

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
GTE Telephone Operating Cos.)
GTOC Tariff No. 1)
GTOC Transmittal No. 1148)
)

CC Docket No. 98-79

COMMENTS OF CTSI, INC.

CTSI, Inc., formerly known as Commonwealth Telecom Services, Inc. ("CTSI"), by its undersigned counsel and pursuant to the Public Notice of December 4, 1998, respectfully submits the following comments in support of the Petitions for Reconsideration filed by MCI WorldCom, Inc. ("MCI WorldCom") and the National Association of Regulatory Utility Commissioners ("NARUC") of the *DSL Jurisdictional Order*¹ issued by the Commission in this proceeding.

CTSI is a competitive local exchange carrier ("CLEC"), currently operating in Pennsylvania and New York providing local exchange services over its own facilities and over Bell Atlantic's ("BA") unbundled loops. CTSI is also certificated to provide local exchange services in Maryland.

In its Petition for Reconsideration, MCI WorldCom urged the Commission to reverse its determination that GTE's DSL service, when used to connect end users to an Internet Service Provider ("ISP") in the same state, is an interstate service. Similarly, in a Petition for Clarification and/or Reconsideration, NARUC, among other things, requested the Commission to clarify that

¹ In the Matter of GTE Telephone Operating Cos., Memorandum Opinion and Order, CC Docket No. 98-79, FCC 98-292, released October 30, 1998 ("*DSL Jurisdictional Order*"). See Public Notice, DA 98-2502, released December 4, 1998.

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states may require tariffing of DSL services used to connect end-users to the Internet. NARUC also requested that the Commission reconsider the rationale proposed for allowing the GTE DSL tariff to go into effect.

CTSI agrees with these positions advanced by MCI WorldCom and NARUC and offers the following comments in support of those Petitions.

I. The Commission Incorrectly Applied Its Own Precedent In Its Jurisdictional Analysis

In its *Report to Congress*, the Commission affirmed its prior findings that Congress established information services and telecommunications services as mutually exclusive regulatory categories.² Although the Commission recognized that telecommunications are used to provide information services, the Commission concluded that “when an entity offers transmission incorporating the ‘capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,’ it does not offer telecommunications.”³ Instead, the Commission determined that for regulatory purposes, it offers an “information service” even though it uses telecommunications as its means to provide the service. Thus, for example, the Commission determined in the *Report to Congress* that information service providers would not be required to contribute to universal service funding even though information services can be comprised in part of telecommunications components.⁴

² Federal State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd 11501, ¶ 39 (1998) (“*Report to Congress*”).

³ *Id.*

⁴ *Report to Congress*, ¶¶ 123-130. See also *In the Matter of Federal-State Joint Board* (continued...)

Despite this conclusion in its *Report to Congress*, in the *DSL Jurisdictional Order*, the Commission stated that “it has never found that ‘telecommunications’ ends where ‘enhanced’ information services begins.”⁵ The Commission further stated that, “[we] analyze ISP traffic as a continuous transmission from the end user to a distant Internet site.” Because these statements in the *DSL Jurisdictional Order* directly conflict with the Commission’s past precedent stated in its *Report to Congress* and its past regulatory treatment of information services, the Commission should reconsider this analysis.

Indeed, contrary to the Commission’s statements in the *DSL Jurisdictional Order*, it is plain that the Commission has previously determined that for *regulatory* purposes telecommunications ends where information services begins. The Commission’s prior conclusion that under the 1996 Telecommunications Act (“1996 Act”), telecommunications and information services are mutually exclusive for regulatory purposes can only logically be interpreted to mean that when an information service begins, the telecommunications aspect of that service must have concluded.

Moreover, the Commission’s determination in the *Report to Congress* that information services and telecommunications are separate regulatory categories is consistent with its longstanding regulatory treatment of information services. The Commission has ruled pursuant to its “contamination doctrine,” that once a service has any information service components it becomes

⁴(...continued)
on *Universal Service*, Report to Congress, CC Docket No. 96-45, 12 FCC Rcd 8776, 9180 (1997)(“*Universal Service Order*”)

⁵ *DSL Jurisdictional Order*, ¶ 20.

exclusively an information service for regulatory purposes.⁶ The Commission applied that doctrine in its *Report to Congress* when it explained that the telecommunications components of Internet access services do not under the Act have any “legal status” separate from that of the information service.⁷

