* docket, the Commission ordered LECs to include ONA Basic Serving Arrangements (BSAs) and Basic Service Elements (BSEs) in their federal access tariffs.⁶² BSEs, of course, were aimed primarily at information service providers. The Commission then initiated a related proceeding to "consider how best to integrate ONA tariffing policies into the existing federal access charge rules."⁶³ In that proceeding, the Commission preserved the ISP exemption but explicitly rejected requests that ISPs be permitted to "mix-and-match" interstate-tariffed BSEs with state-tariffed business lines.⁶⁴ As a result, information service providers were free either to avoid access charges by retaining their existing business lines or to pay access charges in order to obtain BSEs. GTE's ADSL offering is no different. All

⁶² *Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd 1, 144-46 (1988). Some BSAs and BSEs were also made available in state tariffs.

⁶³ *Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, 6 FCC Rcd 4524, 4525 (1991), *modified on recon.*, 7 FCC Rcd 5235 (1992), *modified on recon.* 8 FCC Rcd (1993), *vacated on other grounds in MCI Telecommunications Corp. v. FCC*, 57 F.3d 1136 (1995), *further proceeding* 1997 FCC LEXIS 526 (1997); *see also Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, 4 FCC Rcd 3983, 3989 (1989)(Notice of Proposed Rulemaking)(initially rejecting mix and match).

⁶⁴ *Id.* at 4535.

ISPs may continue to avoid paying GTE's ADSL service charges contained in its access tariff by obtaining access through business lines. If, however, they wish to obtain access through ADSL, the federally-tariffed rates would apply. ADSL is simply an attractive new competitive option.

IV. Tariffing ADSL-Provided Services at the Federal Level Will Not Create a Price Squeeze.

The alleged risk of an unlawful "price squeeze" provides no basis for the Commission to abdicate its jurisdiction over interstate services. Northpoint contends that because UNE cost data is submitted to the states, federal tariff cost data may be "significantly different than the cost data submitted at the state level" and inhibit consistent tariff review.⁶⁵ Under its theory, state UNE prices will be set too high and federal tariff rates too low, thus preventing competitors from using UNEs to compete with the federal tariff offering. Accordingly, Northpoint proposes that one set of "regulators [should] review both GTE's retail DSL rates and GTE's wholesale charges for unbundled network elements (UNEs) used by competitors to provide their own DSL services."⁶⁶ Northpoint's argument must fail for three reasons: (1) it irrationally presumes that both state and federal regulators will fail to perform their respective responsibilities, (2) the relationship between UNE and service pricing is subject to the dual regulatory structure inherent in the Act, and (3) the Commission is fully capable of fulfilling its responsibilities for interstate services.

⁶⁵ *Designation Order* at 3.

⁶⁶ *Id.*

Northpoint's argument is premised on an unsubstantiated *presumption* that state and federal regulators cannot fulfill their statutory responsibilities. Northpoint argues that states should tariff ADSL because, absent state regulation, GTE will federally tariff its ADSL-service too low, and price its UNEs at the state level too high. Yet GTE cannot file a federal tariff that does not recover its relevant costs. Nor is GTE permitted to obtain state UNE pricing that is above costs.⁶⁷ Therefore, if state and federal regulators do their jobs, there can be no price squeeze.⁶⁸

Northpoint's second concern regarding the division of responsibility between state and federal regulators is inherent in the "dual regulatory structure for interstate and intrastate wire communications" under the Communications Act.⁶⁹ In a regime in which "purely intrastate facilities and services used to complete even a single interstate call may become subject to FCC regulation to the extent of their interstate use," it is not only possible, but indeed virtually certain, that state-priced UNEs will be used to provide federally-tariffed services. Indeed, under Northpoint's apparent theory, the Commission should cede jurisdiction for virtually all access services to the states because their

⁶⁷ This outcome is even more unlikely because many states require UNEs to be priced at long run incremental costs. See, e.g., *In the Matter of the Commission Investigation and Generic Proceeding on GTE's Rates for Interconnection Services, Unbundled Network Elements, Transport and Termination Under the Telecommunications Act of 1996 and Related Indiana Statutes*, Cause No. 40618, Order (Ind. Util. Regulatory Comm., May 7, 1998); *In the Matter of AT&T Communications of the Southwest, Inc.*, Case No. TO-97-63, Final Arbitration Order (Mo. Pub. Service Comm., July 31, 1997).

⁶⁸ Moreover, the notion of a price squeeze also ignores the numerous competitive options available for high speed Internet access in the marketplace. See GTE May 28, 1998 Reply, *GTE Telephone Operating Companies Tariff FCC No. 1* at 5-6.

⁶⁹ *NARUC v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984).

component UNEs are state-tariffed. Northpoint's argument is little more than an effort to reverse the dual regulatory structure established by the Act.

Finally, the Commission is capable of fulfilling its responsibilities to evaluate this tariff filing under the Act. There is no inhibition on the Commission's authority to explore the pricing bases for the ADSL offering. The Commission can ascertain whether the offering is appropriate in light of all the information presented. The relevant cost data at the state and federal level is readily available for public inspection and review by competitors, regulators, and customers alike. Any perceived inconsistencies can be remedied through existing procedures in the appropriate forum. More than adequate safeguards exist to prevent the "price squeeze" claimed by Northpoint; Commission abdication of this responsibility based on this threat is not warranted.

