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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of)
)
)

Bell Atlantic Telephone Companies)
Tariff FCC No. 1)
Transmittal No. 1076)
)

CC Docket No. 98-168

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FEDERAL COMMUNICATIONS COMMISSION
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BELL ATLANTIC'S DIRECT CASE

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Introduction and Summary

Resolution of the issue under investigation – whether Bell Atlantic’s Asymmetric Digital Subscriber Line (“DSL”) service is properly an interstate filing – requires no change whatsoever in Commission policy. The Commission has repeatedly recognized that traffic bound for the Internet – which constitutes the bulk of the DSL traffic – is interstate and interexchange. This is because the Commission has uniformly based jurisdictional findings on the end-to-end nature of the traffic, and without question Internet traffic spans the globe.

The “enhanced service provider exemption” does nothing to change the interstate nature of Internet traffic, or no exception from paying interstate access rates would be needed. In fact, the Commission has uniformly held that enhanced service providers, such as Internet Service Providers (“ISPs”), would be subject to interstate access charges if it had not created the exemption.

¹ The Bell Atlantic telephone companies participating in this filing (“Bell Atlantic”) are 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.; and Bell Atlantic-West Virginia, Inc.

A contrary conclusion, on the other hand, would divest the Commission for now and the future with any authority over Internet traffic. This would allow each of the states to decide for itself how Internet access services would be regulated, in contravention of Congressional policy giving the Commission the obligation to promote the Internet and to further advanced telecommunications services. Likewise, a contrary conclusion would continue to subject Internet access services to reciprocal compensation. As the chairman of a new competing carrier recently explained, reciprocal compensation is a "boondoggle" that will deter deployment of advanced services.

Nor is state tariffing of DSL required to avoid a "price squeeze." The Commission can obtain all the information it needs to determine if the rates in an interstate filing are just and reasonable. And even the proponent of state tariffing to prevent a price squeeze now concedes that federal tariffing is proper.

Therefore, simply by confirming existing law and policies, the Commission can find that Internet access services, such as Bell Atlantic's DSL offering, are interstate and interexchange.²

² The issues under investigation in CC Docket Nos. 98-79, 98-103, and 98-161, which relate DSL tariffs of GTE, Pacific Bell, and BellSouth, respectively, are identical to the issue designated here. Therefore, Bell Atlantic will address many of the comments filed on the direct cases of those companies – comments that are certain to be repeated in this proceeding.

ARGUMENT

I. DSL Is Properly Tariffed As An Interstate Access Service.

Section 203(a) of the Act requires carriers to file with the Commission tariff schedules for interstate and foreign wire and radio communication services. 47 U.S.C. § 203(a). Some parties claim, however, that access to the Internet, which is the primary usage of DSL,³ is a local service that should be tariffed with the states. They assert that the customers for DSL are ISPs, which they claim are end users, not carriers, under the “enhanced service provider exemption.” Therefore, they maintain, DSL traffic simply originates and terminates local traffic between two end users in the same exchange. They are wrong and completely ignore the unbroken line of Commission precedent from 1983 to the present.

A. 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, provides access to “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.*

³ Although there may be other uses of Bell Atlantic's DSL, for the purposes of this proceeding the Commission need address only use of the service for Internet access.

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 itself has referred to the Internet as an "interstate information service." *Access Charge Reform*, 11 FCC Rcd 21354, ¶ 282 (1996) (emphasis added).

B. DSL Carries Interstate and Global Traffic and Is Properly Tariffed At The Federal Level.

More than five decades of unbroken precedent, both at the Commission and in the courts, have held that the jurisdiction over a telecommunications service is determined by "the nature of the communication itself rather than the physical location of the technology." *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). See also, *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, where the hotel wanted to charge an unregulated rate); *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."); *General Telephone Company of California v. FCC*, 413 F.2d 390, 401 (D.C. Cir. 1969) (common carrier services that are physically within a state are considered interstate when used to transmit out-of-state broadcast stations).

Here, no party disputes that communications using the Internet, whether for retrieval of information from distant Websites or for exchange of electronic mail, are overwhelmingly interstate and interexchange, nor could it. The Internet provides such connections worldwide, and neither the party originating the communication nor any of the intermediate service providers track whether the destination is one or ten thousand miles away. 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. The Commission, simply by virtue of exercising jurisdiction over Internet pricing arrangements, has acknowledged that Internet access is an interstate matter under its authority. See *Access Charge Reform*, at ¶¶ 311-17.

