UNITED STATES DEPARTMENT OF COMMERCE
National Telecommunications and Information Administration
Washington, D.C. 20230

EX PARTE OR LATE FILED

October 27, 1998

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FEDERAL COMMUNICATIONS COMMISSION
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Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: *Ex parte* Tariffing of Digital Subscriber Line Services, CC Docket Nos. 98-79, 98-103, 98-161, and 98-165

Dear Ms. Salas:

Enclosed please find two copies each of the hand-delivered *ex parte* letter from Larry Irving, Assistant Secretary for Communications and Information, U.S. Department of Commerce, to Chairman William Kennard in the above-referenced proceedings. Copies have also been hand-delivered to each of the Commissioners.

Please direct any questions you may have regarding this filing to the undersigned. Thank you for your cooperation.

Respectfully submitted,

Kathy Smith

Kathy Smith
Acting Chief Counsel

Enclosures

No. of Copies rec'd 0+8
List A B C D E

UNITED STATES DEPARTMENT OF COMMERCE
The Assistant Secretary for Communications and Information
Washington, D.C. 20230

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FEDERAL COMMUNICATIONS COMMISSION
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The Honorable William E. Kennard
Chairman
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, D.C. 20554

Re: Tariffing of Digital Subscriber Line Services, CC Docket Nos. 98-79, 98-103, 98-161, and 98-165

Dear Chairman Kennard:

A number of incumbent local exchange carriers (ILECs) have filed tariffs with the Commission covering so-called digital subscriber line (DSL) services, which can provide end users with relatively high speed connections to Internet Service Providers (ISPs). The Commission has solicited comment on the question of whether such services are interstate offerings that can be tariffed at the Federal level.[1] For the reasons set forth below, the National Telecommunications and Information Administration (NTIA) believes that the services at issue are interstate in nature. The Commission should therefore permit the associated tariffs to go into effect, subject to the conditions discussed below. The Commission should make clear, moreover, that its decision (1) does not address the jurisdictional classification of dial-up calls to ISPs; (2) does not disturb myriad State commission rulings that, under existing interconnection agreements, such calls were intended to be treated as local calls, thereby obliging ILECs to compensate competitive local exchange carriers (CLECs) for dial-up calls to ISPs that are terminated via CLECs' facilities; and (3) leaves in place the long-standing access charge exemption for ISPs and other information service providers.

ILECs assert that their proposed DSL offerings would create a dedicated channel between an individual subscriber and a single predesignated location, typically an ISP gateway.[2] As such,

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[1] Bell Atlantic Telephone Companies, Order Designating Issues for Investigation, CC Docket No. 98-165, DA 98-1863 (rel. Sept. 15, 1998); Pacific Bell Telephone Company, Order Designating Issues for Investigation, CC Docket No. 98-103, DA 98-1772 (rel. Sept. 2, 1998); BellSouth Telecommunications, Inc., Order Suspending Tariff and Designating Issues for Investigation, CC Docket No. 98-161, DA 98-1734 (rel. Sept. 1, 1998); GTE Telephone Operators, Order Designating Issues for Investigation, CC Docket No. 98-79, DA 98-1667 (rel. Aug. 20, 1998).

[2] See Direct Case of BellSouth Telecommunications, Inc. in CC Docket No. 98-161, at 1, 2 (filed Sept. 11, 1998) (BellSouth) (service furnishes connection between "two customer-designated locations"; "primary customers" for the service will be ISPs); Direct Case of Pacific

those services are functionally indistinguishable from conventional private line services. An unbroken line of Commission and judicial precedent establishes that the jurisdictional classification of such services hinges on the nature of the transmissions or communications carried, rather than the characteristics or location of the underlying facilities.[3] When the traffic

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Bell in CC Docket No. 98-103, at 2 (Pacific Bell) (filed Sept. 11, 1998) (service creates a "permanent virtual circuit" to a destination selected by the customer); Direct Case of GTE in CC Docket No. 98-79, at 4 (filed Sept. 8, 1998) (GTE) ("one dedicated path"; service will be "most commonly used" by ISPs).

The technology underlying DSL service also permits the simultaneous transmission of voice traffic. NTIA understands, however, that the DSL tariffs at issue here do not also cover provision of voice telephony. GTE notes, for example, that each of its DSL customers "will still need to purchase standard residential or business service." GTE, supra, at 6 n.14.

[3] See, e.g., United States v. Southwestern Cable Co., 392 U.S. 157, 168-169 (1968); NARUC v. FCC, 746 F.2d 1492, 1499 (D.C. Cir. 1984); New York Tel. Co. v. FCC, 631 F.2d 1059, 1066 (2d Cir. 1980); United States v. AT&T, 57 F. Supp. 451, 454 (S.D.N.Y. 1944); Teleconnect Co. v. The Bell Tel. Co. of Pennsylvania, 10 FCC Rcd 1626, 1629, ¶ 12 (1995); Southern Pacific Communications Co., 61 FCC 2d 144, 146 (1976).