CONCLUSION

For the foregoing reasons, the Commission should find that ADSL-provided service is properly tariffed at the federal level. By allowing GTE's tariff to continue in effect, the Commission will facilitate significant benefits to consumers and advance the Commission's fundamental goal of expanding the availability of advanced communications capabilities.

Respectfully submitted,

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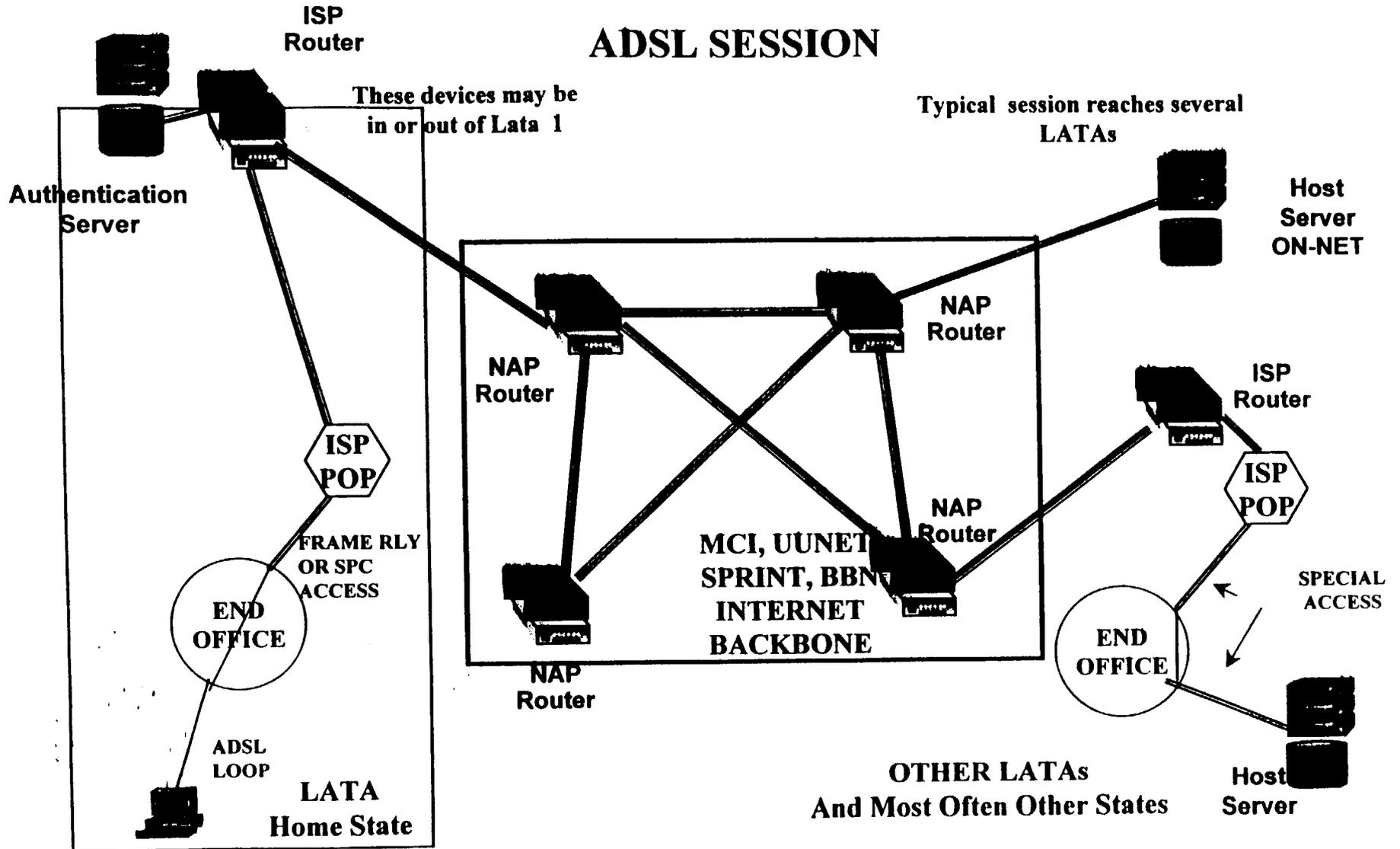
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September 8, 1998

