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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

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

OPPOSITION

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BELLSOUTH TELECOMMUNICATIONS, INC.

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OPPOSITION

BellSouth Corporation and BellSouth Telecommunications Inc. ("BellSouth") hereby submit their opposition to the Petitions For Reconsideration filed by MCI WorldCom Inc. ("MCI WorldCom") and the National Association of Regulatory Utility Commissioners ("NARUC") regarding the Commission's October 30, 1998 Order ("*GTE Order*") in the above referenced proceeding.[1]

I. INTRODUCTION AND SUMMARY

The *GTE Order* concluded the Commission's investigation of GTE's DSL Solutions-ADSL Service tariff ("ADSL"). The initial and primary use of GTE's ADSL offering is to provide Internet service providers ("ISPs") a means by which to establish a high speed connection to the Internet for their subscribers. In its *GTE Order*, the Commission determined that GTE had properly filed its ADSL offering in the interstate jurisdiction. The Commission found that the Communications Act vests it with exclusive jurisdiction over all interstate and

[1] *In the Matter of GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, CC Docket No. 98-79, *Memorandum Opinion and Order*, FCC 98-292, released October 30, 1998 ("*GTE Order*").

foreign communication by wire.[2] As the Commission explained, "the communications at issue here do not terminate at the ISP's local server,...but continue to the ultimate destination or destinations, very often at a distant Internet website accessed by the end user."[3] The Commission recognized that a single Internet communication could involve websites that reside on servers in various states or foreign countries and concluded that more than a *de minimis* amount of interstate communications would be involved in Internet traffic.[4]

MCI WorldCom and NARUC seek reconsideration of the Commission's jurisdictional determinations. As discussed below, the petitioners fail to present any credible, new arguments that would warrant reconsideration of the *GTE Order*. It is abundantly clear that petitioners would prefer the Commission avoid its statutory duty to define and exercise its jurisdiction over interstate communications. The outcome favored by the petitioners is legally dubious and most certainly bad public policy.

II. MCI WORLDCOM PETITION

MCI WorldCom urges the Commission to reconsider its determination that an Internet communication extends through the ISP location to that of the ISP's subscriber.[5] The premise of MCI WorldCom's argument is that the Commission's jurisdictional analysis treats ISPs as providers of telecommunications service. This premise, however, is totally manufactured by

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2 *GTE Order* ¶ 16.

3 *Id.* ¶ 19.

4 *Id.* ¶ 26.

5 MCI WorldCom, pp. 2-5.

MCI WorldCom. There is nothing in the *GTE Order* that states, implies or otherwise suggests that an ISP is a provider of telecommunications service.

The jurisdictional analysis employed by the Commission was to determine the jurisdictional nature of the end-to-end "communications" involved in an Internet transmission.[6] Contrary to MCI WorldCom's apparent belief, the statutory framework of the Communications Act is not limited to telecommunications services and information services. To the contrary, the Commission has jurisdiction over all interstate communications[7] and the Act defines communications very broadly.[8] Under the Act's definition, the term communication is a transmission by wire or radio of any kind between a point of origin and reception that includes all of the "instrumentalities, facilities, apparatus and services" that are incidental to such transmission. For jurisdictional purposes, the Commission properly identified the points of origin and reception of the transmission. The fact that both telecommunications services and information services are incidental to the communication is irrelevant to the jurisdictional analysis.

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[6] MCI WorldCom consistently mischaracterizes the Commission's determination in the *GTE Order*. For example, citing paragraph 19 of the *GTE Order*, MCI WorldCom claims that the Commission found that telecommunications continues through the ISP location to the distant website. The fact of the matter is that the Commission concluded "that the communications at issue here does not terminate at the ISP's local server...." (emphasis added) MCI WorldCom's constant transformation of the term "communications" to "telecommunications" is essential to the fabrication of its argument that the Commission's *GTE Order* treats ISPs as providers of telecommunications.

