

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Intermedia Communications,)
Inc. against GTE Florida, Inc. for breach of terms)
of Florida partial interconnection agreement under)
Sections 251 and 252 of the Telecommunications)
Act of 1996 and request for relief)
_____)

DOCKET NO. 980986-TP

DIRECT TESTIMONY OF
STEVEN J. PITTERLE
ON BEHALF OF
GTE FLORIDA INCORPORATED

DECEMBER 10, 1998

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GTE FLORIDA INCORPORATED

TESTIMONY OF STEVEN J. PITTERLE

DOCKET NO. 980986-TP

Q. PLEASE STATE YOUR NAME AND ADDRESS.

A. My name is Steven J. Pitterle and my business address is 600 Hidden Ridge Dr., Irving, Texas 75038.

Q. BY WHOM ARE YOU EMPLOYED AND IN WHAT CAPACITY?

A. I am employed by GTE Service Corporation as Wholesale Markets Director – Negotiations.

Q. PLEASE SUMMARIZE YOUR EDUCATIONAL BACKGROUND AND EXPERIENCE IN THE TELECOMMUNICATIONS INDUSTRY.

A. I graduated from the University of Wisconsin at LaCrosse with a Bachelor of Science Degree in Mathematics in 1970. I also obtained postgraduate credits at the University of Wisconsin at Madison in the MBA program during 1975 through 1977. I began working for General Telephone Company of Wisconsin in 1970 as an Engineering Assistant in the Outside Plant Engineering Department. I held several positions in the Engineering area until 1979, when I spent one year in the Service Department and was responsible for Business Office staffing levels.

1 In 1980, I joined the Regulatory Affairs Department in Wisconsin as
2 Tariff Administrator and later became Manager-Regulatory Affairs. In
3 1985, I moved to Westfield, Indiana, to take a position in the
4 Regulatory Affairs group and soon became involved in intraLATA
5 compensation issues as a Compensation Administrator. I was
6 appointed to the position of Interexchange Account Manager in 1987
7 at Westfield for the entire GTE North area and, in 1988, was named
8 to the position of State Director-External Affairs in Wisconsin. I
9 served in that capacity for over eight years and was responsible for
10 all legislative and regulatory matters in Wisconsin. In June 1997, I
11 transferred to Dallas, Texas, where I now serve as Director of
12 Wholesale Markets-Negotiations.

13
14

15 **Q. PLEASE STATE IN GENERAL TERMS YOUR RESPONSIBILITIES.**

16 A. My principal responsibilities are to oversee GTE's competitive local
17 exchange carrier (CLEC), incumbent local exchange carrier (ILEC),
18 and commercial mobile radio service (CMRS) provider interconnection
19 negotiation activities specified by Sections 251 and 252 of the
20 Telecommunications Act of 1996.

21

22 **Q. WHAT IS THE PURPOSE OF YOUR DIRECT TESTIMONY?**

23 A. I will set forth GTE's positions on the policy and jurisdictional aspects
24 of the issue identified for resolution in this case: whether, under their
25 interconnection agreement, Intermedia Communications Inc. (ICI)

1 and GTE are required to compensate each other for transport and
2 termination of traffic to Internet Service Providers (ISPs.)

3

4 **Q. PLEASE BRIEFLY SUMMARIZE GTE'S POSITION ON THIS ISSUE.**

5 A. ICI is not entitled to the reciprocal compensation payments it seeks
6 for ISP traffic. Such traffic is functionally and jurisdictionally interstate,
7 as the FCC recently determined in GTE's ADSL case (discussed
8 later). It is thus outside the scope of the ICI-GTE local
9 interconnection Agreement. The FCC is the proper entity to
10 determine the parameters of any compensation due for ISP traffic.

11

12 **Q. PLEASE DESCRIBE WHAT ISP TRAFFIC IS.**

13 A. For purposes of this proceeding, ISP traffic refers to an end user's
14 communication with the Internet. Specifically, the end user's call
15 travels over the local exchange network to an ISP point of presence
16 (i.e., its modem), where it is routed to the Internet backbone and
17 ultimately to the World Wide Web. GTE witness Jones describes the
18 functional nature of ISP traffic in more detail in his Direct Testimony.

19

20 **Q. HOW DID THIS PROCEEDING ARISE?**

21 A. ICI filed a Commission complaint against GTE for breach of the terms
22 of its local Interconnection Agreement (Agreement) with ICI. ICI
23 claims that the Agreement entitles ICI to compensation for traffic
24 transiting through ISPs because such traffic is jurisdictionally local.
25 This position rests on ICI's contention that the end user's call to the

1 ISP "is a separate and distinguishable transmission from any
2 subsequent Internet connection enabled by the ISP." (ICI Complaint
3 at 10.) This "two-call" theory permits ICI to conclude that this
4 Commission may carve out an intrastate portion of the ISP
5 communication that is subject to reciprocal compensation obligations
6 under the parties' Agreement.

