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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
GTE Telephone Operating Companies	)	
GTOC Tariff FCC No. 1	)	CC Docket No. 98-79
GTOC Trans. No. 1148	)	
	)	
BellSouth Telecommunications, Inc.,	)	
Tariff FCC No. 1 Access Service	)	CC Docket No. 98-161
BellSouth Trans. No. 476	)	
	)	
Pacific Bell Telephone Company	)	
Pacific Bell Tariff FCC No. 128	)	CC Docket No. 98-103
Pacific Trans. No. 1986	)	
	)	
To: Competitive Pricing Division	)	

COMMENTS ON DIRECT CASES
OF RCN TELECOM SERVICES, INC.

RCN Telecom Services, Inc. ("RCN"), by its undersigned counsel, pursuant to applicable Orders in the above-referenced proceedings,[1] submits these comments on the direct cases filed by GTE Telephone Operating Companies ("GTE"), BellSouth Telecommunications, Inc. ("BellSouth"), and Pacific Bell Telephone Company ("PacBell"). The Commission should reject the proposed ADSL service tariffs on the ground that they are defective insofar as they purport to offer exchange

[1]In re GTE Transmittal No. 1148, CC Docket No. 98-79, *Order Designating Issues for Investigation*, DA 98-1667 (rel. Aug. 20, 1998)[hereinafter *GTE Order*]; In re BellSouth Transmittal No. 476, CC Docket No. 98-161, *Order Suspending Tariff and Designating Issues for Investigation*, DA 98-1734 (rel. Sep. 1, 1998)[hereinafter *BellSouth Order*]; In re Pacific Transmittal No. 1986, *Order Designating Issues for Investigation*, DA 98-1772 (rel. Sep. 2, 1998)[hereinafter *Pacific Order*].

access services to Internet service providers ("ISPs").[2] In the alternative, if the Commission determines that the proposed tariffs are not defective because they could be used by IXCs to provide interexchange telecommunications, the Commission should allow the tariffs to take effect only as they apply to such interstate uses of ADSL service, without considering the jurisdictional nature of ADSL traffic from an end user to an ISP, and on the condition that GTE, BellSouth, and PacBell tariff their ADSL service offerings at the state level as well.

A. Local Exchange Carriers Do Not Provide "Exchange Access" to Information Service Providers

The provision of "exchange access" is limited to providers of "telephone toll service." 47 U.S.C. § 153(16). "Telephone toll service" is a defined term, 47 U.S.C. § 153(48), which is roughly equivalent to interexchange telecommunications. GTE, BellSouth, and PacBell propose to provide their ADSL service to ISPs, however. ISPs are information service providers that do not provide telecommunications. Therefore, GTE, BellSouth, and PacBell improperly characterize the proposed traffic as exchange access. On this basis, the Commission should reject the GTE, BellSouth, and PacBell tariff filings with respect to the provision of ADSL service to ISPs.[3]

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[2]*See* Bell Atlantic Telephone Companies, Tariff FCC No. 1, Bell Atlantic Trans. No. 1076, *Petition to Reject, or to Suspend and Investigate* of Hyperion Telecommunications, Inc., KMC Telecom Inc., and RCN Telecom Services, Inc. (Sep. 8, 1998).

[3]GTE Telephone Operating Companies, GTOC Tariff FCC No. 1, GTOC Trans. No. 1148, *Petition to Reject, or to Suspend and Investigate* of Focal Communications, Inc. and ICG Communications, Inc. (May 22, 1998); BellSouth Telecommunications, Inc., Tariff FCC No. 1 Access Service, BellSouth Trans. No. 476, *Petition to Reject, or to Suspend and Investigate* of Hyperion Telecommunications, Inc., ICG Communications, Inc., ITC^DeltaCom Communications, Inc., KMC Telecom Inc., and RCN Telecom Services, Inc. (Aug. 25, 1998).

