

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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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 No. 1)
GTOC Transmittal No. 1148)
)

MCI WORLDCOM REPLY COMMENTS

I. Introduction

Pursuant to the Commission's December 4, 1998 Public Notice,¹ MCI WorldCom, Inc. (MCI WorldCom) hereby submits its reply to comments on MCI WorldCom's petition for reconsideration of the ADSL Tariff Order.² In its petition for reconsideration, MCI WorldCom requested that the Commission reconsider its conclusion that "the communications at issue here do not terminate at the ISP's local server, as some competitive LECs and ISPs contend, but continue to the ultimate destination or destinations, very often at a distant Internet website accessed by the end users."³

MCI WorldCom's petition for reconsideration has received broad support from state commissions and from competitive local exchange carriers (CLECs). These parties agree

¹Public Notice, DA 98-2502, released December 4, 1998.

²In the Matter of GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148, Memorandum Opinion and Order, CC Docket No. 98-79 (released October 30, 1998) (ADSL Tariff Order).

³ADSL Tariff Order at ¶19.

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that the ADSL Tariff Order's jurisdictional analysis is inconsistent with the statutory definitions of "information service" and "telecommunications," as the Commission has interpreted those terms in the Universal Service Report to Congress⁴ and in orders adopted since the passage of the 1996 Act.

Several commenters also note that the Commission's order rests in large part on assumptions about the nature of Internet-related traffic on ADSL services, and that these assumptions are not supported by any record evidence. KMC, for example, points out that the Commission's finding that Internet-related traffic on ADSL services is predominantly interstate relied "on sweeping generalizations about the world-wide nature of the Internet."⁵ Hyperion, similarly, notes that there is a "complete absence of record support for the Commission's factual assumptions"⁶

Furthermore, the separations issue raised by NARUC in its petition for clarification demonstrates that the Commission's decision to address Internet-related jurisdictional issues in this proceeding -- when it did not need to -- has had "broad and even unintended implications."⁷ While the ILECs contend that separations issues are beyond the scope of this proceeding,⁸ or argue that ADSL-equipped loops should be treated as common lines for

⁴Federal State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd 11501 (1998) (Universal Service Report to Congress).

⁵KMC Comments at 9.

⁶Hyperion Comments at 2.

⁷ADSL Tariff Order, Separate Statement of Commissioners Harold Furchtgott-Roth and Gloria Tristani.

⁸See, e.g., Pacific Bell Comments at 8.

separations purposes,⁹ the Commission's use of the "ten percent rule" in the ADSL Tariff Order indicates a Commission finding that ADSL-equipped loops are subject to Section 36.154(b) of the separations rules.¹⁰ Separations issues were, however, never addressed in this proceeding.

MCI WorldCom respectfully requests that the Commission reconsider the Internet-related jurisdictional analysis in the ADSL Tariff Order. As MCI WorldCom and other parties have pointed out on numerous occasions,¹¹ the Internet-related jurisdictional analysis is not necessary to answer the question designated for investigation: whether GTE's ADSL service is properly tariffed at the federal or state level. By addressing Internet-related jurisdictional issues in this proceeding, the Commission has contradicted the core findings of the Universal Service Report to Congress, has made unsupported statements concerning the nature of Internet traffic, and has opened up complex separations issues.

⁹See, e.g., Bell Atlantic Comments at 5.

¹⁰The "ten percent rule," upon which the Commission relies in claiming jurisdiction over GTE's ADSL service, is fundamentally a separations rule. See 47 C.F.R. §36.154(a); In the Matter of MTS and WATS Market Structure; Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, Decision and Order, 4 FCC Rcd 5660 (1989).

¹¹See, e.g., ACI Comments at 3.