[7] *See* 47 U.S.C. § 152(a).

[8] The Act defines wire communication as "the transmission of writing, signs, signals, pictures and sounds of all kinds by aid of wire, cable, or other like connection between points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." 47 U.S.C. § 153(51). The Act contains an equally broad definition for radio communications. *See* 47 U.S.C. § 153(34)(A).

Nor is there anything in the Commission's jurisdictional analysis that converts ISPs into providers of telecommunications service. As the Commission made clear, "[u]nder the definition of information service added by the 1996 Act, an information service, while not a telecommunications service itself, is provided via telecommunications."[9] Referring to its *Universal Service Report to Congress*,[10] the Commission further explained that "because information services are offered via telecommunications, they necessarily require a transmission component in order for users to access information." The fact that multiple carriers provide parts of the transmission component used by an information service provider does not alter the fundamental jurisdictional question: what are the points of origin and reception of the transmission? The Commission, based on a thorough record which is not impugned by MCI WorldCom's petition, found that Internet transmissions were continuous from an ISP's subscriber to a distant Internet site.[11] Having determined the points of origin and reception involve more than *de minimis* interstate transmissions, the Commission recognized that the underlying telecommunications services that are used to provide the information service are jurisdictionally interstate.[12] This determination is nothing more than the application of an end-

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9 *GTE Order* ¶ 20.

10 *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11830 (1998).

11 *GTE Order* ¶ 20.

12 Nor is there anything special required because an information service is involved. The Commission, quoting its order reviewing open network architecture plans, stated: "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." *GTE Order* ¶ 20. GTE's ADSL offering is the basic service that is used in the continuous Internet transmission between the end user and a distant Internet site. Since the Internet transmission is interstate, the basic service used in providing the interstate information service is also jurisdictionally interstate.

to-end jurisdictional analysis that the Commission and courts have consistently followed and is called for under the Communications Act.[13]

No more persuasive is MCI WorldCom's contention that the *BellSouth MemoryCall Order*[14] supports its position that the ISP location is the relevant end-point for jurisdictional purposes.[15] MCI WorldCom argues that there was only one type of service, a telecommunications service, involved in the end-to-end communication in *BellSouth MemoryCall Order*. MCI WorldCom is wrong. There was an interstate call to an end user made using an interstate telecommunications service. The call, rather than completing to the end user, is forwarded to the voice mail platform. The voice mail service, an enhanced service, includes not only the voice mail platform but also incorporates a transmission component to enable the subscriber to direct its calls to the messaging service. In other words, the messaging service is offered via telecommunications. For jurisdictional purposes, the Commission in the *BellSouth MemoryCall Order,* analyzed the end-to-end communication, *i.e.*, the point of origin and reception that included telecommunications services and information services offered via telecommunications.

MCI WorldCom next argues that the *BellSouth MemoryCall Order* stands for the proposition that the telecommunication between an end user and an ISP can be jurisdictionally

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13 MCI WorldCom attempts to depict the Commission's end-to-end jurisdictional analysis as requiring the assumption that there is an ADSL communication that extends between the two end points or an end-to-end Internet access service between the two end points. MCI WorldCom's argument is feeble. As noted above, the end-to-end jurisdictional analysis applies to points of origin and reception of the communication and the communication may be comprised, among other things, of multiple services. *See* 47 U.S.C. 153(51).

14 *Petition for Emergency Relief and Declaratory Ruling Filed By BellSouth Corporation*, 7 FCC Rcd 1619 (1992) ("*BellSouth MemoryCall Order*").