Further, even if communications between ISPs and their end users did fall within the statutory definition of "exchange access" service -- which they do not -- these services would still be exempt from interstate tariffing under Commission precedent. Under the Enhanced Service Provider "Exemption," which was recently affirmed by the Court of Appeals for the Eighth Circuit as "a reasonable exercise of the agency's discretion under the 1996 Act,"[4] ESPs, including ISPs, are permitted to obtain telecommunications to provide their information services from local tariffs,[5] whether or not they are jurisdictionally interstate. There is no legitimate reason to reach a different conclusion now.

B. Any Interstate Uses of ADSL Service Must be Narrowly Identified

The Commission's inquiry in this investigation is a very narrow one. The question presented by the proposed interstate access tariffs for ADSL service filed by GTE, BellSouth, and PacBell is "whether [the ILECs] DSL service offering is an interstate service, properly tariffed at the federal level, or an intrastate service that should be tariffed at the state level." The specific issue designated for investigation is "whether [the ILECs'] DSL service is a jurisdictionally interstate service."[6]

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[4]*Southwestern Bell Tel. Co. v. FCC,* 1998 WL 485387, *8 (8th Cir., Aug. 19, 1998).

[5]In the Matter of Access Charge Reform, CC Docket No. 96-262, *First Report and Order,* 12 FCC Rcd 15982 para. 342 (rel. May 16, 1997)[hereinafter *Access Charge Reform Order*] ("ISPs may purchase services from incumbent LECs under the same intrastate tariffs available to end users. ISPs may pay business line rates and the appropriate subscriber line charge, rather than interstate access rates[.]")

[6]*GTE Order* para.12; *BellSouth Order* para.10; *Pacific Order* para.10.

The simple answer is: it could be, depending upon how it is used. The proposed service should be tariffed at the federal level for interstate uses, and it should also be tariffed at the state level for intrastate uses. For example, no one would dispute that there are some interstate applications for ADSL services when they are part of an unseverable stream of *telecommunications* provided by carriers. GTE and BellSouth each propose that they will provide ADSL services to interexchange carriers.[7] When an interexchange carrier purchases ADSL service in order to connect a LEC's local packet network and DSL loop to its own interstate telecommunications packet network for the purpose of providing interstate telecommunications, the service provided by the LEC is an interstate exchange access service subject to the Commission's jurisdiction.

C. The Jurisdictional Nature of Local Traffic to ISPs is Not Relevant to this Proceeding

At the same time, the Commission should not rise to the bait and address the question that the BOCs and GTE would like the Commission to resolve in their favor: whether local exchange traffic from an end user to an Internet service provider ("ISP") is jurisdictionally interstate. It is not necessary to resolve this issue to answer the fundamental question presented by these tariffs. The Commission need only decide whether there are interstate applications for the service, and whether there are intrastate applications for the service. To the extent that the Commission asserts jurisdiction over the exchange access portion of the tariff (which, as discussed above, cannot apply to information service providers) and allow it to go into effect, it should make clear that it is not asserting jurisdiction for other uses of ADSL service.

D. ADSL Service Has Intrastate Uses that Must be Separately Regulated

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[7]Description and Justification, GTOC Tariff No. 1, Transmittal No. 1148, at 2; BellSouth Direct Case at n.2.

DSL services clearly have intrastate characteristics, and are subject to state jurisdiction. BOCs have tariffed their ADSL service at the state levels. BellSouth and PacBell admit in their Direct Cases that the proposed ADSL services have intrastate uses.[8] GTE, PacBell, and BellSouth include "xDSL Capable" loops or "2-wire ADSL" or "2-wire and 4-wire HDSL" loops in local exchange service interconnection agreements.[9] PacBell defines ADSL as "a dedicated digital circuit between a residence and a telephone company's central office over existing copper telephone lines."[10] BellSouth says ADSL uses "your existing copper telephone line."[11] Clearly, PacBell and BellSouth acknowledge that ADSL is no more than an alternative use of the local loop (indeed the term "digital subscriber line" is no more than another expression for a local loop), an unbundled network element universally subject to state regulation. Only GTE argues that DSL services are exclusively interstate. GTE ignores reality in this case.