7

8 **Q. DOESN'T THE AGREEMENT CALL FOR DISPUTE RESOLUTION**
9 **THROUGH BINDING ARBITRATION, RATHER THAN**
10 **COMMISSION PROCESS?**

11 A. Yes. ICI acknowledges this fact in its Complaint. As stated there, ICI
12 informed GTE of its preference to resolve this dispute before the
13 Commission and GTE agreed not to insist on arbitration in this
14 particular case. This special situation does not, however, alter in any
15 way the Agreement's arbitration requirement. As GTE made clear to
16 ICI, GTE reserves the right to demand arbitration to settle any future
17 disputes with ICI. (ICI Complaint at 3.)

18

19 **Q. WHAT IS THE CONTRACT LANGUAGE RELEVANT TO THIS**
20 **CASE?**

21 A. Section 3.1 of the Agreement states that: "The parties shall
22 reciprocally terminate Local Traffic originating on each other's
23 networks utilizing either direct or indirect network interconnections as
24 provided in this Article." Section 1.20 defines "Local Traffic" as "traffic
25 that is originated by an end user of one Party and terminates to the

1 end user of the other Party within GTE's then current local serving
2 area, including mandatory local calling scope arrangements."

3

4 **Q. WILL THE RESOLUTION OF THIS CASE TURN PRIMARILY ON**
5 **INTERPRETATION OF THIS CONTRACT LANGUAGE?**

6 A. No. The Agreement's reciprocal compensation requirement is just the
7 jumping off point for the dispute. But the heart of the matter, as the
8 Commission has acknowledged in previous reciprocal compensation
9 cases, is what meaning is to be given the term "local traffic"—that is,
10 does it include ISP traffic? This question must be settled by reference
11 to controlling law and regulation—principally FCC precedent.

12

13 **Q. WHY IS FCC PRECEDENT SO IMPORTANT TO THIS CASE?**

14 A. It is indisputable that most Internet traffic does not stay within local
15 exchange calling areas. Rather, as Mr. Jones describes in his direct
16 testimony, it is switched through the ISP gateway, routed to the
17 Internet backbone, and ultimately to the World Wide Web. For this
18 Commission to impose reciprocal compensation obligations under a
19 local interconnection agreement, then, it must determine that some
20 portion of this Internet communication is jurisdictionally local. If the
21 FCC rules that ISP traffic cannot be parsed into functionally distinct
22 pieces, there is no separate component over which the State may
23 exercise jurisdiction. It must all be jurisdictionally interstate and under
24 the FCC's control.

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Q. HAS THE FCC RULED ON THIS ISSUE?

A. Yes. Although the FCC has not yet issued its overdue order specifically addressing reciprocal compensation issues with respect to dial-up Internet access, it has unequivocally addressed the broad issue of the jurisdictional nature of ISP traffic. It has clarified that such communications are continuous, inseverable, and thus jurisdictionally interstate.

The FCC made this ruling on October 30, 1998, in the context of a jurisdictional dispute relating to GTE's proposed ADSL offering. The FCC found ADSL to be an interstate service properly tariffed at the federal level. GTE Tel. Operating Cos. GTOC Tariff No. 1, GTOC Transmittal No. 1148, FCC 98-292, Memorandum Op. and Order (FCC Order). (A copy of the FCC Order is attached to this Testimony as Exhibit No. SJP-1.) ADSL service permits ISPs to provide end users with high-speed access to the Internet, using a combination of the local telephone plant and specialized equipment at the wire center. The end user connects to the ISP's point of presence and, from there, the communication travels on to the Internet. This is the same situation as that presented in this proceeding. While ADSL involves a dedicated, rather than dial-up, connection to the ISP's POP, this difference does not affect the fundamental jurisdictional analysis of the ISP traffic travelling over the network. In fact, ICI's Complaint makes many of the same arguments other competitive

1 LECs made at the FCC, and GTE's response here is the same as the
2 GTE companies' position at the FCC.

3

4 **Q. ISN'T THE FCC'S RULING CONTRARY TO ICI'S THEORY OF ITS**
5 **CASE HERE?**

6 A. Yes. The FCC Order proves that ICI has misinterpreted FCC
7 precedent to arrive at the erroneous conclusion that: "Under current
8 FCC rules, traffic to an ISP is local traffic." (ICI Complaint at 10.)

9

10 ICI says that the FCC, in its Universal Service Order, "determined that
11 Internet access consists of severable components"—the first, which is
12 a "simple local exchange telephone call," eligible for reciprocal
13 compensation, and the second, which is "the information service
14 subsequently provided by the ISP." (ICI Complaint at 10-11.)

