

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

RECEIVED

OCT 15 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Bell Atlantic Telephone Companies) CC Docket No. 98-168
Tariff No. 1)
Transmittal No. 1076)

**COMMENTS OF ACI CORP. ON
BELL ATLANTIC'S DIRECT CASE**

Jeffrey Blumenfeld
Glenn B. Manishin
Lisa N. Anderson
Stephanie A. Joyce
Blumenfeld & Cohen—Technology Law Group
1615 M Street, N.W., Suite 700
Washington, D.C. 20036
202.955.6300
202.955.6460 fax

Counsel for ACI Corp.

Dated: October 15, 1998

No. of Copies rec'd
List ABCDE

OH

SUMMARY

Bell Atlantic has correctly concluded that its DSL services are interstate special access services properly tariffed under federal jurisdiction. However, while this conclusion is correct, Bell Atlantic's analysis is not. Bell Atlantic's DSL services are not interstate on the asserted ground that it is providing "Internet access." Bell Atlantic offers data connectivity between end users and their ISPs, but it is the ISPs who are providing Internet access, not Bell Atlantic's DSL service. Rather, Bell Atlantic's DSL services are jurisdictionally interstate because they are dedicated, mixed-use facilities used to transport both intrastate and interstate traffic, and as such are evaluated under the Commission's long-standing "ten percent rule" for jurisdictional classification of dedicated private line and special access services. DSL is a data transport technology that can be used to provide a number of different high-speed data services, many of which, like Bell Atlantic's services in these dockets, are properly classified as interstate telecommunications services.

The Commission's authority over interstate DSL services is critical to the promotion of competition in the advanced services market because it enables the Commission to enforce vigorously the ILECs' obligations to provide unbundled network elements, notably loops, and collocation space to competitors at reasonable rates and conditions. The Commission should expressly reaffirm in this proceeding Bell Atlantic's obligation to provide UNEs, including DSL-capable loops, for use by competitors in providing interstate services. Further, Bell Atlantic's DSL services must remain under regulatory oversight to ensure that it complies with these obligations in a manner commensurate to its own DSL provision. The Commission should therefore exercise its authority under the 1996 Act to require Bell Atlantic to treat FirstWorld and all CLECs in like manner.

the Commission is well versed in addressing the price squeeze concerns of new entrants and has, in the past, successfully forestalled attempts by ILECs to shift costs to monopoly services in order to justify retail rates that effect a price squeeze. If upon review Bell Atlantic's rates cannot possibly account for the unbundled loop and other input costs needed to provide those services, the Commission should simply reject its tariffs. Third, in related ongoing proceedings, the Commission is currently considering requiring ILECs to offer their advanced services, including those based on DSL technologies, through an affiliate. This is the best available alternative for limiting the ability of ILECs to impose an illegal price squeeze. In the past the Commission has correctly viewed affiliate arrangements, with the proper safeguards, as removing incumbents's incentive to engage in anticompetitive pricing.

Some parties have erroneously argued that classifying and tariffing Bell Atlantic's DSL services as interstate would allow it to avoid its obligation to pay mutual or reciprocal compensation to CLECs for the origination and termination of "dial-up" calls from end users to ISPs. This is simply not the case. DSL technology can be used to provide both interstate and intrastate services, and in the case of Bell Atlantic's services, DSL technology is being used to provide dedicated, interstate services. Thus, a finding that Bell Atlantic's DSL services are properly interstate special access services will not prevent CLECs from collecting mutual compensation for ordinary, "dial-up" traffic terminated to ISPs.

In keeping with the fact that DSL technology can be used in conjunction with UNEs to provide interstate services, the Commission should, as it addresses these jurisdictional issues, vigilantly protect new entrants' rights to access UNEs and collocation under Section 251 of the 1996 Act. The Commission should expressly reaffirm in this proceeding Bell Atlantic's obligation to provide UNEs, including DSL-capable loops, for use by competitors in providing

interstate services. Further, the Commission must retain jurisdiction over Bell Atlantic's DSL tariff to ensure that the company complies with these obligations.

TABLE OF CONTENTS

SUMMARY i

INTRODUCTION 1

DISCUSSION..... 3

I. BELL ATLANTIC’S PROPOSED APPLICATION OF DSL SERVICE IS AN INTERSTATE COMMUNICATIONS SERVICE..... 3

 A. Bell Atlantic’s DSL Services Merely Provide Connectivity Between Internet Service Providers and Their Subscribers.....4

 B. Bell Atlantic’s DSL Services Are Interstate Special Access Services Subject to Federal Jurisdiction Under the Commission’s “Mixed Use” Classification Regime 5

 C. The Commission May Exercise Jurisdiction Over Bell Atlantic’s DSL Tariffs Without Any State Preemption 7

II. THE COMMISSION SHOULD RETAIN ITS AUTHORITY OVER BELL ATLANTIC’S DSL TARIFFS AND SHOULD REJECT DSL TARIFFS THAT EVIDENCE AN ANTICOMPETITIVE PRICE SQUEEZE 8

 A. As a Matter of Law the Commission Has the Authority to Review Bell Atlantic’s DSL Tariff and Determine If the Prices Contained Therein Are Anticompetitive, and Thus Inconsistent with the Communications Act 9

 B. Input Costs Represent a Substantial Portion of Competitors’ Costs for Providing DSL Services, and the Current Disparity Between Bell Atlantic’s Input Charges and Retail Rates Effect an Illegal Price Squeeze..... 10

 C. Unless Bell Atlantic’s DSL Tariff Contains Rates That Reflect UNE and Input Costs, the Commission Should Reject That Tariff and Allow It to Choose Either to Lower Input Costs or Cease the Cross-Subsidization of Its DSL Services 13