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.⁴

Here, exercise of state jurisdiction over DSL service for Internet access would “thwart or impede” the Commission’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.⁵

Even competing local exchange providers who earlier objected to federal tariffing of DSL now recognize that “it is likely that a majority of web sessions will include access to a web site in a different state or country, thereby rendering the call interstate in nature.” Northpoint Communication, Inc. Response to Direct Case of BellSouth at 2 (“Northpoint”). And the Association for Local Telecommunications Services (“ALTS”) admitted more than a year ago that Internet access “may well be

⁴ 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) (“*NARUC*”) (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).

⁵ 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.”); *NARUC*, 880 F.2d at 430 (preemption limited to requirements that would “thwart or impede” a valid federal policy).

'interexchange' for the purpose of determining the Commission's jurisdiction under the Communications Act." ALTS Request for Expedited Letter Clarification, CCB/CPD 97-30 (filed June 30, 1997).

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

The parties here claim, however, that an Internet communication is entirely local, because it consists of two calls, one to an ISP (which they erroneously claim the Commission treats as an "end user" for this purpose) and the other into the Internet. The Commission has repeatedly rejected similar "two-call" claims and held that it is the end-to-end communication that matters, regardless of whether part of the service is provided by an enhanced service provider, a reseller, private facilities, or by CPE.

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, consists of two calls. Instead, the Commission found that its jurisdiction is based on the location of the calling and called parties, regardless of where the intermediate interception is located.

Southwestern Bell Tel. Co., 3 FCC Rcd 2339, ¶ 28 (1988). Similarly, it has held that 800 calls to an intermediate switch, where the caller inputs a PIN, receives a second dial tone, and then dials the called party, "convey 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 part of the end-to-end communication consists of an information service, as is the case here. In fact, the Commission rejected that very argument when it held 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. *See also, MTS and WATS Market Structure*, 97 F.C.C.2d 682, ¶ 79 (1983) (a caller who obtains a second dialtone from an enhanced service provider, PBX, or other source and completes an interstate call is engaged in interstate communication, notwithstanding use of the enhanced service provider or CPE as part of the transmission path).

Accordingly, a long line of Commission precedent holds that when, as here, the end-to-end communication is interstate and interexchange, the entire communication is interstate and interexchange, subject to federal jurisdiction, notwithstanding whether an enhanced service provider (such as an ISP), CPE, private network, or a reseller provides part of the service.

D. The "ISP Exemption" Merely Provides ISPs the Option Of Buying Intrastate Services; It Does Not Change the Interstate Nature of the Traffic.

Many parties continue to mischaracterize the long-standing "enhanced service provider exemption" as somehow changing the nature of the end-to-end communication. It does nothing of the kind. Instead, it simply gives ISPs the option of subscribing to existing state-tariffed services to originate and terminate their interstate information services. Not only does it not in any way change the interstate nature of the underlying service, it does not bar telephone companies from tariffing new interstate services at the federal level merely because ISPs may be among their customers. In fact, there would be no justification for Bell Atlantic to file DSL at the state level unless it were being used to carry intrastate communication.⁶

Nor does the exemption turn ISPs into end users for all purposes, as some parties claim. The Commission has held that, under that exemption, ISPs 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 charges. *MTS and WATS Market Structure*, at ¶ 78. It concluded in 1983 that requiring the then-nascent ISPs to pay the newly-imposed switched access charges, which at the

⁶ One commenter states that Bell Atlantic has tariffed DSL at the state level. *See Opposition of Hyperion Telecommunications, Inc. to Direct Cases of GTE, BellSouth, and Pacific Bell* at 5, n.2. It has not.

time were upwards of five cents per minute, it 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 ISP exemption means anything more than merely allowing ISPs 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 ISPs 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.

The parties further claim, however, that the ISP exemption obligates Bell Atlantic to tariff at the local level new interstate services that ISPs might use. 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 DSL is because it carries interstate and interexchange traffic, it is properly filed at the federal level, regardless of whether ISPs choose to purchase it. *See* 47 U.S.C. § 203(b).

II. A Commission Finding that DSL Is Interstate Will Avoid Conflicts With the States.

Some of the parties contend that federal tariffing of DSL would create a conflict with the states, many of which have found that Internet access traffic is local for reciprocal compensation purposes. They are wrong.

Instead, the failure to find that DSL is interstate would perpetuate an untenable situation in which Internet-bound calls would remain subject to reciprocal compensation payments. As one analyst has explained, payment of reciprocal compensation on this traffic actually deters investment in competing facilities because it has the “perverse effect of turning customers from assets to liabilities.” See S. Cleland, “Reciprocal Comp For Internet Traffic—Gravy train Running Out of Track,” Legg Mason Research Technology Team (June 24, 1998). Moreover, as the Chairman of Covad, a competing provider of advanced services recently explained, the effect of the reciprocal compensation “boondoggle” is to “slow down the deployment of a high-speed packet-based network.” See Transcript, Economic Strategy Institute Forum on Section 706 (Sept. 16, 1998); Comm. Daily, Sept. 17, 1998 at 4.

