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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 Companies)
GTOC Tariff FCC No. 1) CC Docket No. 98-79
GTOC Trans. No. 1148)

OPPOSITION TO GTE MOTION TO STRIKE

Hyperion Telecommunications, Inc. ("Hyperion"), by its undersigned counsel and pursuant to Rule 1.45 of the Commission's Rules, 47 C.F.R. §1.45, hereby opposes the Motion to Strike filed by GTE Service Corporation ("GTE") in this proceeding. The Commission should deny the GTE Motion and accept Hyperion's Reply Comments and the Hyperion Survey because the basis for the GTE Motion, Section 1.106 of the Commission's Rules, is not applicable to this proceeding. Even if it were applicable, there is good cause for the Commission to consider the information contained in the Hyperion Reply Comments and the Hyperion Survey because they underscore a key point raised in the MCI WorldCom Petition for Reconsideration and demonstrate that the rationale underlying the *GTE ADSL Order* is suspect.

I. REGARDLESS OF WHICH RULES APPLY, THE HYPERION SURVEY SHOULD BE CONSIDERED BY THE COMMISSION

GTE places great reliance on strict adherence to Section 1.106(c) of the Commission's Rules to argue that the Hyperion Survey should be stricken from the record in this case. This reliance is misplaced for at least two reasons. First, as RCN Telecom Services, Inc., noted in its earlier Opposition to the Motion to Strike filed by Ameritech in this case, Section 1.106 does not apply to the comments and reply comments in this proceeding because an alternate procedural mechanism

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was established by the Public Notice of December 4, 1998.¹ That Notice provided for alternative procedures for the Petitions for Reconsideration by, among other things, extending the opportunity to file reply comments to “interested parties,” rather than just the Petitioners as directed by Section 1.106. *See* 47 C.F.R. §1.106(h). The Public Notice also revised the standard procedure for Petitions for Reconsideration by seeking “comments,” rather than limiting the record to “oppositions” as provided by Section 1.106. Evidentiary support for comments is quite typical in proceedings before the Commission. Hyperion seriously questions whether GTE would be willing to forego production of evidentiary support for its comments in other proceedings unless the Commission were specifically to ask for it.

Second, even if it were to apply, Section 1.106 in fact supports the acceptance of Hyperion’s Survey in this proceeding. The Commission should accept the Hyperion Survey because “consideration of the facts relied on is required in the public interest.” In the *GTE ADSL Order*, the Commission recognized that even under its “end to end” analysis, some traffic destined for Internet locations would begin and end within the same state. Therefore, GTE’s ADSL traffic would necessarily carry both intrastate and interstate traffic. Consequently, the Commission based the *GTE ADSL Order* upon application of a rule for determining federal jurisdiction for mixed-used special access facilities. That rule depends entirely upon a finding that interstate use of mixed-used facilities must be more than a *de minimis* amount. Interstate traffic is deemed *de minimis* when it amounts

¹Pleading Cycle Established for Petition of MCI/WorldCom and National Association of Regulatory Utility Commissioners (NARUC) for Reconsideration of GTE DSL Order, Public Notice, CC Docket 98-79, DA 98-2502 (rel. Dec. 4, 1998).

to ten percent or less of the total traffic on a special access line.² The Commission concluded that “GTE’s ADSL service is a special access service, thus warranting federal regulation under the ‘ten percent’ rule.”³ MCI WorldCom immediately recognized that there was no support in the record for this factual conclusion, and raised that point in its Petition for Reconsideration. As MCI WorldCom stated,

MCI WorldCom respectfully requests that the Commission reconsider the ADSL Tariff Order’s blanket conclusion that more than ten percent of Internet traffic is destined for websites in other states or other countries. Even if more than ten percent of some end users’ Internet traffic is destined for websites in other states or countries, the record in this proceeding does not support a conclusion that this is the case for all end users. *It is entirely possible that less than ten percent of certain end users’ Internet traffic may be destined for websites in other states or countries.*⁴

Hyperion’s Survey merely follows up on that statement in the MCI WorldCom Petition for Reconsideration. Not only is there no factual basis in the record for the Commission’s conclusion, but Hyperion’s Survey tends to show that the conclusion itself is flawed. For this reason, the Hyperion Survey should be considered as highly probative of MCI WorldCom’s statement that the facts in the record do not support the conclusions reached by the Commission. Because it raises substantial questions regarding the validity of the *GTE ADSL Order*, the Commission should recognize that consideration of the Hyperion Survey “is required in the public interest.”

²*GTE ADSL Order* at ¶ 23.

³*Id.* at ¶ 25.

⁴MCI WorldCom Petition for Reconsideration, Nov. 30, 1998, at 9-10 (emphasis added).

Finally, this proceeding has far-reaching regulatory and policy implications concerning the Commission's jurisdiction over local service used to access the Internet. The Commission should accept and fully consider all comments in order to base its decision on a complete record. Accordingly, consideration of any and all comments filed thus far, and any evidentiary support included with those comments, is required in the public interest.

II. ALL OTHER ARGUMENTS MADE BY GTE GO TO THE WEIGHT GIVEN TO THE SURVEY

Given that the Hyperion Survey should be accepted and considered by the Commission as it decides the NARUC and MCI WorldCom Petitions for Reconsideration, the remainder of GTE's unrestrained attack on the Hyperion Survey merely goes to the weight that the Commission should give to the Hyperion Survey. Hyperion anticipated the sort of attack waged here by GTE.⁵ GTE, as well as the RBOCs, have already identified the *GTE ADSL Order* as a potential source for their deliverance from contractual obligations to pay reciprocal compensation to CLECs. If the validity of the *GTE ADSL Order* is made suspect, their entire defense to the 33 state commission, federal court, and state court decisions that require them to pay reciprocal compensation would instantly vanish. Yet lost in the *sturm und drang* of the GTE Motion is this simple truth: there is no support in the record to justify the Commission's conclusion that more than ten percent of the traffic carried over GTE's ADSL lines is interstate traffic. The Hyperion Survey merely underscores the

⁵Hyperion even anticipated the attack on the methodology of the survey. *See* Hyperion Reply Comments at n. 20 ("Although Hyperion anticipates an argument that this methodology is not applicable to packet-switched traffic, it is the methodology that the Commission implicitly relies upon in the *GTE ADSL Order*, and, in the absence of another methodology for packet-switched traffic, it is the only methodology available under Commission rules for special access lines.") GTE proves Hyperion's point by failing to identify another methodology in the Commission's rules that Hyperion should have used.

importance of this omission by showing that, under applicable Commission rules, the amount of interstate traffic over Internet access lines is significantly less than ten percent.

For the foregoing reasons, GTE's Motion to Strike should be denied, the Hyperion Reply Comments and Hyperion Survey should be considered by the Commission, and the Petitions for Reconsideration filed by MCI WorldCom and NARUC should be granted.

Respectfully submitted,



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Dated: February 24, 1999

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CERTIFICATE OF SERVICE

I, Michael W. Fleming, hereby certify that the foregoing OPPOSITION TO MOTION TO STRIKE was served on this 24th day of February, 1999 upon the following persons by first class mail, postage prepaid, except as indicated.

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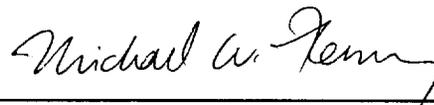
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