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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matters of	)	
GTE Telephone Operating Companies GTOC Tariff FCC No. 1 GTOC Transmittal No. 1148	)	CC Docket No. 98-79
BellSouth Telecommunications, Inc. BellSouth Tariff FCC No. 1 BellSouth Transmittal No. 476	)	CC Docket No. 98-161
Pacific Bell Telephone Company Pacific Bell Tariff FCC No. 128 Pacific Bell Transmittal No. 1986	)	CC Docket No. 98-103

COMMENTS OF BELL ATLANTIC ON DIRECT CASES

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COMMENTS OF BELL ATLANTIC[1] ON DIRECT CASES

Introduction and Summary

The fundamental issue in these proceedings is the jurisdictional nature of Internet-bound traffic that will be delivered over the Asynchronous Digital Subscriber Line ("ADSL") services that are the subject of these tariffs. As the Commission repeatedly has held, the end-to-end nature of this traffic is overwhelmingly interstate and interexchange in nature. And because some limited number of Internet calls that are delivered to databases in the same state are inseverable from the bulk of the Internet calls

[1] Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; New York Telephone Company; and New England Telephone and Telegraph Company.

that are delivered to distant Websites in other states and around the globe, this traffic is subject to the exclusive jurisdiction of this Commission.

Contrary to the claims of some parties, the so-called enhanced service provider exemption does nothing to change all of this. Rather, it merely exempts Internet service providers from the requirement to pay the interstate access charges that would otherwise apply. Indeed, if this was not interstate and interexchange traffic, there would be no need for an "exemption" in the first place.

1. Internet Traffic Is Interstate, Interexchange, and Global.

There can be no question that Internet traffic is overwhelmingly interstate and interexchange. The Internet provides connections to databases and electronic mail addresses worldwide. The Commission, the Act, and the courts have all confirmed the global nature of Internet communication. The United States Supreme Court has found that the Internet, and its most prevalent use, the World Wide Web, "consists of a vast number of documents stored in different computers all over the world." *Reno v. Amer. Civil Liberties Union*, 117 S.Ct. 2329 (1997) (emphasis added). *See also*, *ACLU v. Reno*, 929 F.Supp 824, 831 (E.D. Pa. 1996), aff'd, 117 S.Ct. 2329 (1997) (the Internet is a "global medium of communications" that "links people, institutions, corporations, and governments around the world."). Congress defined the Internet as "the international computer network of both Federal and non-Federal interoperable packet switched data networks." 47 U.S.C. § 230(e)(1) (emphasis added). And the Commission has referred to the Internet as an "interstate information service." *Access Charge Reform*, 11 FCC Rcd 21354, ¶ 282 (1996). By initiating an inquiry into the proper pricing of Internet access

services , the Commission itself also has acknowledged that these services are interstate and therefore subject to its jurisdiction. *See id.* at ¶¶ 311-17.

2. To the Extent Internet Traffic Has An Intrastate Component, it Is Inseparable From the Interstate Traffic and Subject to this Commission's Exclusive Jurisdiction.

Even though some small increment of the traffic flowing over the Internet may be destined for an intrastate database, that does not change its jurisdictional nature. When the interstate and intrastate components of a service cannot be regulated separately, and when state regulation would interfere with the Commission's exercise of its lawful interstate authority, a service remains within the exclusive jurisdiction of this Commission. *See California v. FCC*, 39 F.3d 919, 932-33 (9th Cir. 1994) ("*California*") (the FCC can lawfully preempt state restrictions on local exchange carrier provision of enhanced services where dual regulation would not be "economically or operationally feasible."), cert denied, 115 S. Ct. 1427 (1995); *NARUC v. FCC*, 880 F.2d 422, 429 (D.C. Cir. 1989) (the FCC has preemptive jurisdiction when a state's exercise of authority over intrastate communications negates the FCC's lawful exercise of its authority over interstate communications).

In the case of Internet traffic, it is not possible to know whether the destination of a call is one or ten thousand miles away, and even a call to a database around the corner may first be carried across the country. *See* Kevin Werbach, *Digital Tornado: The Internet and Telecommunications Policy*, OPP Working Paper No. 29, at 45 (Mar. 1997) ("[b]ecause the Internet is a dynamically routed, packet-switched network, only the origination point of an Internet connection can be identified with

clarity"). Moreover, any individual Internet session may involve many connections to many different locations. With hyperlinks, a user may easily hop from state to state or country to country at the click of a mouse. As a result, it is simply not possible to determine whether a particular Internet session, or portion of a session, is intrastate or interstate. In fact, the Eighth Circuit has recently affirmed the Commission's determination that, even if there are in some circumstances both an interstate and an intrastate component to an Internet call, it is "impractical if not impossible to separate the two elements." *Southwestern Bell Tel. Co. v. FCC*, No. 97-2618, slip op. at 41 (8th Cir. Aug. 19, 1998).