15 MCI WorldCom, pp. 5-6.

intrastate, even where the ISP is providing an interstate information service.[16] MCI WorldCom's argument is only correct where the telecommunication between the end user and the ISP is not part of an interstate communication. Enhanced service providers may provide interstate information services and may also provide intrastate information services. The relevant question regarding the jurisdiction of the underlying basic service used to connect the end user to the enhanced service is point of origin and reception of the entire communication, which is the analysis that underlies the *BellSouth MemoryCall Order*. In the *BellSouth MemoryCall Order*, the enhanced service provider's location happened to be an end point in the communication. There is nothing in the *BellSouth MemoryCall Order* that stands for the proposition that an enhanced service provider location is always the end point of a communication as MCI WorldCom argues.[17] In the case of Internet communications, the Commission concluded in the

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[16] MCI WorldCom, pp. 6-8.

[17] Indeed, the Commission long ago rejected the jurisdictional argument presented by MCI WorldCom. First Data Resources, Inc. ("First Data") was a remote access data processing service vendor that served clients around the United States. First Data had been using intrastate intraLATA 800 Service that it obtained under Pacific Bell's intrastate tariff to carry traffic from its customers in Southern California to the First Data location in the same LATA. All of the traffic that originated and terminated on this link was routed through a concentrator in Los Angeles and carried to or from First Data's host computer in Omaha, Nebraska, over First Data's private network. The controversy arose when First Data sought to replace its intrastate intraLATA 800 service with interstate Feature Group B access service. Pacific Bell argued, much like the CLECs and state commissions are arguing here, that the Commission never intended interstate access tariff offerings to replace jurisdictionally intrastate services traditionally used to provide local connections between two intrastate customers. First Data disputed Pacific Bell's characterization of the communications as intrastate and contended that the Commission's access charge orders made clear that access services provided by the LECs and used to originate and terminate interstate communications are clear subjects of federal jurisdiction and regulation. The Common Carrier Bureau, acting on behalf of the Commission, determined that the connection between First Data's location in California and its California customers was interstate based on the end points of the communications—the location of First Data's customer and the location of First Data's host computer in Nebraska. The fact that all the communications transited through First Data's concentrator, which was located in the same state and same LATA as First Data's customers, did not alter the end points of the communication or the interstate nature of the communication. *In the Matter of Petition of First Data Resources,* (Footnote Continued)

GTE Order that the ISP location was not an end point of the communication. Thus, there is absolutely nothing in the *BellSouth MemoryCall Order* that is inconsistent with the Commission's determination in the *GTE Order*.

MCI WorldCom next argues that the Commission was incorrect in its statement that the issue of whether GTE's ADSL offering constituted an interstate access service involves determining how the Internet traffic fits within the Commission's regulatory framework.[18] The basis of MCI WorldCom's argument is that ADSL service may have other, non-Internet related uses. These potential other uses lead MCI WorldCom to conclude that all the Commission had to do was to determine that GTE's ADSL service is a transmission service that does not inherently belong to any one jurisdiction.

MCI WorldCom's naive argument conveniently overlooks the facts that surrounded the offering of ADSL service and that gave rise to the Commission's investigation in the first instance. The demand for ADSL service was then and is today from ISPs that use ADSL to connect their subscribers to the Internet. It is the ISP demand and use of the service that gave rise to the jurisdictional issue investigated by the Commission. In this context, the Commission had to, and properly did, address the jurisdiction of Internet traffic. The Commission could not, based on the facts before it, merely treat the jurisdictional question as a hypothetical exercise as MCI WorldCom now argues.

Inc. Regarding the Availability of Feature Group B Access Service to End Users, 1986 FCC LEXIS 3347 (CCB May 28, 1986).

[18] MCI WorldCom, pp. 8-9.

Finally, MCI WorldCom requests that the Commission reconsider its conclusion that more than a *de minimis* amount of Internet traffic is interstate.[19] MCI WorldCom offers absolutely no support for its request other than a speculative statement that for an individual end user it is possible that less than ten percent of such user's traffic is interstate. Reconsideration cannot be based on the conjecture of the petitioner. The record establishes that interstate use predominates Internet traffic and, further, that interstate and intrastate uses of the Internet are inseverable and cannot be measured. Indeed, not a single ISP suggested in this proceeding that it had the capability of identifying and tracking Internet usage on a jurisdictional basis. Accordingly, MCI WorldCom's petition should be denied.