15

16 But the FCC itself says that "it has never found that
17 'telecommunications' ends where 'enhanced' information service
18 begins." (FCC Order at para. 20.) Rather, the FCC "analyze[s] ISP
19 traffic as a continuous transmission from the end user to a distant
20 Internet site." (Id.) To this end, the FCC's interpretation of its
21 Universal Service Order is directly contrary to ICI's; the FCC quotes
22 that Order for the proposition that "[t]raffic is deemed interstate 'when
23 the communication or transmission originates in any state, territory,
24 possession of the United States, or the District of Columbia and
25 terminates in another state, territory, possession, or the District of

1 Columbia.” (FCC Order at 10, quoting Federal-State Joint Board on
2 Universal Service, Report and Order, 12 FCC Rcd 8776, 9173 (1997).
3

4 Further, ICI says that the FCC’s Access Charge Reform Order, in
5 which the FCC exempted ISPs from interstate access charges for
6 policy reasons, indicates that the connection from the end user to the
7 ISP is local traffic. (ICI Complaint at 11.) The FCC, however, has
8 pointed out that its Access Charge Reform Order means just the
9 opposite. It explicitly rejected “competitive LEC arguments that,
10 because the Commission has treated ISPs as end users for purposes
11 of the ESP exemption, an Internet call must terminate at the ISP’s
12 point of presence.” (FCC Order at para. 21.) Rather, “[t]hat the
13 Commission exempted ESPs from access charges indicates its
14 understanding that they in fact use interstate access service;
15 otherwise, the exemption would not be necessary.” (Id.)
16

17 In short, the FCC has thoroughly destroyed the foundation for ICI’s
18 argument that reciprocal compensation applies to ISP traffic. For ICI
19 to win its argument, there must be a severable local call from the end
20 user to the ISP’s POP. If no such jurisdictional division is
21 possible—and the FCC has now confirmed that it is not—there is no
22 piece of the ISP transmission over which this Commission can
23 exercise jurisdiction to impose reciprocal compensation obligations.
24
25

1 Q. YOU MENTIONED THAT THIS COMMISSION HAD MADE
2 DECISIONS IN OTHER RECIPROCAL COMPENSATION
3 COMPLAINTS. WHAT WAS THE NATURE OF THOSE CASES?

4 A. Four companies—ICI, Worldcom Technologies, MCI
5 Telecommunications Corporation, and Teleport Communications
6 Group, Inc.—filed complaints against BellSouth Telecommunications,
7 Inc., claiming they were due reciprocal compensation under the terms
8 of their respective interconnection agreements with BellSouth. The
9 Commission consolidated the four cases into one proceeding
10 (Dockets 971478-TP et al.) because the resolution of all of them
11 turned upon whether the Commission found ISP traffic to be
12 jurisdictionally local (and thus subject to reciprocal compensation) or
13 interstate. So the issue there was the same as that presented in ICI's
14 Complaint against GTE here.

15

16 Q. HOW DID THE COMMISSION RESOLVE THOSE CASES?

17 A. It ruled that ISP traffic was local and thus subject to the reciprocal
18 compensation obligations included in the local interconnection
19 agreements between BellSouth and each of the complainants. (Order
20 No. PSC-98-1216-FOF-TP, Sept. 15, 1998, BellSouth order).

21

22 Q. DOESN'T THE COMMISSION HAVE TO APPLY THE SAME
23 RATIONALE IN THIS CASE?

24 A. No. While I am not qualified to express a legal opinion on this matter,
25 it stands to reason that this is a different case and there will be a

1 different evidentiary record. In fact, I believe the Commission cannot
2 use its earlier rationale to resolve this case. The BellSouth decision
3 was made before the FCC clarified its position on the jurisdictional
4 nature of ISP traffic. Because this Commission's understanding of
5 controlling FCC precedent has proven to be incorrect, it cannot be
6 applied to this case.

7
8 **Q. WHAT DID THE COMMISSION SAY ABOUT FCC PRECEDENT IN**
9 **THE BELL SOUTH CASE?**

10 A. The Commission's interpretation of the FCC precedent presented by
11 the parties necessarily guided the ultimate decision. The Commission
12 agreed that it must consider the FCC orders extant at the time of
13 contract execution (BellSouth Order at 19) and understood that its
14 exercise of jurisdiction rested on whether ISP traffic can be separated
15 into telecommunications and information service components (Id. at
16 18.)

17
18 While the Commission seemed to believe that the question of
19 whether ISP traffic is local or interstate was a close call, it ultimately
20 interpreted FCC precedent to find that such traffic was local. It opined
21 that the FCC seemed to be "leaning toward the notion of severability
22 of the information service portion of an Internet call from the
23 telecommunications portion, which is often a local call." (BellSouth
24 Order at 18.) The Commission "d[id] not comprehend" BellSouth's
25 point in using the BellSouth MemoryCall case, in which the FCC

1 considered the jurisdictional nature of traffic comprised of an
2 interstate call to the switch serving a voice mail subscriber and an
3 intrastate transmission of that message from the switch to the voice
4 mail equipment. (Id. at 13, citing Petition for Emergency Relief and
5 Declaratory Ruling filed by BellSouth Corp., 7 FCC Rcd 1619 (1992),
6 aff'd, Georgia Public Service Commission v. FCC , 5F 3d 1499 (11th
7 Cir. 1993). The Commission concluded that the FCC “intended for
8 the states to exercise jurisdiction over the local service aspects of ISP
9 traffic, unless and until the FCC decided otherwise.” (Id. at 8.)

