

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20054

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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

REPLY COMMENTS OF ACI CORP. ON  
PETITIONS FOR RECONSIDERATION AND/OR CLARIFICATION

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Dated: January 19, 1999

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REPLY COMMENTS OF ACI CORP. ON  
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ACI Corp. ("ACI"), by its attorneys, hereby submits these reply comments in the above-captioned proceeding. ACI believes that the Commission should clarify the analysis in its recent *GTE DSL Order*<sup>1</sup> to hold that digital subscriber line ("DSL") service is jurisdictionally interstate as a service, without relying on confusing and inappropriate notions of "end-to-end" service in the new environment of the Internet.

Many commenters in this proceeding continue to argue that the Commission's "end-to-end" jurisdictional analysis, traditionally applied to voice communications, is the proper construct to apply to GTE's proposed DSL service.<sup>2</sup> This historic construct cannot simply be ported to DSL and Internet services. As ACI has explained, "the 'end points' of communication become virtually irrelevant in the 'connectionless' medium of today's packet-switched based Internet technology."<sup>3</sup> Further, application of "end-to-end" analysis in this instance leads

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<sup>1</sup> *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, Memorandum Opinion and Order, CC Docket No. 98-79, FCC 98-292 (rel. Oct. 30, 1998) ("*GTE DSL Order*").

<sup>2</sup> Ameritech Opposition to Petitions for Reconsideration at 4-7; Opposition of Bell Atlantic to Petitions for Reconsideration and Clarification at 1-3, 4; Opposition of BellSouth Corporation at 3; GTE Opposition to Petitions for Reconsideration at 3; Pacific Bell Opposition to MCI WorldCom and NARUC Petitions for Reconsideration at 2; Opposition of US West, Inc. to Petitions of MCI WorldCom and NARUC at 2-8; Opposition Comments of the United States Telephone Association at 2.

<sup>3</sup> ACI Comments at 3. Indeed, the Commission has recognized that Internet communications "do[] not provide sufficient information to identify the routing of the call for jurisdictional purposes." FCC, *Digital Tornado: The Internet and Telecommunications Policy*, at 45, OPP Working Paper Series, No. 29 (March 1997) ("*Digital Tornado*").

inevitably to policy results that run counter to the Commission's entire regulatory regime for wire communications.<sup>4</sup> Contrary to the suggestions of Bell Atlantic<sup>5</sup> and BellSouth,<sup>6</sup> the Commission's conclusion that DSL service extends from the end user to "any distant website"<sup>7</sup> conflates GTE's DSL telecommunications service with an Internet Service Provider's ("ISP's") information service such that, *a fortiori*, GTE becomes an ISP or the ISP becomes a telephone company. (Conversely, if GTE is *not* an ISP, the connection to "any distant website" is irrelevant to jurisdictional classification of its point-to-point DSL service.) The Commission can avoid this perverse result by relying upon its settled special access regulatory regime to conclude that DSL falls within its exclusive jurisdiction if it meets the ten percent *de minimis* rule.<sup>8</sup>

This proceeding is also marked by a prodigious amount of discussion of the Commission's so-called *BellSouth MemoryCall* Order<sup>9</sup> regarding jurisdiction over voice mail. *BellSouth MemoryCall* stands only for the unremarkable proposition that the Communications Act of 1934<sup>10</sup> preempts states from regulating voice mail service, an enhanced service, because it stores messages from interstate calls. The Commission recognized that voice mail is an enhanced service separate from voice telephony, which "uses the same equipment and

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<sup>4</sup> See Comments of RCN Telecom Services, Inc. on Petitions for Reconsideration at 7 ("The Commission's decision to 'analyze ISP traffic as a continuous transmission from the end user to a distant Internet site' is an anachronistic approach that fails to reflect Internet communications while it needlessly complicates the issue of reciprocal compensation for dial-up traffic.").

<sup>5</sup> "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[.]" Bell Atlantic at 2.

<sup>6</sup> "The premise of MCI WorldCom's argument is that the Commission's jurisdictional analysis treats ISPs as providers of telecommunications service. . . . There is nothing in the GTE Order that states, implies or otherwise suggests that an ISP is a provider of telecommunications." BellSouth at 3.

<sup>7</sup> *GTE DSL Order* ¶ 19.

<sup>8</sup> 47 C.F.R. § 36.154.

<sup>9</sup> *Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation*, Memorandum Opinion and Order, 7 FCC Rcd. 1619 (1992).

<sup>10</sup> The Commission cited Section 153 the Communications Act, which gives the Commission exclusive jurisdiction over interstate wire communication for "transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including the instrumentalities, facilities, apparatus, and services (among other things, the receipt,

underlying basic services” but is subjected it to a different regulatory regime.<sup>11</sup> Nothing in *BellSouth MemoryCall*, however, requires the Commission to determine that, despite *Computer II*, telecommunications and information services have now become a single, seamless service that cannot be differentiated. Moreover, nothing in that Order requires the Commission to use its end-to-end analysis, which is helpful in the context of traditional telephony, to an altogether new service that uses wireline facilities for Internet communications.