Parties who oppose interstate tariffing of DSL services allege that the jurisdiction of those services must be determined by considering the endpoints of their underlying telecommunications component. They contend that the telecommunications portion of a DSL offering terminates at the ISP's gateway, at which point a separate, and jurisdictionally irrelevant, information service begins. See, e.g., MCI WorldCom Comments on Direct Case in CC Docket Nos. 98-161, 98-103, and 98-79, at 5 (filed Sept. 18, 1998); Opposition of ICG Telecom Group, Inc. in CC Docket No. 98-103, at 2 (filed Sept. 18, 1998). However, the Commission's and the court's use of the expansive words "transmission" and "communication," rather than the narrower term "telecommunications," reflects their view that the jurisdictional treatment of a particular service should not turn on semantic claims about the definitional classification of its constituent parts.

Further, the Commission has indicated that, in determining jurisdiction, it examines a communications "from the reception of a call to its completion, regardless of any intermediate facilities." Teleconnect Co. v. The Bell Telephone Co. of Pennsylvania, supra, 10 FCC Rcd at 1629, ¶ 12. Plainly, when a user attempts to access the Internet, he does not expect that the call will terminate at the ISP's gateway. If customer knew that their traffic would go no further than the ISP gateway, most Internet calls would likely not be made in the first place.

conveyed is significantly and inseverably interstate in nature, the service is an interstate offering subject to exclusive Commission regulation.[4]

For the average user, a connection to an ISP provides an opportunity to read e-mail messages from correspondents both local and remote, to access databases across the country or around the world, to participate in a geographically dispersed chat group, or to enjoy audio and video transmissions from distant communities. Although some of those resources may be located in the user's home state, most are likely not. As importantly, given the nature of Internet addressing and routing, it is practically impossible to separate the intrastate and interstate strands of the typical Internet communication.[5] Accordingly, to the extent that end users employ an ILEC's DSL service to reach an ISP and the Internet, the Commission could reasonably conclude that the communications involved and, thus, the service itself, are interstate in nature.[6] ILEC provision of such services is therefore subject to Commission jurisdiction under Title II of the Communications Act, including Federal tariffing requirements.

NTIA emphasizes that the foregoing jurisdictional analysis applies only to a very simple DSL arrangement, when the service is used to establish a single pathway between an end user location and one other point -- an ISP. We understand that there are DSL configurations that can connect a telecommuter to two locations, for example, an ISP and her employer's corporate local area network (LAN). Furthermore, we anticipate that subsequent generations of the technology will incorporate even more sophisticated routing functionality that will enable subscribers to designate multiple terminating locations. As DSL services diverge from the simple model described in the ILECs' tariff filings, they begin to resemble switched offerings, which would raise more complicated questions than does the simple point-to-point configuration at issue here. The Commission should make no decisions about the appropriate tariffing of these more advanced DSL services without first consulting with State regulators and taking further public comments.

Moreover, ILECs should not be allowed to provide DSL services without condition. The "DSL service" that the ILECs seek to tariff herein is comprised of two separate, but related,

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[4] See, e.g., BellSouth, supra note 2, at 10 (citing Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986) and MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, 4 FCC Rcd 5660 (1989)).

[5] See Pacific Bell, supra note 2, at 10-11.

[6] Although the ILECs contend that their private line DSL services will be used primarily for ISP traffic, they acknowledge that DSL can also be used for other purposes. E.g., GTE, supra note 2, at 4 n.10; Pacific Bell, supra note 2, at 2-3. Thus, where a telecommuter uses DSL to connect to a corporate LAN located within the same state, the resulting communications may be intrastate in nature and the associated service would therefore have to be tariffed with the relevant State commission.

components: (1) a DSL-equipped subscriber line[7] and (2) data transport facilities that carry a subscriber's traffic from a serving central office to a designated ISP. Although NTIA believes that ILECs should be allowed to combine those components to create a high speed, virtual private line service for Internet users, we also urge the Commission to require that ILECs make the piece parts of the service available to alternative providers, so that they may have an opportunity to develop competitive alternatives. In this vein, the Commission has issued an order and initiated a rulemaking concerning ILEC provision of advanced services such as DSL.[8] NTIA expects that, at a minimum, ILECs will offer their DSL services in accordance with the rules and policies established therein.

A Commission decision treating ISP-related DSL services as interstate offerings would not necessarily affect the classification of dial-up traffic to ISPs, any more than policy decisions with respect to private line services would dictate regulatory treatment of switched services. Nor should a Commission decision herein disturb State commission decisions defining reciprocal compensation obligations between ILECs and CLECs, pursuant to existing interconnection agreements. To date, more than twenty State commissions have concluded, under existing interconnection agreements, that dial-up calls from end users to ISPs are local in nature. Those commissions have therefore construed particular ILEC/CLEC interconnection agreements to require ILECs to compensate CLECs for dial-up ISP traffic that terminates via CLEC facilities.[9]

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[7] Strictly speaking, DSL is a loop technology designed to increase substantially the transmission capacity of a subscriber's copper access line. See, e.g., Petition of Ameritech Corp. to Remove Barriers to Investment in Advanced Telecommunications Capability, CC Docket No. 98-32, at 10 (filed Mar. 5, 1998) ("Through xDSL technology, customers can use existing copper loops to provide high-speed data communications, and they can do so without interfering with carriage of voice.").