THEIR ATTORNEYS

EXHIBIT A: TYPICAL INTERNET

ADSL SESSION



LATAS ARE TYPICALLY IN DIFFERENT STATES, END OFFICES PERFORM NO SWITCHING

Exhibit B: WEB Report : Domain Level**Unique Visitors****May 1998**

Rank	Site	City	State	ZIP	Unique Visitors (000)
1	yahoo.com	Santa Clara	CA	95051	26,726
2	netscape.com	Mountain View	CA	94043	20,723
3	microsoft.com	Redmond	WA	98052	15,674
4	excite.com	Redwood City	CA	94063	12,502
5	infoseek.com	Santa Clara	CA	95054	11,696
6	aoi.com	Reston	VA	20191	11,243
7	geocities.com	Santa Monica	CA	90405	10,498
8	lycos.com	Pittsburgh	PA	15219	6,787
9	altavista.com	Campbell	CA	95008	6,764
10	msn.com	Redmond	WA	98052	6,315
11	hotmail.com	Sunnyvale	CA	94086	6,016
12	four11.com	Menlo Park	CA	94025	4,499
13	webcrawler.com	Vienna	VA	22182	4,477
14	znet.com	Cambridge	MA	02142	4,066
15	whowhere.com	Mountain View	CA	94043	3,280
16	real.com	Seattle	WA	98101	2,965
17	cnn.com	Atlanta	GA	30303	2,924
18	att.net	Morrisville	NC	27560	2,888
19	weather.com	Atlanta	GA	30339	2,880
20	tripod.com	Williamstown	MA	01267	2,745
21	hotbot.com	San Francisco	CA	94107	2,703
22	switchboard.com	Westboro	MA	01581	2,696
23	get.net	Irving	TX	75038	2,550
24	compuserve.com	Columbus	OH	43220	2,536
25	usatoday.com	Arlington	VA	22229	2,518
26	amazon.com	Seattle	WA	98103	2,448
27	looksmart.com	San Francisco	CA	94107	2,447
28	mindspring.com	Atlanta	GA	30309	2,352
29	msnbc.com	Redmond	WA	98052	2,219
30	pathfinder.com	New York	NY	10020	2,217
31	angelfire.com	Fort Washington	MD	20744	2,143
32	mapquest.com	Denver	CO	80202	2,136
33	sony.com	Park Ridge	NJ	07656	2,037
34	search.com	San Francisco	CA	94111	2,020
35	bluemountain.com	Boulder	CO	80301	1,910
36	sportszone.com	Bellevue	WA	98005	1,893
37	infobeat.com	Denver	CO	80202	1,735
38	adobe.com	San Jose	CA	95110	1,707
39	mit.edu	Cambridge	MA	02139	1,704
40	nytimes.com	New York	NY	10036	1,680
41	travelcity.com	Fort Worth	TX	76155	1,667

Exhibit B: WEB Report : Domain Level

Unique Visitors May 1998

Rank	Site	City	State	ZIP	Unique Visitors (000)
42	abcnews.com	New York	NY	10023	1,655
43	disney.com	Burbank	CA	91521	1,635
44	netcom.com	San Jose	CA	95113	1,603
45	pointcast.com	Sunnyvale	CA	94086	1,602
46	ebay.com	San Jose	CA	95125	1,593
47	erols.com	Springfield	VA	22151	1,524
48	cnet.com	San Francisco	CA	94111	1,499
49	sportsline.com	Fort Lauderdale	FL	33309	1,491
50	ustreas.gov	Washington	DC	20220	1,455
51	fxweb.com	Dubugue	IA	52001	1,411
52	hp.com	Palo Alto	CA	94304	1,409
53	intellicast.com	Billerica	MA	01821	1,392
54	city.net	Mountain View	CA	94043	1,338
55	umich.edu	Ann Arbor	MI	48103	1,304
56	gateway2000.com	North Sioux City	SD	57049	1,302
57	kbb.com	Irvine	CA	92618	1,298
58	download.com	San Francisco	CA	94111	1,294
59	primenet.com	Phoenix	AZ	85034	1,293
60	nfl.com	New York	NY	10022	1,282

Source of Information

1. Web Site Ranking: RelevantKnowledge, Inc.
2. Web Site Location: Mecklermedia Corporation

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
) CC Docket No. 98-79
GTE Telephone Operating Companies)
GTOC Tariff No. 1)
GTOC Transmittal No. 1148)

To the Commission:

AFFIDAVIT AND VERIFICATION

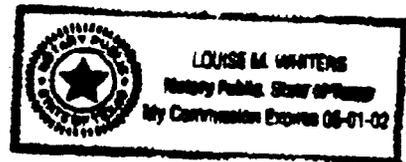
Pursuant to Section 1.16 of the Commission's Rules, I, Carl Huster, in my capacity as Director-Resale Market Management of GTE hereby declare under penalty of perjury that the factual statements made in the foregoing "Direct Case of GTE" are true and correct to the best of my knowledge, information, and belief. I also do hereby verify that all exhibits attached to this pleading are true and correct to the best of my knowledge, information, and belief.

Carl B. Huster

SWORN TO and SUBSCRIBED
before me this 8th day of September, 1998.

Louise M. Whiters
Notary Public

My commission expires: 05/01/02



Certificate of Service

I, Ann D. Berkowitz, hereby certify that copies of the foregoing "Direct Case of GTE" have been mailed by first class United States mail, postage prepaid, on September 8, 1998 to all parties of record.

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Certificate of Service

I, Ann D. Berkowitz, hereby certify that copies of the foregoing "Comments on Direct Case" have been mailed by first class United States mail, postage prepaid, on September 18, 1998 to all parties of record



Ann D. Berkowitz