10
11 **Q. ISN'T THE COMMISSION'S INTERPRETATION OF FCC**
12 **PRECEDENT INCONSISTENT WITH THE FCC'S OWN?**

13 A. Yes. The language of the BellSouth Order squarely collides with the
14 FCC's Order. As I explained above, the FCC relied on its past
15 precedent (as well as Court cases and the Act) to conclude that ISP
16 communications “do not terminate at the ISP's local server, as some
17 competitive LECs and ISPs contend” (FCC Order at para. 19), but
18 that ISP traffic is a continuous transmission from the end user to a
19 distant Internet site. (FCC Order at para. 20.) The FCC thus declined
20 to draw the telecommunications/information service distinction that
21 was fundamental to this Commission's jurisdictional analysis. Rather,
22 the FCC noted that under the 1996 Act, “an information service, while
23 not a telecommunications service itself, is provided via
24 telecommunications.” (FCC Order at para. 20 [emphasis in original].)

25

1 The FCC explained that its MemoryCall order was directly relevant to
2 the jurisdictional analysis of ISP traffic, because it (and other cases)
3 confirmed that "the Commission traditionally has determined the
4 jurisdictional nature of communications by the end points of the
5 communication and consistently has rejected attempts to divide
6 communications at any intermediate points of switching or exchanges
7 between carriers." (FCC Order at para. 17.)

8
9 Because the FCC has now made clear that there are no "local service
10 aspects of ISP traffic," it could not, in fact, intend for the States to
11 exercise jurisdiction over such aspects. ISP traffic is a continuous,
12 interstate communication under the FCC's jurisdiction. In light of this
13 necessarily generic finding, this Commission cannot maintain the
14 reasoning it set forth in the BellSouth Order.

15
16 **Q. IS IT SIGNIFICANT TO THIS DISPUTE THAT THE FCC'S ORDER**
17 **RESTS ON PAST PRECEDENT, RATHER THAN DECLARING NEW**
18 **POLICY OR LEGAL INTERPRETATIONS?**

19 A. Yes. As I noted above, the Commission recognizes that FCC
20 precedent existing at the time parties execute their interconnection
21 contracts is relevant to discerning the parties' intent. (BellSouth
22 Order at 19.) Parties are assumed to be aware of that precedent and
23 understand its effect on the contract. In this case, GTE correctly
24 understood the then-existing FCC precedent that compels the
25 conclusion that ISP traffic is part of a continuous interstate

1 communication, and, as such, not subject to reciprocal compensation
2 obligations under a local interconnection contract. There was no
3 need to break out ISP traffic as a separate category of local traffic,
4 because it was not then and is not now local traffic that would have
5 come under the interconnection Agreement.

6

7 **Q. IS THERE OTHER EVIDENCE THAT GTE DID NOT INTEND THE**
8 **AGREEMENT TO COVER ISP TRAFFIC?**

9 A. Yes. Reciprocal compensation agreements are grounded in the
10 understanding that traffic between two networks will be roughly
11 balanced, as the average user receives about as many calls as he
12 makes. In the case of an ALEC serving an ISP, however, this
13 common expectation is wildly skewed; while ISPs do not generally
14 make calls, they generate a huge volume of inbound calls. In
15 addition, these calls typically last much longer than the average voice
16 call. As a rational business entity, GTE would never have acquiesced
17 to applying reciprocal compensation to such traffic.

18

19 GTE's local end-user rate structure is primarily flat rate, while
20 reciprocal compensation amounts would be usage-based. Given the
21 long holding times associated with Internet calls, GTE would thus
22 have to pay substantial compensation to ICI without the ability to
23 recover its costs from GTE customers who originate those calls. On
24 a nationwide basis, this amounts to millions of dollars annually that
25 GTE operating companies would not be able to recover. This amount

1 is expected to increase exponentially over the next few years, along
2 with the growth in Internet usage.

3

4 **Q. PLEASE GIVE AN EXAMPLE OF THE SPECIFIC IMPACTS YOU**
5 **DESCRIBE.**

6 A. If a GTE residential end user stays connected to an ISP for just one
7 hour each day for a whole month, the ALEC serving the ISP would be
8 entitled to \$16.02 (assuming a per-minute rate of \$.0089, as reflected
9 in the ICI-GTE Agreement). GTE's average local residential rate is
10 \$11.81 a month. Thus, in this example, GTE loses \$4.21 a month by
11 serving this customer. GTE would certainly never have agreed to
12 compensate its competitors in this way, without a reasonable ability
13 to recover its expenses.

14

15 **Q. HOW WOULD GTE OR, FOR THAT MATTER, A NEW ENTRANT,**
16 **RECOVER THESE NEW COSTS?**

17 A. Neither would have any immediate mechanism to recover these new
18 costs. The carrier which is forced to pay excessive amounts in
19 reciprocal compensation will have to recover these unanticipated
20 costs from its customers. The FCC and other state Commissions
21 have recognized this effect. The Illinois Commission, for example,
22 has stated that "[t]he Commission, like the FCC, is aware that
23 Ameritech Illinois may need to change its rate structure to correct the
24 alleged underrecovery of providing local network services for
25 connections to ISPs." Teleport Comm. Group Inc. v. Illinois Bell Tel.