As a matter of public policy, exercise of state jurisdiction over ADSL service for Internet access would "thwart or impede" the FCC's and Congress's policy objective to promote advanced technology. It would do so by subjecting the service to duplicative, and potentially protracted, tariff proceedings in the state, and by subjecting this single inseverable service to multiple and potentially conflicting requirements from the Commission and various state commissions.[2]

Under the circumstances, the Internet traffic at issue here is subject to the exclusive jurisdiction of this Commission. The Commission should preempt state jurisdiction and exercise authority over the entire service.

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[2] *See Computer III Remand Order*, 6 FCC Rcd 7571, ¶ 121 (1991) (preempting "state requirements [that] would thwart or impede the nonstructural safeguards pursuant to which AT&T, the BOCs, and the independents may provide interstate enhanced services and the federal goals that they are intended to achieve."), aff'd in relevant part, *California*, 39 F.3d at 933 ("The FCC has met its burden of showing that its regulatory goals of authorizing integration of services would be negated by the state regulations it has preempted.").

3. Jurisdiction Is Based On the End-To-End Communication; and Internet Traffic Consists of a Single Call For Purposes of Determining Jurisdiction.

Some parties claim that Internet traffic consists of two separate calls, and that the supposed first call to an Internet service provider is a local call. They are wrong.

More than five decades of unbroken precedent from this Commission and the courts firmly establish that jurisdiction over a telecommunications service is determined by the end-to-end nature of the communication itself, not the physical location of the technology that is used to provide the service.[3] In this case, the end-to-end communication is between the end user and the distant databases and is overwhelmingly interstate and interexchange in nature.

Moreover, the Commission itself repeatedly has rejected "two-call" arguments that are indistinguishable from the claims made with respect to Internet traffic. For example, it has rejected claims that a call to an 800 number for credit card verification, after which the call is routed to the called party in another state, consists of two calls. Instead, the Commission has asserted jurisdiction based on the ground that there is a single interstate call involved, regardless of where the intermediate interception

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[3] *See United States v. AT&T*, 57 F.Supp. 451, 453-55 (S.D.N.Y. 1944) (finding that end-to-end interstate rates apply to an interstate telephone call placed from a hotel PBX); *NARUC v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984) ("Every court that has considered the matter has emphasized that the nature of the communications is determinative [of jurisdiction] rather than the physical location of the facilities used."); *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corp.*, 7 FCC Rcd 1619, ¶ 12 (1992) ("MemoryCall"), quoting *New York Tel. Co. v. FCC*, 631 F.2d 1059, 1066 (2d Cir. 1980) (jurisdiction over a telecommunications service is determined by "the nature of the communication itself rather than the physical location of the technology.").

is located. *Southwestern Bell Tel. Co.*, 3 FCC Rcd 2339, ¶ 28 (1988). Similarly, it has found that an 800 call to an intermediate switch, where the caller inputs a PIN, receives a second dial tone, and then dials the called party, "convey[s] a single communication from the caller to the called party." *Long Distance/USA Inc. v. Bell Tel. Co. of Pa.*, 10 FCC Rcd 1634, ¶ 15 (1995).

This conclusion does not change merely because the customer dials a local, rather than an 800, number prior to being connected to his or her ultimate destination. This is no different from a call made to a Feature Group A access line to place a long distance call. Even though the caller's line and the Feature Group A line are in the same local calling area, and the customer dials a local number, the Commission always has looked to the ultimate destination to determine that calls made using these arrangements are interexchange and interstate. *See e.g., Determination of Interstate and Intrastate Usage of Feature Group A*, 4 FCC Rcd 8448 (1989).

Nor does the conclusion change merely because there is an information service somewhere in the path of the end-to-end communication. In fact, the Commission rejected that very argument when it found that an interstate call that is forwarded to a voice mailbox in the same LATA as the called party and then retrieved by that party constitutes a "continuous path of communications across state lines" and is subject to preemptive Commission authority. MemoryCall at ¶ 9.

Here, as the Commission has acknowledged, just like the intermediate switches in the above examples, the Internet service provider is merely an intermediary that "connects the end user to an Internet backbone provider that carries traffic to and from other Internet host sites." *Non-Accounting Safeguards Order*, 11 FCC Rcd 21905,

n.291 (1996). In this way, the Internet service provider is acting exactly like an interexchange carrier when it carries voice or data traffic interstate, or like the intermediate switch in the cases cited above. In each instance, there can be no question that the communication does not end in the intermediate switch but extends to the user's intended destination.[4]

4. The "ESP Exemption" Merely Provides Internet Service Providers the Option Of Buying Intrastate Services; It Does Not Change the Interstate Nature of the Traffic

The Commission's so-called "enhanced service provider exemption" simply gives Internet providers the option of subscribing to existing state-tariffed services to originate and terminate their interstate information services. It does not in any way change the interstate nature of the underlying service, and it does not bar telephone companies from tariffing new interstate services at the federal level merely because ESPs, such as Internet service providers, may be among their customers.