Application of the traditional end-to-end jurisdictional analysis to DSL inevitably leads to insoluble and unnecessary argumentation because the nature of Internet traffic that DSL carries is wholly unlike voice telephony. Internet traffic is unlike circuit-switched voice telephony because it is a packet-switched communication that is prohibitively difficult, if not impossible, to trace as it routes through the network. No single network provides end-to-end, or even POP-to-POP, transport of Internet data.<sup>12</sup> It is the phenomenon of packet-switching that makes the Internet not a definable network but a “cloud” of information services that has no origination or termination. Thus, the Commission’s Office of Plans and Policy has concluded that “simply mapping the rules that apply to other services onto the Internet will produce outcomes that are confusing, perverse, or worse.”<sup>13</sup>

As the Commission has concluded from GTE’s amended DSL tariff,<sup>14</sup> DSL will carry primarily Internet traffic between end users and ISP POPs. Therefore, DSL special access services may be presumed to carry the requisite interstate traffic under the Commission’s ten

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forwarding, and delivery of communications) incidental to such transmission.” 7 FCC Rcd. at 1621 (citing 47 U.S.C. § 153(a)).

<sup>11</sup> *Id.* at 1623.

<sup>12</sup> Joint Opposition of Netscape Communications Corporation, Voxware, Inc. and InSoft, Inc., *The Provision of Interstate and International Interexchange Telecommunications Service Via The “Internet” By Non-Tariffed, Uncertificated Entities*, RM No. 8775, at 16 (filed May 8, 1996).

<sup>13</sup> *Digital Tornado* at 1.

<sup>14</sup> *GTE DSL Order* ¶¶ 8-9.

percent rule.<sup>15</sup> Commenters arguing the contrary, including KMC Telecom<sup>16</sup> and Hyperion Communications,<sup>17</sup> have no factual basis for requiring the Commission to reverse this conclusion. Hyperion's claim that it has "commissioned a survey of Internet usage"<sup>18</sup> and found that less than ten percent of Internet traffic is interstate deserves no credence.<sup>19</sup> Even if Hyperion's survey could determine which servers processed the information that made up an Internet communication, no technology could trace the exact paths taken by its individual packets of code. For, as Hyperion admits, "tiny bursts of information go beyond the ISP sporadically throughout the session, and additional bursts are sent back just as sporadically."<sup>20</sup> Because Internet packet switching involves no single connection between a client and server, there is simply no way to measure and jurisdictionally classify Internet traffic.

Finally, the Commission's conclusion that special access is within its exclusive jurisdiction precludes a conclusion that, as some commenters have suggested, states may require DSL carriers to file intrastate service tariffs.<sup>21</sup> Provided that carriers can, as GTE promises,<sup>22</sup> certify to the Commission that ten percent of their DSL traffic is interstate, the Commission retains exclusive tariffing authority over that service as a matter of statutory mandate. If states were to exercise tariffing authority over a service already deemed interstate, Section 2 of the

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<sup>15</sup> *Id.* ¶ 23.

<sup>16</sup> "In essence, the Commission merely assumed that more than 10 percent of DSL traffic would be jurisdictionally interstate rather than present any foundation for its ten percent conclusion." KMC Telecom at 9.

<sup>17</sup> Hyperion at 2-3.

<sup>18</sup> *Id.* at 2.

<sup>19</sup> KMC Telecom also insists erroneously that "[i]n fact, it is probable, or at least possible, that only a small percentage of usage of DSL to connect users to the Internet would be jurisdictionally interstate under the jurisdictional end-to-end analysis of the DSL Jurisdictional Order because of 'caching' and 'mirroring' of web sites on local servers." KMC Telecom at 9. Technological advances in caching and mirroring cannot negate the fact that, while Internet information can be stored on a local server, the path that the information takes between the server and the end user is not via a single network circuit connection but literally thousands of bits of information transmitted over any available piece of the existing interstate telephone network.

<sup>20</sup> Hyperion at 3 n.6.

<sup>21</sup> Response by California to Petitions for Reconsideration at 5-6; Comments of the Minnesota Department of Public Service at 1-3; Comments of Washington Utilities and Transportation Commission in Support of Petitions to Reconsider and Clarify at 6-7.

Communications Act<sup>23</sup> would be meaningless and the Commission would be a superfluous agency. The concern of many commenters that state commissions must retain authority to enforce reciprocal compensation rules for local telephone “dial-up” traffic, although legitimate, is not implicated by dedicated DSL services and is therefore irrelevant here.<sup>24</sup> The Commission should therefore clarify that mixed traffic DSL carrying ten percent or more interstate traffic remains within its exclusive authority as to all regulatory purposes. Any DSL service that does not meet that threshold, of course, cedes to state jurisdiction under the Commission’s well-settled special access rules.

In sum, the Commission’s *GTE DSL Order* can stand squarely on its first conclusion that DSL is a form of special access without engaging in the complex, artificial application of end-to-end analysis upon a technology that cannot support it. As the Commission grapples with the novel issues presented by advanced services, especially Internet access service, such economy of decision will minimize regulatory involvement, greatly assisting the Commission in continuing to support the development of ever-evolving new technology.

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<sup>22</sup> GTE Opposition to Petitions for Reconsideration at 8.

<sup>23</sup> 47 U.S.C. § 152.

<sup>24</sup> The Commission’s conclusion that dial-up Internet service from an end user to an ISP POP is an intrastate local call does not apply to DSL’s connectionless, “always-on” service configuration. See *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, ¶ 42 n.73 (rel. Aug. 7, 1998).

CONCLUSION

For these reasons, the Commission should grant the petitions of MCI WorldCom and NARUC and clarify its analysis in the *GTE DSL Order* to hold that GTE's DSL service is within its exclusive interstate jurisdiction solely as a mixed-use special access service.

Respectfully submitted,

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