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

In the Matter of)	
)	
GTE Telephone Operating Companies)	CC Docket No. 98-79
GTOC Tariff FCC No. 1)	
GTOC Transmittal No. 1148)	
)	

**OPPOSITION OF BELL ATLANTIC¹ TO PETITIONS FOR
RECONSIDERATION AND CLARIFICATION**

The petitions filed by MCI WorldCom and the National Association of Regulatory Utility Commissioners ("NARUC") provide no new information or arguments that warrant reconsideration of the Commission's Order approving GTE's ADSL tariff. In fact, MCI WorldCom's principal arguments are based on mischaracterizations of both the Order and a key Commission precedent. The petitions should be denied.

MCI WorldCom primarily claims that the Commission's finding that a communication between the end user and the Internet should be treated as a single call is inconsistent with precedent. MCI WorldCom at 2-8. Its argument fails for several reasons:

First, MCI WorldCom mischaracterizes one of the findings in the Order. MCI WorldCom claims that the "one-call" finding somehow means that the Internet service provider's ("ISP's") information service would become a telecommunications

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

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service. *Id.* at 2-3. It does not. In fact, the Commission based its finding that calls into the Internet are jurisdictionally interstate not on the nature of the entity that carries the call but on “the totality of the communication.” Order at ¶ 20. Whether the end-to-end communication is carried in whole or in part by a common carrier, an information service provider, private system, or CPE, it is the end-to-end nature of the transmission that determines jurisdiction. Here, the Commission correctly found that that ISP traffic does not end at the Internet Service Provider’s point of presence but continues through to the distant website, and is part of “a continuous transmission from the end user to a distant Internet site.” *Id.*

The fact that the jurisdictional nature of Internet traffic is determined by the end-to-end communication does not, however, make the ISP a telecommunications provider, as MCI WorldCom claims (at 3). On the contrary, this fact alone no more makes an ISP a telecommunications provider than it makes the owner of a hotel PBX a telecommunications provider just because it patches a guest’s call through to an interstate line to place a long distance call. *See United States v. AT&T*, 57 F.Supp. 451, 453-55 (S.D.N.Y. 1944). Nor does a voice mail platform that stores a call for later retrieval or delivery suddenly become a telecommunications service just because the end-to-end nature of the call that is stored and retrieved is interstate. *See Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corp.*, 7 FCC Rcd 1619 (1992) (“MemoryCall”). On the contrary, in all of these cases, the end-to-end communication is jurisdictionally interstate, not two separate calls, but that does not convert CPE or information service providers along the route of communications into telecommunications providers.

Second, MCI WorldCom claims that the MemoryCall case holds that a call to a voice mail platform to retrieve messages is treated as intrastate if the call to retrieve messages is placed from the same state as the voice messaging platform. MCI WorldCom at 7. There is no such holding in that case. In fact, MemoryCall holds that a voice mail service involves calls placed from both in-state and out-of-state telephones and is therefore a mixed-use service. Such a service is jurisdictionally interstate where the two portions are practically inseverable, regardless of whether the voice mail platform and the recipient of the calls are in the same or different states. The Commission further found that its jurisdiction,

does not end at the local switch but continues to the ultimate termination of the call. ‘The key to jurisdiction is the nature of the communication itself rather than the physical location of the technology.’

MemoryCall at ¶ 12, citing *New York Telephone Co. v. FCC*, 631 F.2d 1059, 1066 (2d Cir. 1980). The “ultimate termination” of a call stored in a voice mail platform is the called party, not the voice mail platform, and, as the Commission found, the physical location of that platform has no effect on the jurisdiction over that call.

Nor does anything in MemoryCall suggest that the Commission needs to examine every customer’s traffic pattern to determine if that customer receives any interstate calls, as MCI WorldCom appears to suggest it should. Under its argument, the ADSL service of any individual customer would be jurisdictionally intrastate during any month in which that customer accesses primarily in-state websites but interstate in those months in which the customer accesses interstate sites. *See* MCI WorldCom at 9-10. Besides the impossibility of tracking that usage, such a result makes no sense. Instead, as in MemoryCall, if the service as a whole involves mixed interstate and intrastate traffic,

and that traffic is inseverable, as is the case here, the service is properly treated as interstate in nature.