II. The ADSL Order's Analysis is Inconsistent with the Statutory Definitions of Information Service and Telecommunications

In its petition for reconsideration, MCI WorldCom noted that the ADSL Tariff Order's jurisdictional analysis assumes that there is end to end telecommunications between the end user and the distant website, with one portion provided by GTE and the other portion provided by the ISP.¹² As MCI WorldCom discussed, this approach effectively treats the ISP as if it is a provider of telecommunications, and is therefore completely inconsistent with the statutory definition of "information service."¹³

In their oppositions to MCI WorldCom's petition for reconsideration, the ILECs argue that the Commission's finding that there is "continuous end to end transmission" between the end user and a distant website follows from the fact that information services are built on "an underlying transmission component."¹⁴ In the ILECs' view, the "continuous end to end transmission" then consists of the ADSL service and the transmission component of the information service, with the ISP POP "represent[ing] an intermediate switching point through which communications between subscribers and the Internet must pass."¹⁵

The Commission and the ILECs attach undue weight to the fact that information services "use" telecommunications. Because the ISP does not simply transport data via

¹²MCI WorldCom petition for reconsideration at 3.

¹³Id.

¹⁴Ameritech Opposition at 5.

¹⁵Id. at 6.

telecommunications, but is engaged in “generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information” via telecommunications, the ISP POP is not simply an intermediate switching point in a continuous end to end transmission. The likelihood that an ISP may have cached in a local server the information requested by the end user is only the most obvious manifestation of the fact that the ISP’s status as an information service provider is relevant to the jurisdictional analysis. As the Commission pointed out in the Universal Service Report to Congress, ISPs also store information, make information available, change the form or content of information, and store and forward email messages.¹⁶ Thus, as the Washington Utilities and Transportation Commission discusses, “[t]he fact that [the Internet service] involves interstate telecommunications does not mean that [the ADSL service] is inherently part of an uninterrupted [interstate] communication”¹⁷

The Commission apparently believes that one of the services provided by ISPs -- access to data stored on distant websites -- involves only transparent “continuous end to end transmission.”¹⁸ Not only is there no record support for such a finding, but, contrary to the Universal Service Report to Congress, the Commission’s approach effectively treats the ISP as if it is providing telecommunications to its subscribers: “transmi[tting], between or among points specified by the user (in this case, the subscriber and the distant website) of information of the user’s choosing, without change in the form or content of the

¹⁶Universal Service Report to Congress at ¶¶76-78.

¹⁷WUTC Comments at 4.

¹⁸ADSL Tariff Order at ¶20.

information as sent and received.”¹⁹ By singling out one of the services provided by the ISP and treating it as telecommunications, the Commission has contradicted its statement in the Universal Service Report to Congress that “it would be incorrect to conclude that Internet access providers offer subscribers separate services -- electronic mail, Web browsing, and others -- that should be deemed to have separate legal status.”²⁰

In any event, the Commission apparently misunderstands how information is retrieved by ISPs. First, the ISP’s customer must establish a connection with the ISP. One of the benefits of ADSL technology is that the ISP may appear “always on” to the end user. After making the connection, the end user requests information. The end user may or may not specify a location of that information and the ISP may or may not retrieve it from the location specified by the end user. In any event, the retrieval process is separate from the request. There is neither a direct connection or a “continuous” connection between the end user and the assumed distant source of the requested information. Rather, the ISP retrieves the information by periodically filling a buffer and retransmitting the information as the end user’s computer has the ability to accept additional information. It would be grossly inefficient to establish and maintain a “continuous” link between the end user and any distant data source. Further, it would eliminate the significant value added by the ISP of caching or otherwise redirecting inquiries based on information unknown to the end user.

The reality is that ISPs subscribe to telephone services and use those services plus other resources to create a new product. The location of the data that an ISP retrieves in

¹⁹47 U.S.C. 153(43).

²⁰Universal Service Report to Congress at ¶79.

response to its customer's request is irrelevant to the customer and irrelevant to the jurisdictional classification of the telecommunications services to which the ISP or its customer subscribes.