III. CLASSIFYING BELL ATLANTIC’S SERVICES AS INTERSTATE NEITHER INVOKES MUTUAL COMPENSATION CONCERNS NOR DIMINISHES BELL ATLANTIC’S OBLIGATION TO PROVIDE UNE’S, INCLUDING DSL-CAPABLE LOOPS UNDER THE ACT 19

CONCLUSION..... 21

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

In the Matters of)	
)	
Bell Atlantic Telephone Companies)	CC Docket No. 98-168
Tariff No. 1)	
Transmittal No. 1076)	

COMMENTS OF ACI CORP. ON BELL ATLANTIC'S DIRECT CASE

ACI Corp. ("ACI"), by its attorneys, respectfully submits these comments in response to Bell Atlantic's Direct Case¹ on the Commission's Order Designating Issues for Investigation ("*Designating Order*")² in the three above-captioned dockets.

ACI is a competitive local exchange carrier ("CLEC") seeking to promote competition and reasonable rates in the market for Digital Subscriber Line ("DSL") based services. ACI believes that vigorous competition in the high-speed data market can arise only if retail DSL services are tariffed under the proper jurisdiction, in this instance as interstate services, and where there is effective regulatory oversight over retail DSL prices of incumbent local exchange carriers ("ILECs") to protect against anticompetitive pricing, including price squeezes.

INTRODUCTION

Bell Atlantic filed an amendment to its interstate tariff to include DSL services as interstate special access services.³ DSL is an advanced data transport technology that allows the provisioning of high-speed transmission of digital data, voice and video over compatible copper

¹ In the Matter of Bell Atlantic Telephone Companies, Tariff No. 1 Transmittal No. 1076, CC Docket No. 98-168, Bell Atlantic Direct Case (filed Oct. 6, 1998).

² In the Matter of Bell Atlantic Telephone Companies, Tariff No. 1 Transmittal No. 1076, CC Docket No. 98-168, DA 98-1863 (rel. Sept. 15, 1998) ("*Designating Order*").

³ Bell Atlantic Transmittal No. 1076 (filed Sept. 1, 1998).

local loops far more efficiently than existing services.⁴ Several parties filed Petitions to Reject, Deny or Investigate these tariffs on several grounds, including that: (1) the tariff was not properly before the FCC; (2) the tariff included a improper bundling of services; and (3) the rates at which the ILEC Respondents offered the service were unlawful under the Telecommunications Act of 1996 and the antitrust laws.⁵

In response to these petitions, the Commission suspended Bell Atlantic's tariffs for one day and opened investigation proceedings on Bell Atlantic's tariffs to address two principal issues: first, whether Bell Atlantic's DSL services are interstate services subject to the Commission's jurisdiction; and second, whether the FCC should defer pricing authority to the states in order to prevent anticompetitive pricing practices.⁶

The answers to the Commission's questions depend on understanding the network architecture of DSL technology as well as the nature of the DSL market. DSL is a transmission technology with a wide variety of potential applications that offers tremendous promise to invigorate the provision of advance telecommunications and information services. New entrants can use DSL technology to provide both intrastate and interstate services. In the case of Bell Atlantic, its services use DSL, via local loops and dedicated, non-switched facilities, to deliver traffic to Internet Service Providers ("ISPs"). Like Bell Atlantic, DSL competitors must use the local exchange network, and thus purchase unbundled network elements ("UNEs"), i.e. copper loops, to combine with their own DSL equipment. These unbundled elements are the most essential, and most difficult to acquire, input for the provisioning of DSL services. Accordingly, incumbents

⁴ Bell Atlantic's proposed tariff includes rates of \$39.95 per month with a nonrecurring charge of \$99.00. Bell Atlantic Transmittal No. 1076, Section 5, at 1-2.

⁵ The following Petitioners challenged Bell Atlantic's tariff: NorthPoint Communications, Inc., Association of Local Telecommunications Services (ALTS), Hyperion Telecommunications/KMC Telecom/RCN Telecom Services, and Sprint Corporation.

⁶ Designating Order at 4.

such as Bell Atlantic with bottleneck control over these inputs wield an enormous amount of power with respect to the ability of competitive providers to provision DSL services. The Commission should therefore exercise its jurisdiction over DSL services to monitor Bell Atlantic's UNE provision and price practices.

DISCUSSION

I. BELL ATLANTIC'S PROPOSED APPLICATION OF DSL IS AN INTERSTATE COMMUNICATIONS SERVICE

The fundamental question posed in this proceeding is whether Bell Atlantic's DSL services are jurisdictionally interstate, thereby falling within the FCC's jurisdiction. Under the Communications Act of 1934, the Commission's exclusive jurisdiction extends to "all interstate and foreign communication by wire or radio," 47 U.S.C. § 152(a), which by definition includes all transmissions that occur, in whole or in part, between states, regardless of the physical location of the underlying facilities.⁷ The inquiry to determine jurisdictional classification must therefore "contemplate[] the regulation of interstate wire communication from its inception to its completion."⁸

Bell Atlantic is correct that its proposed application of DSL must be classified as an interstate service, although its analysis of this complex issue is faulty. Bell Atlantic's service as provided to ISPs is not interstate merely because the ISP end users apply DSL as part of their own Internet services. Although the Internet is inherently interstate, the "end-to-end analysis" proposed by Bell Atlantic⁹ does not dictate that its DSL service, unlike an ISP's service, is interstate. Rather, Bell Atlantic's application of DSL technology provides access services to its

⁷ See National Ass'n of Regulatory Utils. Commr's v. FCC, 746 F.2d 1492, 1500 (D.C. Cir. 1984) ("NARUC") ("[T]he FCC has for years exercised jurisdiction over intrastate facilities that were partially used to complete interstate telephone calls.").