The Commission has held that, under that exemption, ESPs are classified as "end users" solely "for purposes of applying access charges." *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631, n.8 (1988). In fact, absent the exemption, the Commission recognized that "facilities-based carriers, resellers, ... sharers, privately owned systems, enhanced service providers, and other private line and WATS customers," all would be subject to interstate access

[4] Even if the "two-call" theory were valid, which it is not, in many instances the first "call" would still be interstate. Some of the largest Internet service providers transport subscriber calls to a centralized national database before they are routed into the Internet. In those instances, even under the erroneous "two-call" theory, the entire service would be interstate.

charges. *MTS and WATS Market Structure*, 97 F.C.C.2d 682, ¶ 78 (1983). In 1983, however, it concluded that requiring the then-nascent ESPs to pay the newly-imposed switched access charges, which at the time were upwards of five cents per minute, could "affect their viability." The Commission therefore exempted them from the requirement to pay such access charges as a "transition to avoid this rate shock" and instead gave them the option of buying services from intrastate tariffs. *Id.* at ¶ 83. No Commission order from 1983 to the present has suggested that the ESP exemption means anything more than merely allowing ESPs to subscribe to existing local services as if they were end users so as to avoid the rate shock of the higher switched access charges. *See, e.g.*, *Access Charge Reform*, 12 FCC Rcd 15982, ¶ 348 (1997) ("We therefore conclude that [E]SPs should remain classified as end users for purposes of the access charge system." (emphasis added)). The underlying traffic remains interstate and interexchange in nature, just as it was in 1983.

Some parties have claimed, however, that the ESP exemption obligates the carriers to tariff at the local level new interstate services that ESPs might use, including ADSL. They are wrong. In reality, those parties can cite no Commission order or other legal authority to support this argument for the simple reason that none exists. Instead, if a service is properly classified as interstate, as ADSL is because it carries interstate and interexchange traffic, it is properly filed at the federal level, regardless of whether Internet service providers choose to purchase it. *See* 47 U.S.C. § 203(a).

5. A Contrary Ruling on the Jurisdiction Issue Will Create a Deterrent to Broad Scale Deployment of ADSL and Other Advanced Services.

In contrast, a determination here that Internet-bound calls are local – rather than interstate – will ultimately deter large-scale deployment of ADSL and other advanced services.

The reason is simple. If these services were classified as local, then the carriers that offer the service could be required to pay reciprocal compensation when they hand off the traffic to competitors for delivery to Internet service providers. And adding these payments to the cost of the service would seriously undermine incentives to make the substantial investment needed to deploy ADSL and other advanced services broadly.

In contrast, the Commission previously held that the reciprocal compensation obligations imposed by the Act "do not apply to the transport or termination of interstate or intrastate interexchange traffic." *Local Competition Order*, 11 FCC Rcd 15499, ¶ 1034 (1996) (emphasis added). This distinction between local and interexchange traffic – and the Commission's authority to draw the distinction – was upheld on appeal and is now final. *Comptel v. FCC*, 117 F.3d 1068, 1072 (8th Cir. 1997).

Finally, by confirming that Internet-bound traffic is interstate and interexchange – and therefore not subject to reciprocal compensation – the Commission will not interfere with any legitimate interests of the states. In fact, the bulk of the states that have ruled on the issue to date expressly recognized that the decision as to the jurisdictional nature of Internet traffic is one that this Commission needs to make. Therefore, although they have generally misinterpreted the ESP exemption as designating

the traffic as local, they have almost uniformly indicated that a definitive ruling by this Commission is needed to clarify the issue.

6. Properly Tariffing ADSL As an Interstate Service Will Not Create a Risk of a Price Squeeze.

Some parties have claimed that tariffing ADSL at the federal level will create the risk of a "price squeeze" between the cost of unbundled network elements, the rates of which are regulated by the states, and the price of ADSL. Their arguments are misplaced.

First, claims of a possible price squeeze cannot change the jurisdictional nature of a service. Under the Act, if a service is interstate, it is under the Commission's jurisdiction and can be regulated only at the federal level. 47 U.S.C. §§ 152(a), 201(b).

Second, the fact is that the cost of unbundled network element prices is not an incremental cost of ADSL, because it does not reflect new costs incurred to offer that service. *See* Alfred E. Kahn, *Letting Go: Deregulating the Process of Deregulation* at 78 (1998) ("If indeed the costs of the loop do not vary depending upon the number of local or toll calls placed on it, then incorporating some portion of those costs in the prices for those uses of it ... inefficiently discourages that usage.") Moreover, the Commission has already found that the cost of the local loop did not need to be included in the cost calculation of ADSL when used for video dialtone service. *Bell Atlantic Telephone Companies Petition for Waiver of Section 69.106 of the Commission's Rules to Offer Video Dialtone Service in a Limited Market Trial in Northern Virginia*, 10 FCC Rcd 5717, ¶ 9 (1995).

Third, competitors have the same opportunity as local exchange carriers to offer a variety of services over those facilities -- such as local exchange service – not just ADSL. And just like the local exchange carriers, competitors can recover their costs of subscribing to the network elements from all of the services they offer through the facilities.

Respectfully Submitted,

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September 18, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September, 1998, a copy of the foregoing "Comments of Bell Atlantic on Direct Cases" was sent by first class mail, postage prepaid, to the parties on the attached list.

Jennifer L. Hoh

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* Via hand delivery.

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