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September 17, 1998

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VIA FEDERAL EXPRESS

Magalie R. Salas, Secretary
Federal Communications Commission
1919 M Street NW, Room 222
Washington, D.C. 20554

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

Dear Ms. Salas:

Enclosed for filing are an original and six copies of the Opposition of Washington Utilities and Transportation Commission to Direct Case of GTE. Also enclosed is a diskette with an electronic version of the document in WordPerfect 6.1. Per instructions, three copies have been sent to the Competitive Pricing Division and one copy to the International Transcription Service.

We enclose an additional copy of the cover page and request that it be file stamped and returned in the enclosed envelope.

Sincerely,

JEFFREY D. GOLTZ
Sr. Assistant Attorney General

JDG:kll

Enclosures

cc: John F. Raposa
Bryan N. Tramont
Gail L. Polivy

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AUG 21 1998
COMMUNICATIONS DIVISION

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

In the Matter of)	
)	CC Docket No. 98-79
GTE Telephone Operating Companies)	
GTOC Tariff FCC No. 1)	OPPOSITION OF WASHINGTON
GTOC Transmittal No. 1148)	UTILITIES AND TRANSPORTATION
)	COMMISSION TO DIRECT CASE
)	OF GTE

I.
INTRODUCTION

The Washington Utilities and Transportation Commission (WUTC) opposes the tariff filing of GTE Telephone Operating Companies (GTE) for its Asymmetrical Digital Subscriber Line (ADSL) service. We believe the ADSL service is properly an intrastate service within the jurisdictions, for tariffs and other purposes, of the various state commissions in which it is offered. Indeed, the WUTC has filed a complaint against GTE asserting that it must file its ADSL tariff with the WUTC. Washington Utilities & Transportation Comm'n v. GTE Northwest, Inc., No. UT-980763 (WUTC, filed August 21, 1998).

In its Designation Order, the Commission identified as the threshold issue whether GTE's ADSL service is properly tariffed at the state or federal level. It also solicited comments on whether it should "defer to the states" in order to lessen the possibility of a price squeeze. We address only the threshold jurisdictional issue.

In addition to the complaint referenced above, the WUTC has considered tariffs for ADSL services filed by US West Communications, Inc. (US West). There are two parts to the US West tariffs. One (called "MegaCentral" by US West) is the service for the Internet service provider (ISP). The other (called "MegaBit" by US West) is the service for the end user, whether that be a residential or business customer. Both the ISP and the end user need to subscribe to the service. The WUTC approved the US West tariffs, WUTC Dkt. No. UT-980416, after an agreement was reached between the WUTC Staff and US West on limitations on marketing the service so that US West's ISP, USWest.net, does not receive a competitive advantage over other ISPs.¹ We understand the GTE tariff to work somewhat differently in that though the ISP would need facilities compatible with the ADSL service used by the end user, it need not actually subscribe to a service from GTE.

We mention this experience for two reasons. First, we want to clarify an ambiguity in GTE's direct case. GTE states that "ADSL service will be most commonly used by Internet Service Providers." That statement is factually incomplete. GTE's ADSL service will be used by local residential and business end users as a local connection to the ISPs and from there to the Internet. In essence, it is a substitute for the standard local loop that many of us now use for our home or business link to the ISP. Second, it highlights the strong procompetitive interest the WUTC has in preserving jurisdiction over this vital telecommunications service.

¹The WUTC filed comments with the Commission in response to its Further Notice Proposed Rulemaking issued on January 30, 1998, relating to joint marketing. Reply Comments of the Washington Utilities & Transportation Commission, In the matter of Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review -- Review of Computer III and ONA Safeguards and Requirement, CC Docket Nos. 95-20, 98-10 (April 22, 1998).

We make four points in our argument. First, the "telecommunications" at issue in use of ADSL service is between the end user and the Internet Service Provider (ISP), an intrastate link. Second, the issue of whether the service should be tariffed at the federal or state level should be interpreted consistent with the historical practice of accessing ISPs and with consumer expectations, which are that the communication is intrastate. Third, there are policy and efficiency reasons for determining that this should be tariffed at the state level, including the ability of state regulators to insure that residential and business consumers of the service are assured quality service and are protected from potential anticompetitive practices of companies offering the service. Finally, the Commission should refrain from disrupting historical jurisdictional understandings in the context of a single tariff filing when the consequences of such a change could have far reaching implications.

II. ARGUMENT

A. As a Matter of Law and Commission Policy, GTE's ADSL Service Is an Intrastate Service, Connecting the End User to the Internet Through the ISP.