⁸ United States v. AT&T, 57 F. Supp. 451, 454 (S.D.N.Y. 1994), aff'd, 325 U.S. 837 (1945).

⁹ Bell Atlantic at 7-8.

ISP customers that fall within well-established Commission precedent governing the jurisdictional classification of private lines and special access services. This settled jurisdictional regime classifies Bell Atlantic's DSL services as interstate without the need to resort to any "inseparability" state preemption analysis.

A. Bell Atlantic's DSL Services Merely Provide Connectivity Between Internet Service Providers and Their Subscribers

DSL technology provides a dedicated communications conduit, a "transparent, unenhanced, transmission path,"¹⁰ over which Internet content can be packet-switched between users, including Internet Service Providers (ISPs) and their subscribers. Although ISPs will use this technology to provide Internet access services that are decidedly interstate, Bell Atlantic is incorrect in arguing that this fact, in itself, necessarily classifies its own DSL as interstate.¹¹

Bell Atlantic cannot stand in the shoes of its ISP customers for purposes of jurisdictional classification, because it is not using DSL to provide Internet access services. Were Bell Atlantic providing both the DSL service and the interstate Internet service, its argument would be correct. Bell Atlantic, however, is providing to its ISP customers only the dedicated line between the ISP points of presence ("POPs") and their subscribers' modems. It is the nature of this access line— not the Internet service offered by Bell Atlantic's ISP customers — that classifies Bell Atlantic DSL services as interstate communications.

¹⁰ Deployment of Wireline Services Offering Advanced Telecommunications Capability et al., Memorandum Opinion and Order, FCC 98-188, (rel. Aug. 7, 1998) ("Advanced Services Order") ¶ 36. The Commission uses these terms to describe "basic" telecommunications that are regulated under Title II of the Communications Act. See Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer

B. Bell Atlantic's DSL Services Are Interstate Special Access Services Subject to Federal Jurisdiction Under the Commission's "Mixed Use" Classification Regime

Bell Atlantic is offering DSL service to Internet and data service providers in the form of a dedicated point-to-point communications service. Its DSL technology is new, but the manner in which Bell Atlantic will provide it is not. As applied by Bell Atlantic, DSL service is a modern version of the private lines that high-volume voice telephony customers have for years purchased as a means of obtaining direct access to interexchange carrier ("IXC") networks. DSL is simply a new provision of special access, having the new characteristics of advanced telecommunications capability.¹² The regulatory tradition of private lines must therefore be the regulatory scheme for DSL, and the ILEC DSL services should remain within the Commission's jurisdiction as interstate telecommunications services.

The Commission has already classified DSL as an access service in its recent Memorandum Opinion and Order regarding high-speed data services.¹³ Access services comprise two categories: special access services and switched access services.¹⁴ Special access services "do not use the local switch; they are dedicated facilities that run directly between the end user and the IXC's point of presence."¹⁵ Because Bell Atlantic's DSL services provide a dedicated

II), 77 FCC.2d 384, 419-20 (1980), aff'd, Universal Service Report to Congress, FCC 98-67, ¶ 45 (rel. Apr. 10, 1998) ("Stevens Report").

¹¹ Bell Atlantic Direct Case at 5-6.

¹² ACI notes that Pacific Bell acknowledges that its own DSL offering is "analogous" to special access services for purposes of jurisdiction. In the Matter of Pacific Bell Telephone Company, Pacific Bell Tariff FCC No. 128 Pacific Bell Transmittal No. 1986, CC Docket No. 98-103, Rebuttal of Pacific Bell (filed Sept. 25, 1998) at 2 n.2.

¹³ Advanced Services Memorandum and Order at ¶ 22. The Commission expressly rejected the argument of USWest that advanced services, such as DSL, are not access services because they connect end users to an ISP and not a traditional voice interexchange carrier (IXC). The plain language and legislative history of the 1996 Act, the FCC concluded, "refutes any attempt to tie these statutory definitions to a particular technology." Advanced Services Memorandum and Order ¶ 42. The Commission should similarly reject this argument as repeated in this proceeding. ALTS Petition at 13; Hyperion/KMC/RCN Petition at 3-4.

¹⁴ In the Matters of Access Charge Reform, et al., Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, CC Docket No. 96-262, FCC 96-488, ¶ 24 (rel. Dec. 24, 1996).

¹⁵ Id.

connection between end users and ISP customer POPs, they plainly meet the definition of special access services.

The distinction between special access and local exchange services bears directly on the concerns raised by some Petitioners that the ILECs are seeking interstate classification of their DSL services only to evade reciprocal compensation requirements for Internet traffic delivered to ISPs over the Public Switched Telephone Network (“PSTN”).¹⁶ Unlike the local exchange services used by ISPs to provide the “last mile” of their Internet services, DSL special access provides a dedicated connection.¹⁷ The fact that these dedicated DSL facilities may carry a calculable amount of intrastate traffic, whether Internet-related or purely data services, does not defeat the Commission’s jurisdiction. Rather, the Commission and reviewing courts have always recognized that the same facilities can transport both intra- and interstate traffic.¹⁸ In the case of special access services, where the traffic carried along a single line is of “mixed use,” meaning both intrastate and interstate in nature, the Commission has classified the service as jurisdictionally interstate and claimed exclusive jurisdiction.¹⁹ Applying a *de minimis* standard, the Commission held that facilities carrying even a minimum amount of interstate traffic, designated at 10 percent of traffic on a single line, are interstate communications facilities.²⁰

¹⁶ ALTS Petition at 7-8, 11-13; Hyperion/KMC/RCN Petition at 1-2.