The Commission should reconsider the jurisdictional analysis in the ADSL Tariff Order because its treatment of access to data stored on distant websites as telecommunications is contrary to the Universal Service Report to Congress. The Universal Service Report to Congress makes clear that “when an entity [such as an ISP] offers subscribers the capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, it does not provide telecommunications, it is using telecommunications.”²¹

At a minimum, the Commission should clarify its statement that it “disagree[s] with ALTS's suggestion that the ‘telecommunications’ service ends where the ‘information service’ begins.”²² It should make clear that it is not suggesting that ISPs are providing a telecommunications service -- “offering . . . telecommunications for a fee directly to the public” -- but is instead noting that ISPs use telecommunications services in offering information services.

²¹Id. at ¶41 (emphasis added).

²²ADSL Tariff Order at ¶26.

III. The Commission Should Clarify that xDSL Services are Not Inherently Interstate Services and are not Inherently Access Services

In its Petition for Reconsideration, MCI WorldCom asked the Commission to clarify that ADSL services (and other xDSL services) are not inherently interstate services or inherently access services, and that the classification will depend on the use to which xDSL is put.²³ This request received broad support from state commissions and CLECs, and is not opposed by the ILECs. The Commission should grant MCI WorldCom's request for clarification.

MCI WorldCom also asked the Commission to reconsider its blanket conclusion that -- when ADSL is used to connect to the Internet -- more than ten percent of the traffic is interstate.²⁴ MCI WorldCom noted that, even if it is true that more than ten percent of some end users' traffic is interstate, the record in this proceeding does not support a conclusion that this is the case for all end users. Again, this request received broad support from state regulators and CLECs. The ILECs, however, argue that there is no evidence that less than ten percent of any end user's Internet-related ADSL traffic is interstate.

Even if the Commission does not reconsider its conclusion that access to data on a distant website is interstate, it is entirely reasonable to assume that the percentage of Internet-related xDSL traffic that is interstate will vary from user to user and from ISP to ISP. This percentage will depend on the mix of ISP services used by the end user and on the configuration of the ISP's service. For example, some users may use their ISP's

²³MCI WorldCom Petition for Reconsideration at 9.

²⁴Id. at 9-10.

services mainly to access local websites. Others may use high-speed xDSL links primarily to update “home pages” that are “hosted” on their ISP’s computers -- a use of xDSL that would, according to the Commission’s jurisdictional analysis, be intrastate if the ISP’s computers were in the same state as the end user. Similarly, aspects of an ISP’s configuration -- such as the widespread use of caching -- may result in Internet-related xDSL traffic patterns that are predominantly intrastate. More generally, the Commission cannot predict the service mixes and configurations that will be used in the future.

There is, furthermore, no record evidence to support the Commission’s conclusion that Internet-related xDSL traffic is, for all users, predominantly interstate. As several parties point out in their comments, the record is devoid of any studies of Internet-related traffic patterns on xDSL services.²⁵ Accordingly, the Commission should reconsider its blanket conclusion that more than ten percent of Internet-related traffic on xDSL services is interstate.

The blanket conclusion that more than ten percent of Internet-related xDSL usage is interstate is not necessary to the Commission’s jurisdictional analysis. The Commission could simply state that, consistent with the treatment of other special access services, customers should order xDSL services from the interstate tariff in cases where more than ten percent of the traffic -- Internet-related or otherwise -- is interstate.

²⁵Hyperion Comments at 2; KMC Comments at 9; California Comments at 5.

IV. Conclusion

For the reasons stated herein, the Commission should reconsider its conclusion that “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.” The Commission should also clarify that xDSL services are not inherently interstate access services and reconsider its blanket conclusion that more than ten percent of Internet-related traffic on xDSL links is interstate.

Respectfully submitted,
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January 19, 1999

STATEMENT OF VERIFICATION

I have read the foregoing, and to the best of my knowledge, information, and belief there is good ground to support it, and that it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct. Executed on January 19, 1999.



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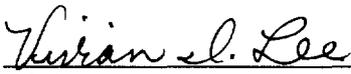
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