As a threshold matter, RCN asserts here, as it and other CLECs have asserted before every state commission that has decided the issue, that in a communication between an end user and an ISP, the local telecommunications transmission terminates at the answering device of the ISP, and at that point a separate, severable information service begins. It is not necessary to resolve that issue in this proceeding, because even if one assumes, *arguendo,* that the communication continues past

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[8]BellSouth Direct Case at 15; PacBell Direct Case at 2.

[9]*See* Agreement between Pacific Bell and GTE Communications Corporation, dated Nov. 11, 1997, Attachment 6, Section 3.2.3; Agreement between BellSouth Telecommunications, Inc. and !nterprise America, dated July 28, 1997, Attachment 2, Section 2.2.1.7.

[10]*FasTrak DSL* (visited Sep. 18, 1998)<http://www.pacbell.com/products/business /fastrak/adsl/adsl-faq.html>.

[11]*Fastaccess* (visited Sep. 18, 1998)<http://www.bellsouth.net/external/adsl/faq.html>.

the ISP in order to determine jurisdiction, there are local "terminations" to bring the service within state jurisdiction.

For the sake of argument then, and if traffic to an ISP continues past the ISP, ISPs may provide access to local or intrastate web sites, including web sites that it hosts itself. When GTE's law firm in Washington, D.C. conducts research over the Internet, and visits the Commission's home page by way of an ADSL connection to its ISP, that law firm is engaging in intrastate communications. Moreover, GTE's Direct Case provides additional proof. In its Exhibit B, GTE identifies the top 50 web sites in the country to demonstrate the national reach of the Internet. Eight of the top ten sites are located in California. GTE cannot seriously suggest that subscribers that live in California do not ever access any of these popular sites that also happen to be located in California. Even assuming, *arguendo*, that communications from an end user to an ISP continue past the ISP, GTE's argument that DSL services are exclusively interstate is simply irrational.

E. The Commission May Not Preempt State Regulation of the Intrastate Uses of ADSL Service

Given the dual regulatory structure for telecommunications between the federal government and the states contemplated by the Communications Act, and the specific delegation of regulatory authority over advanced services, including ADSL, to the Commission and the applicable state commissions, if the proposed ADSL service has *any* intrastate applications, the Commission may not intrude on state regulation of such services. Accordingly, if the Commission allows the federal DSL tariffs to go into effect, it should condition such a grant of approval upon a requirement that the BOCs and GTE also file DSL tariffs at the state level for intrastate uses of the proposed DSL service.

The Communications Act of 1934 ("the Act") establishes a system of dual state and federal regulation over telecommunications services. *Louisiana PSC v. FCC,* 476 U.S. 355, 360, 106 S.Ct. 1890, 1894 (1986). Section 2(b) of the Communications Act, 47 U.S.C. §152(b), fences FCC jurisdiction from intrastate communications. *Louisiana PSC*, 476 U.S. at 370; *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 800 (8th Cir. 1997), *cert. granted sub nom, AT&T Corp. v. Iowa Utils. Bd.*, 118 S. Ct. 879 (1998) (Section 2(b) is "a *Louisiana*-built fence that is hog tight, horse high, bull strong, preventing the FCC from intruding on the states' intrastate turf"). Therefore, if a particular service is jurisdictionally mixed, the FCC must let the states regulate the intrastate component of the service.

In this case, the preemption analysis is buttressed by the fact that Congress specifically contemplated dual regulation of advanced services. "'The critical question in any preemption analysis is always whether Congress intended that federal regulation supersede state law.'" *Iowa Utils. Bd.,* 120 F.3d at 798, *quoting Louisiana PSC,* 476 U.S. at 369. Section 706 of the Telecommunications Act of 1996, which amended the Act, directed "[t]he Commission and each State commission with regulatory jurisdiction over telecommunications services" to encourage the deployment of "advanced telecommunications capability."[12] Advanced telecommunications capability includes the ADSL services proposed in these tariff investigations.[13] Therefore, by specific operation of Section 706, both the states and the Commission are directed to regulate advanced services, including ADSL services, in such a manner as to encourage their deployment.