¹⁷ ALTS notes that 21 state commissions have already made this determination as of the date of their petition. ALTS Petition at 8.

¹⁸ See Smith v. Illinois Bell Telephone, 282 U.S. 133, 147 (1930)(noting that the portion of the network serving the city of Chicago carries local exchange service, intrastate toll service and interstate toll service); In the Matter of MTS and WATS Market Structure, Memorandum Opinion and Order, 97 FCC.2d 682, 711 (1983)(discussing private line WATS service as both local exchange and interstate toll service occurring over the same line).

¹⁹ In the Matter of MTS and WATS Market Structure, 4 FCC Rcd. 5660 (1989)(referring specifically to the costs of providing “mixed use” special access as an interstate matter).

²⁰ Id.

The settled “10 percent rule”²¹ is therefore clearly applicable to the DSL services offered by Bell Atlantic in this case. It is clear that Internet and other interstate data communications comprise the predominant services that Bell Atlantic’s DSL services will carry, thus easily qualifying these DSL services as interstate under the 10 percent criterion.

C. The Commission May Exercise Jurisdiction over Bell Atlantic’s DSL Tariffs Without Any State Preemption

Bell Atlantic also offers in support of its interstate argument the so-called “inseparability” doctrine,²² under which the Commission may preempt state commission jurisdiction over communications services that cannot be separated into their intra- and interstate components.²³ Although this argument may be germane to the jurisdictional status of DSL, it reaches into the realm of state preemption doctrine, which is a sensitive area that the Commission need not reach in order to dispose of these cases.

Because the Commission can rightfully claim exclusive jurisdiction over DSL based on its historical regulation of interstate special access services by virtue of the 10 percent rule, the issue of preempting state law does not arise. Bell Atlantic’s DSL services are not subject to common law notions of separating communications traffic into its intra- and interstate parts. Rather, as has been demonstrated, DSL belongs to a class of special access services over which the Commission must retain exclusive jurisdiction. To illustrate, in a landmark case on communications jurisdiction, the U.S. Court of the Appeals for the D.C. Circuit held that the Commission has exclusive jurisdiction over WATS as an interstate service without employing preemption analysis.²⁴ Therefore, the Commission can exercise exclusive jurisdiction over the

²¹ 47 C.F.R. § 36.154.

²² Bell Atlantic Direct Case at 5-6.

²³ See *Louisiana Public Service Commission v. FCC*, 476 U.S. 335, 376n.4 (1986).

²⁴ *NARUC v. FCC*, 746 F.2d 1492, 1501 (D.C. Cir. 1984).

ILEC DSL services under the “mixed use” regime without resorting to preemption of state jurisdiction.

II. THE COMMISSION SHOULD RETAIN ITS AUTHORITY OVER BELL ATLANTIC’S DSL TARIFFS AND SHOULD REJECT DSL TARIFFS THAT EVIDENCE AN ANTICOMPETITIVE PRICE SQUEEZE

In the *Designing Order*, the Commission also sought comment on “whether the Commission should defer to the states the tariffing of retail DSL services in order to lessen the possibility of a price squeeze.”²⁵ The impetus for this issue is that new entrants providing services that compete with the DSL services of the Bell Atlantic rely on ILEC-controlled and state tariffed wholesale inputs, particularly unbundled loops and collocation, to provide their services. As a result, incumbents like Bell Atlantic are in the position to impose an anticompetitive price squeeze on new entrants by controlling input costs, while simultaneously pricing retail services near or below the total costs of the inputs needed to provide those services. Because state commissions have legal authority over UNE prices, and relative expertise in costing proceedings, some have suggested that the FCC should defer to state authority as a matter of comity.

ACI believes that the Commission should not delegate authority over the DSL services of Bell Atlantic to state commissions in order to lessen the possibility of an anticompetitive price squeeze, for several reasons. First, the price squeeze concerns of new entrants are significant and well-placed, and the Commission has within its own authority the full capabilities to prevent and punish illegal price squeeze conduct. Second, the Commission is well versed in addressing the price squeeze concerns of new entrants and has in the past successfully forestalled attempts by ILECs to shift costs to monopoly services in order to justify retail rates that effect a price squeeze. In protecting new entrants providing DSL services, the Commission should simply

evaluate Bell Atlantic's DSL tariff, and if upon review, the DSL rates cannot possibly account for the loop and other UNE costs needed to provide those services, the Commission should reject the tariff and give Bell Atlantic a simple remedy: either lower the costs of inputs or cease the cross-subsidization of retail DSL services.

Third, the Commission has already initiated proceedings that may provide an additional check on the ability of the ILECs to impose an illegal price squeeze by allowing the ILECs to offer advanced services, including DSL services, through affiliates.²⁶ In the past, the Commission has viewed separate affiliate arrangements, with the proper safeguards, as protection against ILEC cost-shifting and anticompetitive pricing practices, such as price squeezes. The Commission should not even consider deferring authority over Bell Atlantic's DSL tariffs to the states, unless and until ILECs are unconditionally required to use a separate affiliate arrangement to provide advanced services, with the conditions delineated by DATA in its Reply Comments in the related NPRM proceeding.²⁷

A. As a Matter of Law the Commission Has the Authority to Review Bell Atlantic's DSL Tariffs and Determine If the Tariffed Prices are Anticompetitive and Thus Inconsistent with the Communications Act

Sections 205 and 208 of the Communications Act provide the Commission with explicit power to review interstate service tariffs and determine whether or not interstate rates are unreasonable in view of the Commission's charge to protect the public interest, convenience and necessity. In particular, "the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge . . . what classification, regulation or practice is or

²⁵ Bell Atlantic Designating Order at 4.