1 Co., d/b/a Ameritech Illinois, Order, Docket No. 97-0404, at 13 (Mar.
2 11, 1998)

3

4 This situation presents a serious dilemma for GTE, whose basic local
5 rates are frozen by statute and whose rates for non-basic services are
6 also subject to statutory constraints on increases. In any case,
7 significant increases in rates for non-basic services are not a viable
8 option in a competitive marketplace.

9

10 **Q. DOES YOUR EXAMPLE HAVE BROADER IMPLICATIONS FOR**
11 **LOCAL COMPETITION?**

12 A. Absolutely. Even if ISP traffic were jurisdictionally intrastate, a policy
13 of applying reciprocal compensation to it would be anticompetitive and
14 anticonsumer. Such a policy would eliminate competition among local
15 exchange companies to serve the large and ever-expanding class of
16 local customers who are heavy Internet users via an ISP for dial-up
17 traffic. No LEC—whether ILEC or ALEC--would voluntarily serve a
18 subscriber if it stands to pay more in reciprocal compensation fees to
19 the LEC that serves a subscribers' ISP than it receives from providing
20 local telephone service to that subscriber. Applying reciprocal
21 compensation to ISP traffic will incent carriers (and equipment
22 vendors) to maximize and protect regulatory gaming arrangements
23 dependent on today's network, rather than developing the advanced
24 network of tomorrow.

25

1 If carriers are deemed entitled to reciprocal compensation for
2 termination of ISP traffic, they will, moreover, have little incentive to
3 undertake the kind of facilities-based competition Congress
4 envisioned as the ultimate outcome of opening the local exchange to
5 competition. An ALEC will be reluctant to provide facilities-based
6 local services to residential and business customers if it must pay the
7 same reciprocal compensation payments for ISP traffic that it
8 demands of ILECs.

9
10 **Q. WOULD APPLYING RECIPROCAL COMPENSATION TO ISP**
11 **TRAFFIC ALSO AFFECT COMPETITION AMONG LECS TO**
12 **PROVIDE SERVICE TO ISPS?**

13 **A.** Yes. Such a policy would severely distort this type of competition.
14 Instead of competing on the basis of operating efficiencies, service
15 quality, technological improvements, and other market criteria, ALECs
16 would be motivated to actually pay ISPs to be their customers. Their
17 ability to offer customers significantly reduced prices, commissions
18 on reciprocal compensation and the like would derive not from their
19 greater efficiency, but rather their exploitation of a windfall opportunity
20 made possible through regulatory fiat.

21
22 **Q. IF THE COMMISSION ULTIMATELY WERE TO DETERMINE THAT**
23 **INTERNET TRAFFIC IS LOCAL AND IS WITHIN ITS**
24 **JURISDICTION, WHAT COMPENSATION METHODS WOULD GTE**

1 **PROPOSE AS ALTERNATIVES TO RECIPROCAL**
2 **COMPENSATION?**

3 A. If the Commission decides that it has jurisdiction to classify calls to an
4 ISP as "local", "bill and keep" would be an acceptable interim solution.
5 Another appropriate interim compensation mechanism for Internet
6 calls would be a flat rate structure. This flat rate structure should
7 accomplish the following. First, it should consider the costs incurred
8 for the functions actually being performed by the other carrier.
9 Second, the compensation structure should minimize the incentive
10 to use the network inefficiently by those who would seek to maximize
11 any per minute compensation amounts. Also, GTE must be able to
12 ultimately recover its cost from its customers in some reasonable
13 manner. However, for either of these interim solutions, GTE
14 maintains that the traffic is interstate and would be subject to
15 retroactive adjustment when the FCC issues its ruling specifically
16 addressing the reciprocal compensation issue.

17

18 **Q. DOES THE RECIPROCAL COMPENSATION RATE OF \$.0089 PER**
19 **MINUTE CONTAINED IN THE GTE/ICI INTERCONNECTION**
20 **AGREEMENT MEET THE OBJECTIVES DISCUSSED ABOVE FOR**
21 **A FLAT RATE STRUCTURE?**

22 A. No it does not. The rate of \$.0089 per minute is for the exchange of
23 two-way traffic where the traffic flows between carriers are roughly in
24 balance and have holding times in the range of 3-4 minutes, which is
25 typical of voice traffic. This rate is not appropriate for data-intensive

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traffic with long-holding times such as that characterized by Internet
calls.