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[12]Telecommunications Act of 1996, Pub. L. No. 104-104, Section 706.

[13]Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, *Memorandum Opinion and Order and Notice of Proposed Rulemaking,* FCC 98-188 para. 35 (rel. Aug. 7, 1998) [hereinafter *Advanced Services Order*].

Therefore, any jurisdiction over DSL services must be shared with states, if DSL services have *any* intrastate characteristics.

It is possible that the question presented by the Orders Designating Issues for Investigation can be answered in the affirmative for certain ADSL services. The DSL services proposed here may be jurisdictionally interstate, and may be properly tariffed at the federal level *to the extent* they are used by interstate common carriers to provide interstate telecommunications services. But the same DSL services are also certainly jurisdictionally intrastate when used for other purposes, and must be properly tariffed at the state level. The two regulatory systems are not mutually exclusive, and in fact, are mandated by federal statute. Whether local traffic to ISPs is jurisdictionally interstate is not relevant to this analysis.

F. The Filing of a State Tariff Should be a Condition of Approval of the Federal Tariff

GTE suggests that it will tariff ADSL services only at the federal level, and if ISPs would like to purchase ADSL service, they must obtain it out of the interstate tariff. GTE Direct Case at 24. As discussed above, GTE is wrong regarding the jurisdictional nature of ADSL service, and the failure to tariff it at the state level is a violation of applicable state law.[14] Whether the FCC has the authority to require GTE to tariff this service at the state level is uncertain, but that issue is not relevant to this investigation either. It is only necessary for the Commission to recognize that ADSL service may have interstate as well as intrastate uses, which no one other than GTE seriously disputes. Indeed, in a similar context regarding the tariffing and provision of Open Network

[14]*See, e.g.*, Cal. P.U. Code § 486.

Architecture unbundled elements, this Commission has already recognized the dual uses of a single network facility:

> [U]nbundled BOC ONA services are basic services and are subject to regulation as such on both the state and federal levels. Reflecting the fact that both this Commission and the states have interests in regulating the basic services that constitute ONA offerings, the BOCs propose a variety of tariffing schemes and pricing methodologies for ONA services. . . . We conclude that we have jurisdiction over all basic services included in the ONA plans that are used for interstate communications. We adopt, however, a measured approach that reflects, we believe, an appropriate jurisdictional balance in the tariffing of basic services.[15]

The Commission added,

> In reviewing the structures that BOCs propose for the tariffing of ONA services, we are sensitive both to the states' jurisdiction over intrastate basic services and to the need for meaningful implementation of our federal ONA policies. *We are rejecting proposals that we require all ONA services to be offered exclusively in federal tariffs.* [16]

The Commission should similarly reject suggestions from GTE that it will file its tariff only at the federal level, and should consider conditioning the approval of the ADSL tariffs on the filing of state tariffs, in order to avoid any appearance that the Commission is attempting to preempt state regulation of DSL services, which it cannot do as a matter of law.

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[15]In re Filing and Review of ONA Plans, CC Docket No. 88-2, *Memorandum Opinion and Order*, 4 FCC Rcd 1, 116 paras. 224, 225 (1988).

[16]*Id.* at 162 para. 309 (emphasis supplied).

G. Conclusion

For the foregoing reasons, RCN urges the Commission to reject the proposed GTE, BellSouth, and PacBell ADSL tariffs on the grounds that "exchange access" as defined by the Act cannot be provided to providers of information services, and, accordingly, the proposal to offer "exchange access" to Internet service providers is defective. If the Commission determines that the proposed tariffs are not defective because they could be used by IXCs to provide interexchange telecommunications, the Commission should allow the tariffs to take effect only as they apply to such interstate uses of ADSL service, without considering the jurisdictional nature of ADSL traffic from an end user to an ISP, and on the condition that GTE, BellSouth, and PacBell tariff their ADSL service offerings at the state level as well.

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Dated: September 18, 1998

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