In reality, the Commission has already decided 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). And 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). Therefore, the Commission here need only reiterate its finding that an Internet call is interstate and not subject to reciprocal compensation.

The overwhelming majority of the states that have addressed the issue recognized that the Commission has the final say on whether the traffic is interstate or intrastate and said they would revisit their findings based upon this Commission's determination. *See, e.g. MCI Telecommunications Corp.*, Case No. 97-1210-T-PC at 29-30 (W.Va PSC Jan. 13, 1998) ("The Commission agrees that a final determination on this matter rests with the FCC."); *Brooks Fiber Communications of Michigan, Inc.*, Case No. U-11178, et al., at 14-15 (Mich. PSC Jan. 28, 1998) ("When the FCC rules in the pending docket, the Commission can determine what action, if any, is required."); *Petition for Declaratory Order of TCG Delaware Valley, Inc.*, P-00971256 at 20 (Pa. PUC June 16, 1998) ("the FCC has had occasion to state its position on the issue and has not, thus far, definitively addressed the issue.").

To the extent that they have decided to treat Internet traffic as local until this Commission rules, they have done so based on their interpretation of the Commission's ISP exemption, which they read as defining dial-up calls to ISPs as local calls. Consequently, the various state decisions make it all the more important for this Commission to reaffirm that Internet traffic remains interstate and interexchange.

III. There Is No Price Squeeze In DSL Pricing.

Some parties have claimed that tariffing DSL 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 DSL. 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 loops and similar network elements is not an incremental cost of DSL, because it does not reflect new costs incurred to offer that service. Therefore there are no loop costs to be imputed to DSL, as some parties claim. Those parties, which offer competing services, are simply trying to increase DSL rates artificially, in order to suppress demand. *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 DSL 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, the facilities in question are multi-use facilities, capable of supporting a variety of services. As such, the cost of the facilities are already recovered in state-regulated rates for all of the other services that historically have been provided over them, including local dialtone voice services. Any requirement to impute loop costs to DSL would artificially inflate the cost of that service, place Bell Atlantic's DSL service at a competitive disadvantage, and deprive consumers of truly competitive pricing for these services. Competing local exchange carriers have the same opportunity as local

exchange carriers to offer a variety of services over those facilities – such as local dialtone service – not just DSL. 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.

There is also no merit to the petitioners' arguments that states are in a better position to review DSL rates than is the Commission. The Act gives the Commission exclusive authority to determine if rates for interstate services such as DSL are just and reasonable, and that determination requires that the tariff be filed at the federal level. *See* 47 U.S.C. § 201(b). And even the principal proponent of state tariffing to avoid a price squeeze now simply urges this Commission to take into account relevant costs. Northpoint at 2.

IV. No New Proceeding Is Needed to Resolve the Issues.

Several parties urge the Commission to delay still longer deciding the principal issues raised by the DSL filings by asking for yet another rulemaking or separate comment round on whether Internet access is interstate or intrastate. They claim that the nature of Internet traffic should not be resolved in the context of DSL tariff filings. That issue does not have to be decided based on the tariffs, however, because it has already been resolved.

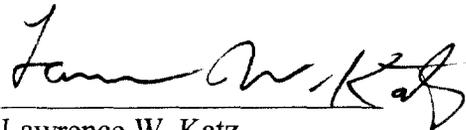
As shown above, the Commission already has found that Internet traffic is interstate and already has found that Internet traffic is interexchange and would be subject to access charges absent the enhanced service provider exemption. Therefore, contrary to the claims of some parties, the Commission will not change any existing policy by

resolving the issues raised here. Internet traffic will remain interstate and interexchange. The enhanced service provider exemption will remain intact. In short, the status quo at the federal level will remain if the Commission simply affirms the existing law. Besides, this issue has been before the Commission for more than a year, the merits have been fully briefed, and the matter is ripe for decision.

V. Conclusion

For the foregoing reasons, the Commission should find that Bell Atlantic's DSL tariff is properly filed at the federal level and reiterate that Internet access is interstate and interexchange.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of October, 1998, a copy of the foregoing
“Bell Atlantic’s Direct Case” was sent by first class mail, postage prepaid, to the parties on the
attached list.



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