²⁶ Deployment of Wireline Services Offering Advanced Telecommunications Capability, Notice of Proposed Rulemaking, CC Docket No. 98-147 (rel. Aug. 7, 1998). In this NPRM, the Commission indicated that it will consider whether to allow ILECs the option to provide DSL-based services through an affiliate not subject to the Section 251 and 271 obligations of the 1996 Act.

²⁷ Reply Comments of DATA, CC Docket 98-147 (filed Oct. 16, 1998).

will be just, fair and reasonable” and may order carriers to “cease and desist” from offering rates that are not just, fair and reasonable.²⁸ This authority plainly would extend to determining whether or not Bell Atlantic’s DSL tariff effect an illegal price squeeze.

It is unquestioned that price squeezes are not just, fair or reasonable and, as such, are inconsistent with the both the Communications Act and antitrust laws. As the Commission has noted, the opportunity to effect a price squeeze upon competitors exists when “an entity that provides both a retail product and a necessary input for providing that retail product possesses market power over that input.”²⁹ Specifically, the anticompetitive nature of a price squeeze is such that “the input product is so high, relative to the price of the retail product, that competing providers of the retail service are unable to make a profit.”³⁰ Such pricing practices are unequivocally anticompetitive. “When a monopolist competes by denying a source of supply to his competitors, raises his competitor’s price for raw materials without affecting his own costs, lowers his price for the finished goods, and then threatens his competitors with sustained competition if they do not accede to his anticompetitive designs, then his actions have cross the shadowy barrier of the Sherman Act.”³¹

B. Input Costs Represent a Substantial Portion of Competitors’ Costs for Providing DSL Services, and the Current Disparity Between Bell Atlantic’s Input Charges and Retail Rates Effects an Illegal Price Squeeze

As the Commission’s inquiry in these investigations suggest,³² the threat of a price squeeze on new entrants arising from Bell Atlantic’s DSL tariff is very substantial. As the front-

²⁸ 47 U.S.C. §§ 205 and 208. See also 47 U.S.C. § 201(b).

²⁹ Ameritech Operating Companies. Petition for a Declaratory Ruling and Related Waivers to Establish a New Regulatory Model for the Ameritech Region. Order. 11 FCC Red 14028, 14040-14041n.44 (1996).

³⁰ Id.

³¹ Bonjorno v. Kaiser Aluminum Chemical Corp., 752 F.2d 802 (3rd Circuit 1984).

³² By raising the question in this matter of whether to defer xDSL tariffing authority to the states, the Commission assumes, and correctly so, that the possibility of price squeezing by ILECs threatens to halt the ability of CLECs to compete in the DSL market, and that, accordingly, determine there has to be some means of preventing this outcome.

runners in the emerging DSL market, CLECs have spent more than a year wrangling with ILECs, including Bell Atlantic, over the prices and terms for the wholesale inputs, including UNEs and collocation, that would enable competitors to provide fast, efficient and sophisticated DSL services. These wholesale inputs represent the majority of the costs that new entrants must bear in providing any DSL services that compete with services of Bell Atlantic.

After overcoming numerous ILEC-imposed artificial constraints and unnecessary delays, CLECs are now, at long last, on the verge of becoming a significant presence in the market for high-speed services. Now, however, several ILECs, including Bell Atlantic, are engaged in a “Johnny-come-lately” attempt to squelch the potential inroads of competitive providers by offering retail DSL-based services at near- or below-cost rates that even the most efficient of competitors cannot match.

ACI has negotiated an interconnection agreement with Bell Atlantic, and thus has first-hand knowledge of the UNE and collocation costs associated with providing DSL services in the areas where Bell Atlantic controls the local loop. Based on the costs of these inputs, the retail prices that Bell Atlantic is proposing to charge for their DSL services barely, if at all, cover all the underlying costs for these services. Competitive providers of DSL solutions cannot compete at a price level with Bell Atlantic’s retail DSL services that do not include the same input costs that competitors must pay to provide similar services.

Unlike CLECs, Bell Atlantic can sustain competitive services that operate at a loss in order to reduce retail prices or can use their monopoly services to subsidize services that are not quite up to par in a competitive market. New entrants have no such luxury. Bell Atlantic has the opportunity to make their DSL services appear more profitable and efficient by excluding some input costs — such as loop costs — on the grounds that these inputs are already used to provide

their dominant services and are accounted for in the tariffing of those services. New CLECs providing DSL services do not have the luxury of eliminating input costs from their services through creative cost-shifting, making their services appear to be less efficient than they are in fact. More importantly, for many new CLECs, DSL services are their “bread-and-butter” services, and if these services operate at a loss, these CLECs will not be able to survive in a competitive market.