Q. DOES THIS CONCLUDE YOUR DIRECT TESTIMONY?

A. Yes, it does.

Federal Communications Commission

FCC 98-292

Before the Federal Communications Commission
Washington, D.C. 20554

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

MEMORANDUM OPINION AND ORDER

Adopted: October 30, 1998; Released: October 30, 1998

By the Commission: (Commissioners Furchtgott-Roth and Tristani dissenting in part and issuing a joint statement)

I. INTRODUCTION

1. In this Order, we conclude our investigation of a new access offering filed by GTE that GTE calls its DSL Solutions-ADSL Service ("ADSL service"). We find that this offering, which permits Internet Service Providers (ISPs) to provide their end user customers with high-speed access to the Internet, is an interstate service and is properly tariffed at the federal level.¹ In addition, we reject the argument of Northpoint that the possibility of a price squeeze warrants the Commission's transfer to the states of its ratemaking authority with respect to interstate DSL services such as the one at issue here.

2. We emphasize that we decide here only the issue designated in our investigation of GTE's federal tariff for ADSL service, which provides specifically for a dedicated connection, rather than a circuit-switched, dial-up connection, to ISPs and potentially other locations. This issue involves the applicability of Commission rules and precedent regarding the provision by one incumbent local exchange carrier (LEC) of special access service. This Order does not consider or address issues regarding whether local exchange carriers are entitled to receive reciprocal compensation when they deliver to information service providers, including Internet

¹ We emphasize that our decision concerning the jurisdictional treatment of GTE's ADSL service is limited to the transport of data from an end user over GTE's frame relay network. Regulation of circuit switched voice and data calls carried over the same ADSL-conditioned loop, as part of the end user's standard residential or business service, is unaffected by GTE's offering and this decision.

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service providers, circuit-switched dial-up traffic originated by interconnecting LECs.² Unlike GTE's ADSL tariff, the reciprocal compensation controversy implicates: the applicability of the separate body of Commission rules and precedent regarding switched access service, the applicability of any rules and policies relating to inter-carrier compensation when more than one local exchange carrier transmits a call from an end user to an ISP, and the applicability of interconnection agreements under sections 251 and 252 of the Communications Act, as amended by the Telecommunications Act of 1996, entered into by incumbent LECs and competitive LECs that state commissions have found, in arbitration, to include such traffic. Because of these considerations, we find that this Order does not, and cannot, determine whether reciprocal compensation is owed, on either a retrospective or a prospective basis, pursuant to existing interconnection agreements, state arbitration decisions, and federal court decisions. We therefore intend in the next week to issue a separate order specifically addressing reciprocal compensation issues.

II. BACKGROUND

3. In an Order released May 29, 1998, the Common Carrier Bureau (Bureau) found that GTOC Transmittal No. 1148 establishing a new offering, GTE DSL Solutions-ADSL Service ("ADSL service"), raised substantial questions of lawfulness and, accordingly, suspended this tariff for one day, initiated an investigation, and imposed an accounting order.³ Subsequently, the Bureau designated for investigation the question whether GTE's ADSL service offering constitutes an interstate access service, thus subject to the Commission's jurisdiction and properly tariffed at the federal level.⁴ The Bureau also solicited comments on whether the Commission should defer to the states the tariffing of DSL services in order to lessen the

² See, e.g., Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings, 61 Fed. Reg. 53,922 (1996); Petition for Partial Reconsideration and Clarification of MFS Communications Co., Inc. at 28; Letter from Richard J. Metzger, General Counsel for ALTS to Regina M. Keeney, Chief, Common Carrier Bureau, FCC, June 20, 1997; Pleading Cycle Established for Comments on Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic, DA 97-1399 (rel. July 2, 1997); Letter from Edward D. Young, Senior Vice President & Deputy General Counsel for Bell Atlantic and Thomas J. Tauke, Senior Vice President -- Government Relations for Bell Atlantic to Hon. William E. Kennard, Chairman, FCC, July 1, 1998. This question sometimes has been posed more narrowly, i.e., whether an incumbent LEC must pay reciprocal compensation to a competitive LEC that delivers incumbent LEC-originated traffic to ISPs. Because the pertinent provision of the 1996 Act pertains to all LECs, we examine this issue in the broader context. 47 U.S.C. § 251(b)(5).

³ GTE Tel. Operating Cos. GTOC Transmittal No. 1148, CC Docket No. 98-79, DA 98-1020 (Com. Car. Bur., rel. May 29, 1998) (*Suspension Order*).

⁴ GTE Tel. Operating Cos. GTOC Transmittal No. 1148, CC Docket No. 98-79, DA 98-1667, at ¶ 12 (Com. Car. Bur., rel. August 20, 1998) (*GTE DSL Designation Order*).

possibility of a price squeeze.⁵ On September 8, 1998, GTE filed its direct case.⁶ More than forty parties filed comments or oppositions responding to GTE's direct case on September 18, 1998.⁷ GTE filed its rebuttal on September 23, 1998.

4. The issue whether GTE's ADSL service offering constitutes an interstate access service involves determining how Internet traffic fits within our existing regulatory framework. We begin, therefore, with a brief description of relevant terminology and technology.