[8] Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, CC Docket Nos. 98-147, et al., FCC 98-188 (rel. Aug. 7, 1998).

[9] Many interconnection agreements specify that reciprocal compensation is not owed for the interchange of exchange access traffic. See, e.g., Time Warner Communications of Ohio, L.P. v. Ameritech Ohio, Case No. 98-308-TP-CSS, 1998 Ohio PUC Lexis 484, at *17-*18 (Ohio Pub. Util. Comm'n Oct. 14, 1998). Although the ILECs' DSL offerings may be interstate services, they do not constitute "exchange access" as defined by the Telecommunications Act of 1996. Section 3 of that Act equates exchange access with "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C.A. § 153(16) (West Supp. 1997). The Commission has ruled, however, that ISPs do not provide telephone toll services. Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 22024, ¶ 248 (1996). Consequently, a telecommunications service that connects users to ISPs cannot be deemed

In so doing, the States were exercising their primary responsibility under the 1996 Act to interpret and to enforce interconnection contracts between ILECs and CLECs.[10] A basic principle of contract law is that every contract implicitly incorporates the legal framework prevailing at the time the contract was executed.[11] When those interconnection agreements were negotiated, the Commission policy classified ISPs as end users.[12] The Commission also permitted ISPs to take service from ILECs' local exchange business tariffs.[13] Given the prevailing law, State commissions could reasonably have concluded that the parties intended that dial-up calls to an ISP were to be treated as local, just like any other call from an individual to a local business establishment. The fact that the Commission may now decide to classify as interstate DSL-based private line ISP traffic can have no bearing on the construction of those previously-executed agreements.[14] At most, the Commission's action would have relevance only for the negotiation and construction of future interconnection agreements, including renewals of existing agreements.

Nor should a Commission decision in this proceeding affect the prevailing access charge exemption for ISPs. That exemption exists because, among other things, the Commission was concerned that imposition of access charges on such services would suppress the growth of

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exchange access.

[10] See Iowa Utils. Bd. v. FCC, 120 F.3d 753, 804 (8th Cir. 1997) ("state commissions retain the primary authority to enforce the substantive terms of the [interconnection] agreements made pursuant to sections 251 and 252" of the 1996 Act).

[11] See, e.g., Ohio, Pennsylvania & West Virginia Coal Co. v. Panenergy Corp., 120 F.3d 607, 611 (6th Cir. 1997) ("contract impliedly adopts the laws that subsist at the time of the making of the contract"); Dillard & Sons Construction, Inc. v. Burnup & Sims, 51 F.3d 910, 915 (10th Cir. 1995) ("existing applicable law is a part of every contract"); Florida East Coast Railway Co. v. CSX Transportation, Inc., 42 F.3d 1125, 1129 (7th Cir. 1994) ("Contracts are presumed to be written in contemplation of the existing applicable law.").

[12] See Access Charge Reform, First Report and Order, 7 Comm. Reg. (P&F) 1209, 1299, ¶ 342 (1997) (Access Charge Order) (citing Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, 3 FCC Rcd 2631 (1988))

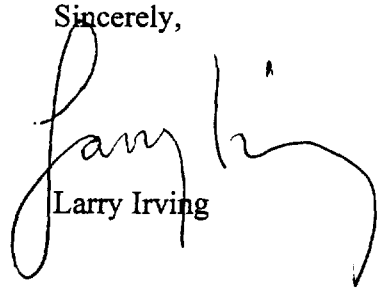
[13] Id.

[14] See Florida East Coast Railway Co. v. CSX Transportation, Inc., 42 F.3d 1125, 1129 (7th Cir. 1994) ("subsequent changes in the law that are not anticipated in the contract generally have no bearing on the terms of [that] contract"). That would be true even if the Commission attempted to give a DSL order retroactive effect, because the Commission cannot, after the fact, change the parties' constructive knowledge of the state of the law when they finalized their contract.

innovative services and networks.[15] The exemption implicitly assumes that communications with the Internet have a substantial interstate component. Otherwise no access charge exemption would be necessary. Consequently, a Commission decision clarifying the interstate character of DSL-based ISP services cannot undermine the continuing validity of the ISP exemption.

For the foregoing reasons, the Commission should determine, subject to the conditions and qualifications set forth herein, that DSL services providing individual virtual private line connections between end users and ISPs are interstate services that can be tariffed at the Federal level. Thank you for considering these views.

Sincerely,



Larry Irving

cc: Commissioner Susan Ness
Commissioner Harold Furchtgott-Roth
Commissioner Michael Powell
Commissioner Gloria Tristani

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[15] See, e.g., Access Charge Order, supra, 7 Comm. Reg. (P&F) at 1299-1300, ¶¶ 344-348. A Federal court recently affirmed the Commission's decision to maintain the ISP exemption. Southwestern Bell Telephone Co. v. FCC, 153 F.3d 523 (8th Cir. 1998).