GTE argues that this service is interstate because the "totality of the communication" must be analyzed "end-to-end" and should not be "subdivided." It characterizes the connection as between the end user and the Internet. It uses a hypothetical of a customer in Missouri, researching the Lewis and Clark expedition, who logs onto his or her home computer and uses GTE's ADSL service to connect through the ISP to the Internet and eventually connecting through the world wide web to the Washington State Historical Museum. They argue that because the two ends are in different states, the communication is interstate. So, even though the transmission of the information over the ADSL service is between two points within one state,

the "totality of the communication" is interstate. But GTE's analysis is inapposite because it overlooks the actual telecommunication which is taking place.

Accessing stored information over the Internet is not "telecommunications." The federal Telecommunications Act of 1996 clearly separates regulated telecommunications from "enhanced" or "information" services.² The Internet, access to which is provided by the ISP, is an information service. However, the link to the Internet is telecommunications.³

In other words, the communication from the home in Missouri through the ISP to the Internet and to the Washington State Historical Museum is not seamless as would be a regular long distance call from Missouri to Washington. In the latter, the communication is unchanged in form and content as it moves first over the local loop and then to the facilities of the inter-exchange carrier and then to the local loop at the receiving end. However, in the former, by definition, once any messages are processed through the ISP, the telecommunications end.

GTE apparently anticipates this argument by stating that some of the cases involved communications with both regulated and non-regulated components. But the instant situation is distinguishable both in kind and in degree. First, here, Congress in the 1996 Act has spoken about the distinction between information services and telecommunications services, and the Commission should defer to Congress for significant changes to current jurisdictional

²See, e.g., In the Matter of Federal-State Joint Bd. on Universal Service, Report to Congress, CC Docket No. 96-45, FCC 98-67, ¶¶ HHH-CCCC (April 10, 1998).

³Id. The Commission has produced voluminous discussions of the relationship between the Internet and telecommunications and the regulatory distinctions between ISPs and common carriers. See, e.g., Barbara Esbin, "Internet Over Cable: Defining the Future in Terms of the Past," OPP Working Paper Series No. 30, Federal Communications Commission, Office of Plans and Policy, August 1998; Kevin Werbach, "Digital Tornado: The Internet and Telecommunications Policy," OPP Working Paper Series No. 29, Federal Communications Commission, Office of Plans and Policy, March 1997.

understandings. Second, the cases cited by GTE involved voice communications. Consumers understood these to be "calls" which would be regulated at an interstate level. We are not so certain that consumers understand that the local access to the Internet falls in the same category.

In sum, the analysis of the "end-to-end" communication argued by GTE is the not the communication between Missouri and Washington, but totally within Missouri, an intrastate communication.⁴

B. Tariffing ADSL at the State Level Is Consistent Historical Practice of Services Accessing ISPs and with Customer Expectations.

Tariffing ADSL with state commissions is consistent with the longstanding practices of companies and with understandings of consumers. ADSL is a substitute for the normal dial-up service that most of us now use. Through local telephone lines, residential and business consumers reach their ISPs and the Internet. Frequently, these lines are used exclusively for access to Internet service, but, whether they are dedicated or not, they are provided by the local exchange companies pursuant to state tariffs. If the consumer has a problem with either his or her regular line, or the dedicated line to the ISP, the consumer can call the company and, if there is no satisfaction, can file a complaint with the local public service commission.

⁴The Federal Telecommunications Act (Federal Act), 47 U.S.C. §153(43), defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." GTE is a "telecommunications carrier" under the Federal Act, as it provides "telecommunications services." 47 U.S.C. §153(44). As such it is treated as a "common carrier" under the Act "only to the extent that it is engaged in telecommunications services." *Id.* In effect, when the ADSL customer logs on using the telecommunications service, the signal is sent from the user's home or business to the location of the ISP. Beyond that point, the "information service" is provided. The "form" of the information is changed so that it is possible to route the message packets out to the web which is the Internet. For a discussion of this in the context of "dial-up" service, see Southwestern Bell Telephone Co. v. Texas Public Utility Comm'n, No. 98CA-043 (W.D. Texas June 16, 1998).

The cases cited by GTE are consistent with tariffing ADSL at the state level in accordance with customer expectations about the nature of the service. Interstate calls routed to voice mail are like "traditional out-of-state long distance" calls. Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corp., 7 FCC Rcd 1619, 1620 (1992). In Southwestern Bell Telephone Co., 3 FCC Rcd 2339, 2341 (1988), the Commission accepted the argument that interstate credit card calls were "functionally equivalent" to "single end-to-end" calls.⁵

It was reasonable for the consumer in these and other cases to expect that these calls were interstate, because they were the "functional equivalent" of interstate calls prior to the addition of new technology. That is the case here. The connection from the end user through the ISP to the Internet has been an intrastate service. Technological innovation should not change the essential nature of the service. Indeed, in Washington, US West filed its ADSL tariff with the WUTC. Here the nature of the communication has always been local, and the ADSL innovation should not make ISP connection an interstate call any more than addition of voicemail should add a local component to a long distance call.