III. NARUC PETITION

In its petition, NARUC requests that the Commission reconsider or clarify its *GTE Order* in three respects:

1. clarify that state commissions are not precluded from requiring intrastate tariffs of ADSL services designed to connect end-users to ISPs;

2. clarify that jurisdictional separations cost allocation processes for special access continue to apply until modified by a Joint Board and the Commission;

3. Reconsider its jurisdictional determination regarding Internet traffic or clarify that its determination is tentative.[20]

With respect to NARUC's first issue, NARUC explains that its concern is that the *GTE Order* may foreclose the intrastate filing of ADSL services using configurations identical to those filed with the Commission in interstate tariffs. There is nothing in the Commission's *GTE*

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[19] MCI WorldCom pp. 9-10.

[20] NARUC, p. 1.

Order that forecloses the filing of intrastate ADSL services, regardless of configuration, for the purposes of carrying intrastate traffic. The service configuration does not determine the jurisdictional nature of the traffic. It is the ultimate use of the service that affects jurisdiction. The *GTE Order* addressed the use of the ADSL service and found that the use of ADSL in connection with Internet traffic is jurisdictionally interstate. This conclusion has no impact on intrastate traffic or the subsequent development of intrastate applications for ADSL service. Nevertheless, if NARUC believes that a further clarification to this extent would be helpful, the Commission could accommodate NARUC's request.

NARUC next requests that the Commission clarify that existing Part 36 rules apply to the jurisdictional allocation of the facilities used to provide ADSL service. While NARUC's conclusion that existing separations procedures apply is correct, their assumptions regarding the classification and categorization of plant and investment are not on the same firm foundation. Because ADSL service provides a virtual private line connection between an end user and an ISP, such virtual connection does not mean that in every instance the facility used to provide the virtual connection is dedicated to ADSL service. Thus, for example, the loop facility that is used in providing BellSouth's ADSL service is a subscriber loop that is also used to provide local exchange service, it is not a dedicated private line loop as the NARUC petition attempts to characterize it. As BellSouth described its ADSL service, ADSL is an overlay service that can be provided over existing facilities that are used to provide other exchange and exchange access services.

NARUC is correct in its view that the virtual connection established by ADSL is not explicitly addressed in existing separations rules. To the extent that these rules need to be modified, NARUC is also correct that Commission in this proceeding is without the authority to

alter existing jurisdictional separations rules. Any such modifications must be made in accordance with the statutory requirement that calls for a federal-state Joint Board recommendation.[21]

Finally, the Commission should deny NARUC's suggestion that it disclaim its determination related to the jurisdiction of Internet related traffic or clarify that its determination is tentative. Contrary to NARUC's belief that the Commission had no obligation to rule on the jurisdiction of Internet traffic, as discussed above in connection with MCI WorldCom's petition, the issue was squarely raised in the tariff investigation and could not be avoided by the Commission.

No more availing is NARUC's claim that the interconnection appeal pending before the Supreme Court may affect the Commission's jurisdiction. NARUC is incorrect. The jurisdictional issue before the Supreme Court relates to the extent to which Sections 251 and 252 of the Communications Act confer jurisdiction upon the Commission over matters that under Section 152(b) would come under the jurisdiction of the states. The Commission's jurisdictional analysis in the *GTE Order* was based on its jurisdictional authority under Section 152(a) of the Act. The scope of the Commission's jurisdiction under Section 152(a) has been well established by the Courts and is not in question before the Supreme Court.

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[21] *See* 47 U.S.C. § 410(c).

For the reasons and to the extent discussed above, the Commission should deny the petitions for reconsideration filed by MCI WorldCom and NARUC.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this 5th day of January 1999 served the following parties to this action with a copy of the foregoing OPPOSITION by hand delivery or by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties listed below.

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