In its Direct Case, Bell Atlantic has boldly posited that there is no price squeeze in DSL pricing.³³ Bell Atlantic is flatly wrong. The threat of Bell Atlantic-imposed price squeeze is of utmost concern to competitive LECs and competitors’ fears have only been heightened by Bell Atlantic’s inability to justify the absence of cost recovery of DSL inputs in their retail prices. Bell Atlantic and other ILECs have in fact filed tariffs that include retail rates that barely or do not at all cover relevant costs, and have created a classic anticompetitive price squeeze as a means of limiting entry into the revolutionary and lucrative high-speed data services market. The Commission cannot passively oversee DSL tariffs with the hopes that state commissioners will ensure that ILECs are not charging unreasonable and anticompetitive prices for the inputs for DSL solutions. Thus, the Commission must evaluate how to respond, and what remedies should be imposed, when ILECs file retail DSL rates that cannot possibly account for the loop and collocation costs needed to compete with those retail services. It is particularly important that the Commission focus on the input costs underlying DSL rates because of the revolutionary potential of DSL technology, and the opportunities that new entrants have to participate in a market not yet dominated by the ILECs. Until newer technologies develop, DSL technology could become the preferred technology for communication delivery, and could upset traditional concepts that have classified telecommunications services as basic or enhanced, or interstate and

intrastate. Allowing ILECs to charge anticompetitive rates could sideline new entrants in that revolutionary process. As the Commission indicated in a previous evaluation of ILEC long-distance affiliates and price squeezes, “[i]t is this unprofitable relationship between the input prices and the affiliate’s prices; and not the absolute levels of those prices, that defines a price squeeze.”³⁴ Regardless of what the UNE prices are, if retail DSL prices assume lower UNE prices or no UNE prices at all, new entrants will not be able to compete effectively. Specifically, the Commission can lessen the price squeeze concerns of new entrants by evaluating retail rates in the ILECs’ DSL tariffs alongside the state-approved cost of UNE inputs needed to provide DSL-based service, and determine whether the rates and costs are inconsistent, and thus effecting an illegal price squeeze.

C. Unless Bell Atlantic’s DSL Tariff Contains Rates That Reflect UNE and Input Costs, the Commission Should Reject The Tariffs and Allow Respondents’ to Choose Either to Lower Input Costs or Cease the Cross-Subsidization of Its DSL Services

In an attempt to mischaracterize the intentions of competitive LECs, Bell Atlantic has stated that competitive LECs are “simply trying to increase DSL rates artificially, in order to suppress demand.”³⁵ Bell Atlantic further argues that “[a]ny requirement to impute loop costs to DSL would artificially inflate the cost of that service” and “place Bell Atlantic’s DSL service at a competitive disadvantage, and deprive customers of truly competitive pricing for these services.”³⁶ Nothing could be further from the truth. Moreover, the Commission should be especially suspicious of Bell Atlantic’s attempts to offer incredulous and emotive appeals aimed

³³ Bell Atlantic Direct Case at 12.

³⁴ NYNEX Corporation and Bell Atlantic Corporation, Petition For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, Memorandum Opinion and Order, 12 FCC Red 19985, 20045 ¶ 117 (1997). The Commission was responding to the concerns of long-distance providers that ILECs would create a price squeeze in the long-distance market by charging higher access fees to long distance competitors than to their affiliates offering long-distance services.

³⁵ *Id.*

³⁶ Bell Atlantic Direct Case at 13.

at the Commission's concern to provide consumers with the competitive choices while those same ILECs have limited competitive options by denying access to the local loops at a competitively-neutral price.

First, in a burgeoning competitive market where many competitive LECs have focused their investments and extensive efforts on DSL solutions, it is nothing more than chicanery to suggest that competitors want to suppress the demand for DSL services.

Second, as long as Bell Atlantic and other ILECs have bottleneck control over loops and collocation—the essential facilities needed to provide DSL services—it is absurd to countenance that ILECS will be at a competitive disadvantage in offering DSL services. This is especially so as Bell Atlantic has already aggressively marketed and extensively deployed DSL services across the Eastern seaboard.

Third, ACI has not asked the Commission to force Bell Atlantic to raise its DSL prices. Indeed, ACI believes that the most effective solution that is available to the Commission to reduce ILECs' ability to impose a price squeeze is the affiliate option that the Commission is currently considering.³⁷ Under the affiliate option, the incumbents must offer its advanced services through an affiliate that functions just like a CLEC. Accordingly, the ILEC's affiliate will have to purchase the loops and other DSL inputs, just like any other competitor providing DSL services, thus reducing the incentive for incumbents to charge competitors UNE prices that effect a price squeeze.

ACI recognize that there are other alternative mechanisms, such as imputation and loop allocation, that will provide competitors will some protection from an illegal price squeeze. However, these alternatives have significant weaknesses. For instance, imputation requirements are difficult to enforce, particularly when incumbents will be able to blur pricing and costing

values in a manner undetectable by the Commission or competitors. Another drawback is that, in view of the dual regulatory structure limiting the Commission's ability to set UNE prices, an imputation alternative lacks the enforcement mechanism needed to ensure that ILECs do not cross-subsidize. In contrast, separate-subsidiary requirements provide a viable method of protection against price squeezes, as outlined in the Reply Comments of DATA in the related NPRM proceeding.³⁸

In an attempt to avoid an affiliate requirement or other Commission intervention to protect competitors against price squeezes, Bell Atlantic offers several arguments in support of their costing methodologies for retail DSL services. However, these arguments fail rigorous scrutiny. Bell Atlantic has argued that it should not have to account for DSL input costs when determining retail DSL prices.³⁹ “[T]he 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.”⁴⁰ Bell Atlantic has further argued that DSL loops are “multi-use facilities capable of supporting a variety of services,” and therefore “are already recovered in state regulated rates for all of the other services that historically have been provided over them...”⁴¹

What Bell Atlantic is advocating here is classic anticompetitive behavior. Bell Atlantic is cross-subsidizing their services in order to shift the majority, if not all, of the input costs from competitive services to monopoly services guaranteed to provide a rate of return that will meet those additional costs. Under this reasoning, Bell Atlantic could price its retail DSL services on the assumption of zero loop costs. This is not an economically rational result. By excluding UNEs and collocation, the inputs that Bell Atlantic has included in their cost recovery represent

³⁷ Advanced Services NPRM ¶¶ 92-115.