⁵The Commission need not heed GTE's warning that ruling against it may "undermine other federal law holding that Internet service is an interstate activity, citing United States v. Carroll, 105 F.3d 740 (1st Cir. 1997), cert. denied, 117 S.Ct. 2424 (1997). We do not question that the Internet is interstate, and pictures transported over the Internet are definitely in interstate commerce. We are only stating, as the Commission had ruled, that the Internet is not "telecommunications" but rather is "information services."

C. There Are Policy and Efficiency Reasons for Interpreting ADSL as an Intrastate Service to Be Tariffed by State Commissions.

Sound policy reasons are in accord with consumer expectations. If there is a problem with regular business or residential service, including dial-up service to an ISP, state commissions stand ready to assist the consumers. Indeed, in Washington State, the WUTC has handled informal complaints from customers of US West's ADSL service in the same way that the WUTC consumer affairs staff handles complaints from customers of other services. Excluding ADSL from state jurisdiction would shift a burden from the states to the Commission and federalize what historically has been a state function. States have greater experience and the local knowledge necessary to resolve these local disputes efficiently.

There are other public interest enforcement issues in provisioning ADSL service that suggest maintaining the state oversight. In Washington, when US West filed its ADSL tariff, the WUTC worked with US West to minimize opportunities for US West to leverage its monopoly power over ADSL into advantages for US West's Internet service, USWest.net. This joint marketing issue currently is within state control. Indeed, there is pending in Minnesota a complaint brought by the Minnesota Attorney General against US West in front of the Minnesota Public Utilities Commission on these issues. In re Investigation in US West Communications Inc.'s Provision of MegaBit Services, No. P421/EM-98-471 (Minn. PUC, filed Sept. 10, 1998). Federalizing the ADSL service would limit authority of state commissions to insure that there are no abuses of market power as these advanced services are rolled out. As state commissions have jurisdiction over marketing of a variety of services offered by local exchange services, it would make little sense to deprive them of transactions involving ADSL.

D. The Commission Should Refrain from Changing the Jurisdictional Understandings of Telecommunications Linking End Users with ISPs as Such a Change Could Have Other Ramifications.

GTE suggests that the Commission need not decide in this proceeding the issue of whether and to what extent a new entrant local exchange company receiving "dial up" Internet access traffic from a customer of an incumbent LEC is entitled to reciprocal compensation. GTE Direct Case at 7. We agree. That is a matter that now is before the courts. E.g. US West Communications, Inc. v. MFS Intelenet and Washington Utilities & Transportation Comm'n, No. C97-222WD (W.D. Wash. Jan 7, 1998) (upholding right to reciprocal compensation for calls to ISPs), appeal pending 9th Cir. 98-35146. However, GTE points out that deciding this case in its favor could affect the analysis of the reciprocal compensation issue.

That GTE mentions the issue highlights the importance of acting cautiously in this filing. Consider the potential ramifications of ruling for GTE in this matter. Would it mean that ADSL would become part of the Internet information service, particularly if it were offered by GTE as part of a bundle with an ISP service? Would it open the door to consideration of Internet communications as being interstate "telecommunications," so regulation of the Internet is affected? We do not know the answers to these questions. However, we suggest that the future of regulation of services related to the Internet should not be decided in the context of a single tariff filing. The Commission should act cautiously.

III.
CONCLUSION

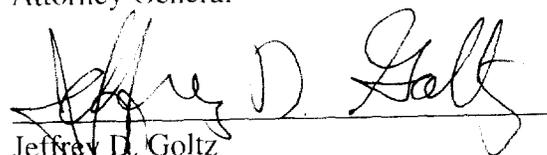
For the reasons stated above, the Commission should reject the filing by GTE. Such an action would be consistent with the Commission's distinction between information services and telecommunications, consistent with consumer expectations, and consistent with sound consumer

protection policies. The GTE ADSL tariff should be filed with the various commissions for the states in which GTE proposes to offer the service

Dated, this 17th day of September, 1998.

Respectfully submitted,

CHRISTINE O. GREGOIRE
Attorney General

A handwritten signature in black ink, appearing to read "Jeffrey D. Goltz", is written over a horizontal line.

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