A. The Internet and ISPs

5. The Internet is an international network of interconnected computers enabling millions of people to communicate with one another and to access vast amounts of information from around the world.⁸ The Internet functions by splitting up information into "small chunks or 'packets' that are individually routed through the most efficient path to their destination."⁹ With packet-switching, "even two packets from the same message may travel over different physical paths through the network . . . which enables users to invoke multiple Internet services simultaneously, and to access information with no knowledge of the physical location of the service where the information resides."¹⁰

6. An ISP is an entity that provides its customers the ability to obtain on-line information through the Internet. ISPs purchase analog and digital lines from local exchange carriers to connect to their dial-in subscribers.¹¹ Under one typical arrangement, an ISP customer dials a seven-digit number to reach the ISP server in the same local calling area. The ISP, in turn, combines "computer processing, information storage, protocol conversion, and routing with

⁵ *GTE DSL Designation Order* at ¶ 12.

⁶ On September 3, 1998, the Competitive Pricing Division granted GTE's Motion for Extension of Time to submit its Direct Case. See GTE Tel. Operating Cos. Transmittal No. 1148 -- Pleading Cycle, CC Docket No. 98-79, Public Notice, DA 98-1793 (rel. September 3, 1998).

⁷ A list of parties submitting comments is included at Appendix A.

⁸ 47 U.S.C. § 230; see also *Reno v. American Civil Liberties Union*, 117 S. Ct. 2329, 2334 (1997).

⁹ Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11531, 11532 (1998) (*Universal Service Report to Congress*).

¹⁰ *Id.* at 11531, 11532.

¹¹ *Id.* at 11532.

transmission to enable users to access Internet content and services."¹² Under this arrangement, the end user generally pays the LEC a flat monthly fee for use of the local exchange network¹³ and generally pays the ISP a flat, monthly fee for Internet access. The ISP typically purchases business lines from a LEC, for which it pays a flat monthly fee which allows unlimited incoming calls.

7. Although the Commission has recognized that enhanced service providers (ESPs), including ISPs, use interstate access services,¹⁴ since 1983 it has exempted ESPs from the payment of certain interstate access charges.¹⁵ Pursuant to this exemption, ESPs are treated as end users for purposes of assessing access charges.¹⁶ Thus, ESPs generally pay local business

¹² *Id.* at 11531.

¹³ Such fees include charges for both intrastate and interstate usage of the local exchange network.

¹⁴ See, e.g., MTS and WATS Market Structure, CC Docket No. 78-72, Memorandum Opinion and Order, 97 FCC 2d 682, 711 (1983) (*MTS/WATS Market Structure Order*) ("[a]mong the variety of users of access service are . . . enhanced service providers"); Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, Order, 3 FCC Rcd 2631 (1988) (*ESP Exemption Order*) (referring to "certain classes of exchange access users, including enhanced service providers"); Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Order, 2 FCC Rcd 4305, 4306 (1987) (ESPs, "like facilities-based interexchange carriers and resellers, use the local network to provide interstate services"); Access Charge Reform, CC Docket No. 96-262, FCC No. 97-158, First Report and Order, 12 FCC Rcd 15982, 16131-32 (1997) (*Access Charge Reform Order*) ("Information service providers may use incumbent LEC facilities to originate and terminate interstate calls.")

The *Access Charge Reform Order* refers to "information service providers." As discussed in that order, the term "enhanced services," defined in the Commission's rules as "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information," 47 C.F.R. § 64.702(a), is quite similar to "information services," defined in the Communications Act of 1934 (Act) as offering "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20). See also *Universal Service Report to Congress*, 13 FCC Rcd 11501, 11516 (reiterating Commission's conclusion that the definitions of telecommunications services and information services, added to the Act by the Telecommunications Act of 1996, "essentially correspond to the pre-existing categories of basic and enhanced services"). For purposes of this order, we refer to providers of enhanced services and providers of information services as ESPs, a category which includes Internet service providers, which we refer to here as ISPs.

¹⁵ The exemption was adopted at the inception of the interstate access charge regime to protect certain users of access services, such as ESPs, that had been paying the generally much lower business service rates from the rate shock that would result from immediate imposition of carrier access charges. See *1983 MTS/WATS Market Structure Order*, 97 FCC 2d at 715.

¹⁶ *ESP Exemption Order*, 3 FCC Rcd at 2635 n.8, 2637 n.53.

rates and interstate subscriber line charges for their switched access connections to local exchange company central offices.¹⁷ They also pay the special access surcharge on their special access lines under the same conditions applicable to end users.¹⁸ In the *Access Charge Reform Order*, the Commission decided to maintain the existing pricing structure and continue to treat ESPs as end users for the purpose of applying access charges.¹⁹ The Commission stated that retaining the ESP exemption would avoid disrupting the still-evolving information services industry and advance the goals of the Telecommunications Act of 1996 to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services."²⁰

B. GTE's ADSL Tariff

8. On May 15, 1998, GTOC filed Transmittal No. 1148, proposing to offer GTE DSL Solutions-ADSL Service, which GTE describes as an interstate data special access service that provides a high speed access connection between an end user subscriber and an ISP by utilizing a combination of the subscriber's existing local exchange physical plant (*i.e.*, copper facility), a specialized DSL-equipped wire center, and transport to the network interface where the ISP will

¹⁷ *Id.* at 2631, 2635 n.8, 2637 n.53. The subscriber line charge (SLC) is an access charge imposed on end users to recover at least a portion of the cost of the interstate portion of LEC facilities used to link each end user to the public switched telephone network ("PSTN"). *Access Charge Reform Order*, 12 FCC Rcd at 16010.