³⁸ Reply Comments of DATA, CC Docket 98-147 (filed Oct. 16, 1998).

³⁹ Bell Atlantic Direct Case at 13.

⁴⁰ *Id.*

only a shell of Bell Atlantic's DSL services. While DSL equipment enables Bell Atlantic to provide sophisticated services, access to UNEs and collocation is still the central component needed to provide DSL services. Thus, to allow Bell Atlantic to exclude UNE and collocation costs from their retail rates is anticompetitive and impermissible.

Bell Atlantic has argued that competitive LECs "have the same opportunity as local exchange carriers to offer a variety of services over [loop] facilities."⁴² This argument ignores the realities that CLECs have faced in attempting to ensure their ability to compete as the telecommunications market moves from traditional categorizations of services to integrated services. The direction of the market indicates that local voice service will be provided via DSL technology, so even CLECs that are offering local dialtone service will need to access DSL inputs at a reasonable price. It is disingenuous for Bell Atlantic to ignore this trend as it and other ILECs have been gearing up to unleash integrated services. Moreover, to the extent that Bell Atlantic uses UNEs for both local exchange service and DSL services, then Bell Atlantic can properly apportion the UNE costs between those services, rather than financing the costs of DSL services on the backs of local exchange customers.

In a final attempt to defend its recovery of DSL input costs from voice services, Bell Atlantic cursorily points to a 1995 FCC order,⁴³ arguing that "the Commission has already found that the cost of the local loop did not need to be included in the calculation of DSL when used for video dialtone service."⁴⁴ In this *VDT Order* the Commission addressed whether or not Bell Atlantic should receive a waiver from the access charge rate structure established in Part 69 of

⁴¹ Bell Atlantic Direct Case at 13.

⁴² *Id.* at 14.

⁴³ 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 Trail in Northern Virginia. Order, 10 FCC Rcd 5717 (1995) ("VDT Order").

⁴⁴ Bell Atlantic Direct Case at 13.

the Commission's rules in order to establish a new rate structure to recover the costs of the video dialtone services provided on a trial basis via ADSL. Bell Atlantic has utilized a fast-and-loose interpretation of the Commission's order, and the Commission should reject Bell Atlantic's ludicrous reliance on this order as a blatant mischaracterization of the order's relevance and the Commission's intentions.

The *VDT* order does not even speak to the inclusion of loop costs for the ADSL services, but rather addresses the inclusion of switching costs. Even then, the Commission's determination on switching costs directly contradicts Bell Atlantic's argument. The paragraph that Bell Atlantic points to in support of its argument indicates the Commission's finding that "the routing involved with ADSL technology is not equivalent to traditional telephone switching and that its costs can be recovered from other charges."⁴⁵ In permitting Bell Atlantic to exclude its DSL costs from the switching rate element, the Commission properly recognized that DSL is a routed and not a switched technology. However, in doing so the Commission did not state that Bell Atlantic could recover its ADSL routing costs from other *service offerings*, such as local voice. Rather, the Commission allowed Bell Atlantic to recover routing costs via other rate elements paid users of Bell Atlantic's ADSL services.⁴⁶ Specifically, the Commission allowed Bell Atlantic to recover routing costs through its port charges, connection charges, and minutes of use charges, all of which are borne by end-users benefiting from DSL or programmers offering services to end-users via DSL.

It is more preposterous that Bell Atlantic should rely on the *VDT Order* when that order addressed a very fact-specific, narrow set of circumstances not intended to apply beyond the scope of the specific video dialtone services offered by Bell Atlantic on a trial basis. The

⁴⁵ VDT Order at ¶ 9.

⁴⁶ *Id.* at ¶ 8.

Commission stated very clearly that the trial-stage nature of Bell Atlantic's video dialtone services and the unresolved regulatory approach to rate structures for new services necessitated that this order apply only to video dialtone services and only to those services provided on a trial basis. "[T]he Commission decided . . . that requiring local telephone companies to seek Part 69 waivers for rate elements would best serve the public interest, at least on an interim basis. The Commission found that this process would allow all interested parties an opportunity to comment on whether the proposed rate structure tracks the manner in which costs are incurred in providing the *specific video dialtone services in question*."⁴⁷ Moreover, the Commission stated, "[w]e wish to emphasize that, consistent with Bell Atlantic's request, we are only approving this rate structure for the duration of this video dialtone market trial."⁴⁸ In addition, the Commission made clear that by allowing Bell Atlantic to use this interim rate structure was by no means an indication that the structure was adequate for the application beyond the scope of this trial and that the Commission would revisit the issue. The Commission indicated that it would "evaluate how well this rate structure worked during this trial and propose any necessary modifications for future offerings."⁴⁹

Finally, the *VDT Order* in other ways supports rather than undercuts competitors position that retail DSL prices should reflect the same input costs that CLECs pay to provide DSL services. The Commission made clear that DSL rate structures should "appropriately disaggregate the ADSL architecture to its local rate components."⁵⁰ Those logical rate components of that ADSL architecture must include local loops and other inputs needed to

⁴⁷ *Id.* at ¶ 5 (emphasis added) and (footnote omitted).

⁴⁸ *Id.* at ¶ 10.

⁴⁹ *Id.*

⁵⁰ *VDT Order* at ¶ 8.

provide DSL services. DSL solutions are nothing without the basic copper twisted pair, as CLECs cannot provision DSL services independent of the essential the local loop.