In the *DSL Jurisdictional Order*, the Commission has seemed to abandon that longstanding policy without providing any rationale for the change. The Commission only cites a footnote from one of the Commission’s ONA orders that states that “an otherwise interstate basic service ... does not lose its character as such simply because it is being used as a component in the provision of a[n enhanced] service that is not subject to Title II.”⁸ The ONA decisions, however, are distinguishable from the DSL services at issue here. In the ONA decision the Commission cites, the BOCs were arguing that their monopoly provision of *telecommunications services* to information service providers should be deregulated because information services are not regulated.⁹ Indeed, the BOCs were attempting to escape regulation of services that were plainly telecommunications services. By prohibiting the BOCs from escaping regulation, however, the Commission did not overturn its policy

⁶ As stated by the Commission: “[u]nder the ‘contamination theory’ developed in the course of the *Computer II* regulatory regime, [value added networks] that offer enhanced protocol processing services in conjunction with basic transmission services are treated as unregulated enhanced service providers. The enhanced component of their offerings ‘contaminates’ the basic component, and the entire offering is therefore considered to be enhanced.” *Computer III Phase II Recon. Order*, 3 FCC Rcd at 1153, n. 23.

⁷ *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, CC Docket No. 96-45, FCC 98-67, released April 10, 1998, ¶ 79 (“Report to Congress”).

⁸ DSL Jurisdictional Order, ¶ 20 citing Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1, 141, n. 617 (1988).

⁹ *Id.*

that an information service provided by an information service provider will continue to be wholly non-regulated even though it is comprised in part of telecommunications service components. In fact, in that same Order, the Commission stated that the addition of enhanced service elements to a basic service “neither changes the nature of the underlying basic service *when offered by a common carrier* nor alters the carrier’s tariffing obligations.”(emphasis added).¹⁰ Read in context, the Commission was simply stating that the basic nature of a regulated carrier’s offering does not change or become unregulated as far as the *common carrier* is concerned just because an information service provider adds enhanced service elements to it as part of its offer of information service to the public. That determination does not impact the Commission’s prior rulings that the service offered by the information service provider is considered to be exclusively an information service, and therefore, unregulated.

Accordingly, the Commission erred in the *DSL Jurisdictional Order* to the extent it concluded that for regulatory purposes under the 1996 Act, telecommunications does not end where information service begins. On reconsideration, the Commission should instead reiterate its determinations in the *Report to Congress* and its long standing policy that provides that because information services and telecommunications are treated separately for regulatory purposes, telecommunications does end where information service begins.

¹⁰ 4 FCC Rcd 1, 141, ¶ 274.

II. The Commission Should Ensure That Its Jurisdictional Analysis is Consistent With Its *Report to Congress*

CTSI suggests that if the Commission intends to assert jurisdiction over GTE's DSL service, it can do so while still adhering to its past precedent that the regulatory treatment of telecommunications and information services differs. The Commission should simply revise its jurisdictional analysis to clarify that the Commission does not need to determine that the telecommunications continues past the ISP in order to exercise jurisdiction over GTE's DSL service. The Commission has jurisdiction under Title I, which governs interstate communications by wire, because it encompasses both telecommunications and information services.¹¹ Title I grants the Commission jurisdiction over a communication to a distant Internet site because it constitutes an interstate communication by wire. Consistent with its prior analysis in the *Report to Congress*, the Commission should then determine that this interstate communication by wire is comprised of two separate components for regulatory purposes--an information service and telecommunications component--of which the telecommunications component terminates at the ISP. This approach would permit the Commission to retain jurisdiction over GTE's DSL service, but would be consistent with its prior determinations that information services and telecommunications are mutually exclusive regulatory categories under the 1996 Act.

If the Commission, however, continues to assert jurisdiction on an end-to-end analysis without recognizing the distinction between information services and telecommunications services, it should clarify that its determination that telecommunications extends past the information service is only for *jurisdictional* purposes. Indeed, the Commission should clarify that for *regulatory*

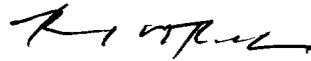
¹¹ See 47 U.S.C. §§ 153(22) and (53).

purposes under the 1996 Act, information services and telecommunications services remain mutually exclusive categories. The Commission should state that for *regulatory* purposes under the 1996 Act, the telecommunications ends where the information service begins notwithstanding that combined the service may be *jurisdictionally* interstate.

IV. CONCLUSION

The Commission should reconsider the jurisdictional analysis applied in the *DSL Jurisdictional Order*. The Commission's Order failed to apply past precedent in determining that telecommunications continues through the information service. Instead, the Commission should conclude, as it has before, that information and telecommunications services are distinct for regulatory purposes.

Respectfully submitted,



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Dated: January 5, 1999

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CERTIFICATE OF SERVICE

I, Pamela S. Arluk, hereby certify that the foregoing COMMENTS OF CTSI, INC. ON the PETITIONS FOR RECONSIDERATION was served on this 5th day of January, 1999 upon the following persons by hand.

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