Third, apparently recognizing the weakness of its Internet argument, MCI WorldCom further contends that GTE's ADSL service has uses other than Internet access, some of which are interstate. Therefore, MCI WorldCom says, the Commission can decide that ADSL is properly tariffed at the federal level without addressing the nature of Internet access. MCI WorldCom at 8-10. MCI WorldCom simply repeats arguments it (and other parties) previously made on GTE's direct case. The Commission, however, recognized that the primary use of this ADSL service will be to connect to the Internet, Order at ¶ 19, and its analysis, logically, took that use into account.

Similarly, the Commission should deny NARUC's request to disclaim the rationale in the Order, because it "suggests treatment of enhanced service providers as common carriers as opposed to end-users." NARUC at 8. As discussed above, the Order in no way finds that ISPs are common carriers, merely that the end-to-end nature of the communication dictates the jurisdiction over that communication. This finding does not change the fact that enhanced services are unregulated, non-common carrier services under the rules. *See* 47 C.F.R. § 64.702(a) ("Enhanced services are not regulated under title II of the Act.") Nor does it repeal the long-standing "enhanced service provider exemption," under which such ISPs are treated as end users solely for the purpose of the interstate access charge system and may therefore subscribe to state-tariffed services to meet their interstate access needs. *See* Order at ¶ 21.

Likewise, the Commission should deny NARUC's claim that federal tariffing of ADSL does not preclude concomitant state tariffing of the same service when

used to connect through Internet Service Providers to the Internet. NARUC at 2-3. The Commission's finding that communication with the Internet is jurisdictionally interstate is conclusive and, under the Act, preempts state authority over such communication. *See* 47 U.S.C. § 152(a) (giving this Commission exclusive jurisdiction over "all interstate and foreign communication"). As the Commission recognizes, if a local carrier offers an ADSL service that is intrastate in nature, such as to connect to an intrastate corporate local area network (and not to the Internet), that tariff should be tariffed at the state level, but that is not the issue before the Commission here. *See* Order at ¶ 27.

NARUC also addresses certain separations issues relating to the ADSL tariff, claiming that some of the costs of the loop facilities should be shifted to the interstate jurisdiction and recovered in interstate rates. NARUC at 3-7. Rate issues were not designated for investigation and, in any event, the separations treatment of dual-use facilities is unrelated to the lawfulness of GTE's tariff. To the extent the Commission chooses to address any of these issues, however, it should find that the provision of ADSL has no effect on the allocation of the costs of the loop facilities. These costs are fully recovered from other services that are provided over that facility, and there is no justification for imputing the costs to ADSL as well. The Commission previously addressed just this issue when NARUC asked the Commission to examine the separations impact of the use of the local loop to transmit video dialtone services. At that time, the Commission found the existing procedures adequate to capture the costs appropriate to each jurisdiction. *Telephone Company-Cable Television Cross-Ownership Rules*, 10 FCC Rcd 244, ¶¶ 186-87 (1994). When Bell Atlantic proposed to use ADSL technology to provide video dialtone service over local loop facilities, the Commission found

“reasonable Bell Atlantic’s argument that the routing involved with ADSL technology is not equivalent to traditional telephone switching and that its costs can be recovered from other charges.” *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). There is likewise no reason to change the separations treatment of the facilities used to provide ADSL to impute loop costs to that service.

Accordingly, the petitions should be denied.

Respectfully submitted,



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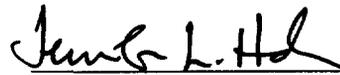
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January 5, 1999

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of January, 1999, a copy of the foregoing "Opposition of Bell Atlantic to Petitions for Reconsideration and Clarification" was sent by first class mail, postage prepaid, to the parties on the attached list.



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* Via hand delivery.

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