III. CLASSIFYING BELL ATLANTIC'S SERVICES AS INTERSTATE NEITHER INVOKES MUTUAL COMPENSATION CONCERNS NOR DIMINISHES ILECs' OBLIGATION TO PROVIDE UNEs, INCLUDING DSL-CAPABLE LOOPS, UNDER THE ACT

Some parties have erroneously argued that classifying and tariffing Bell Atlantic's services as interstate would allow ILECs to avoid their obligations to pay mutual or reciprocal compensation⁵¹ to CLECs for the origination and termination of "dial-up" calls from end users to ISPs.⁵² This is simply not the case. Rather, as noted above DSL technology can be used to provide both interstate and intrastate services, and in Bell Atlantic's application is used to provision a dedicated special access service. Thus, a finding that Bell Atlantic's DSL services are jurisdictionally interstate will not prevent CLECs from collecting mutual compensation in the instances where DSL technology is used in conjunction with UNEs to provide intrastate services. More importantly, a Commission decision to classify these DSL services as interstate special access will obviously have no impact on mutual compensation for switched, dial-up Internet traffic delivered to ISPs over the PSTN, to which the "10% rule" is plainly inapplicable. Consequently, there is no conflict between classifying DSL services as interstate and the many state commission decisions requiring ILECs to pay mutual compensation on Internet traffic delivered to ISP on a switched basis over local exchange services.

Nor is there any conflict between the classification of these DSL services as jurisdictionally interstate and the ability of CLECs to use unbundled loops and other UNEs for the provision of competing DSL services. The Commission has made clear that UNEs can be used for

⁵¹ Section 251 of the 1996 Act requires that LECs "establish reciprocal compensation arrangements for the transport and termination of telecommunication services." 47 U.S.C. § 251(b)(5).

⁵² ALTS Petition AT 7-8; Hyperion/KMC Telecom/RCN Telecom Petition at 1-2.

the provision of either interstate or intrastate services, for instance in the provision of interstate switched access services. At this sensitive point in the development of DSL competition, any ambiguity on this point could provide the ILECs with increased incentives to delay and obstruct interconnection by CLECs, because DSL requires access to unbundled loops, collocation and other UNEs. Therefore, ACI urges that the Commission expressly reaffirm the obligation of ILECs to provide UNEs, including DSL-capable loops, for the provision of interstate DSL services⁵³. The final order in these investigations should reaffirm that this unbundling obligation exists regardless of the jurisdictional classification of the DSL services provided by the CLEC, including the use of DSL technology for offering interstate services.

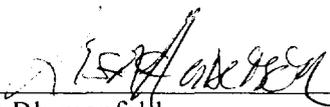
⁵³ Advanced Services Memorandum and Order ¶ 52.

CONCLUSION

For all these reasons, the Commission should (i) classify Bell Atlantic's DSL services as interstate special access; (ii) retain its tariffing authority over interstate DSL services, without deferring to state commissions; (iii) address ILEC DSL price squeezes by rejecting interstate DSL tariffs reflecting retail rates inconsistent with UNE inputs costs (iv) expressly reaffirm Bell Atlantic's obligation to provide UNEs, including DSL-capable loops, for the provision of interstate services; (v) require ILECs to offer their DSL services through an affiliate..

Respectfully submitted,

ACI CORP.

By: 
Jeffrey Blumenfeld
Glenn B. Manishin
Lisa N. Anderson
Stephanie A. Joyce
Blumenfeld & Cohen—Technology Law Group
1615 M Street, N.W., Suite 700
Washington, D.C. 20036
202.955.6300 phone
202.955.6460 facsimile

Counsel for ACI Corp.

Dated: October 15, 1998

CERTIFICATE OF SERVICE

I, Amy E. Wallace, do hereby certify that on this 15th day of October, 1998, that a copy of the document was served, by *hand delivery and U.S. first class mail, postage prepaid, on the following persons:


Amy E. Wallace

*Kathryn C. Brown
Chief, Common Carrier Bureau
FCC
1919 M Street, N.W.
Room 500
Washington, DC 20554

*ITS
1231 20th Street, N.W.
Washington, DC 20036

*Jane E. Jackson
Chief, Competitive Pricing Division
Common Carrier Bureau
FCC
1919 M Street, N.W., Room 518
Washington, DC 20554

*Judith A. Nitsche
Chief, Tariff and Price Analysis Branch
Common Carrier Bureau
FCC
1919 M Street, N.W., Room 518
Washington, DC 20554

*James D. Schlichting
Chief, Competitive Pricing Division
FCC
1919 M Street, N.W.
Room 518
Washington, DC 20554

Lawrence W. Katz
Bell Atlantic Telephone Companies
1320 N. Court House Road
8th Floor
Arlington, VA 22201

John Thorne
Robert Griffen
BELL ATLANTIC
1320 North Court House Road
8th Floor
Arlington, VA 22201

Joseph Mulieri
Director – FCC Relations
Bell Atlantic
1300 I Street, N.W., Ste. 400W
Washington, DC 20005

Lawrence Graham
Bell Atlantic
Senior Specialist
2980 Fairview Park Drive
Falls Church, VA 22042

Richard M. Rindler
Michael W. Fleming
Swidler & Berlin Shereff Friedman, LLP
3000 K Street, N.W.
Washington, DC 20007

Richard J. Metzger
Vice President & General Counsel
Association for Local Telecommun. Services
888 17th Street, N.W., Suite 900
Washington, DC 20006

Steven Gorosh
Vice President & General Counsel
NorthPoint Communications, Inc.
222 Sutter Street
San Francisco, CA 94108

Leon M. Kestenbaum
Jay C. Keithley
Marybeth M. Banks
1850 M Street, N.W., 11th Floor
Washington, DC 20036