¹⁸ 47 C.F.R. § 69.2(m) (End user means "any customer of an interstate or foreign telecommunications service that is not a carrier except that a carrier other than a telephone company shall be deemed to be an "end user" when such carrier uses a telecommunications service for administrative purposes and a person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an "end user" if all resale transmissions offered by such reseller originate on the premises of such reseller."); *see also* 47 C.F.R. § 69.5(a) ("End user charges shall be computed and assessed upon public end users, and upon providers of public telephones. . ."); *see also* 47 C.F.R. § 69.5 (c) ("Special access surcharges shall be assessed upon users of exchange facilities that interconnect these facilities with means of interstate or foreign telecommunications to the extent that carrier's carrier charges are not assessed upon such interconnected usage."); *see also* 47 C.F.R. § 69.115.

¹⁹ *Access Charge Reform Order*, 12 FCC Rcd 15982, 16133, 16134 (1997). On August 19, 1998, the U.S. Court of Appeals for the Eighth Circuit affirmed the FCC's *Access Charge Reform Order*. Specifically, the court found that the Commission's decision to exempt information services providers from the application of interstate access charges (other than SLCs) was consistent with past precedent, did not unreasonably discriminate in favor of ISPs, did not constitute an unlawful abdication of the Commission's regulatory authority in favor of the states, and did not deprive incumbents of the ability to recover their pertinent costs. *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 542 (8th Cir. 1998).

²⁰ *Id.* at 16133. *See also* 47 U.S.C. § 230(b)(2) ("It is the policy of the United States to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.")

connect to GTE's network.²¹ Specifically, according to GTE, an end user's modem is connected to the network interface device/splitter at the end user premises.²² GTE explains that its service "consists of the connection from the network interface device over an existing facility to a splitter, modem, and ADSL equipment combination in the serving wire center."²³ The interstate special access data traffic is routed via a digital subscriber line access multiplexer, or DSLAM, to GTE's "connection point" or packet-switched network.²⁴ The GTE ADSL wire center is connected with the GTE ADSL connection point using frame relay interface capabilities.²⁵ ISPs connect their networks to the GTE ADSL connection point using frame relay services offered elsewhere in its tariff.²⁶ The subscriber's use of GTE's local exchange plant for circuit switched intrastate and interstate voice and data calls is unaffected by the DSL service.²⁷

9. GTE's ADSL service, like other xDSL technology,²⁸ enables ISPs and other customers²⁹ to provide to their end user subscribers "the simultaneous transmission of voice dialed calls and high speed data access over a single transmission path . . . at data speeds that far exceed the current widespread method of voice path dial access to ISPs," thereby reducing the need for subscribers to obtain additional lines for their Internet capabilities.³⁰ According to GTE, this technology provides end user subscribers a reliable and highly efficient way to reach the Internet; it allows information to be retrieved more quickly; and it supports expanded offerings

²¹ GTOC Transmittal No. 1148, Description and Justification at 1.

²² *Id.* at 3.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 2.

²⁸ The "x" in xDSL is a place holder for the various types of DSL service, such as GTE's ADSL (asymmetric digital subscriber line), HDSL (high-speed digital subscriber line), UDSL (universal digital subscriber line), VDSL (very-high speed digital subscriber line), and RADSL (rate-adaptive digital subscriber line).

²⁹ GTE notes that its ADSL service may also be ordered by businesses, IXCs, and competitive LEC customers. GTE Direct Case at iii.

³⁰ GTOC Transmittal No. 1148, Description and Justification at 1; GTE Direct Case at 1.

for enhanced services.³¹ GTE notes that an end user still will need to purchase standard residential or business service.³²

10. GTE expects ISPs to purchase GTE's ADSL service to provide faster connections to end user customers. End users, however, can purchase the service directly from GTE so long as the ISP to which they subscribe is connected to GTE's ADSL network.³³

11. An end user accesses the Internet using GTE's ADSL service by turning on the computer and clicking on the icon for the ISP service.³⁴ The end user thus obtains a dedicated connection to the ISP, rather than a circuit-switched, dial-up connection.³⁵ The communication then travels from the ISP's point of presence to its web server.³⁶ GTE proposes to offer this service through an interstate access tariff, claiming that: 1) Internet traffic is primarily interstate in nature; 2) the ADSL service offering involves dedicated transport of data; and 3) GTE's ADSL service is an access service under section 69.2 of the Commission's rules.³⁷

12. In its Direct Case, GTE contends that its ADSL service offering is inherently an interstate service because it will be used to communicate with parties outside the end user's home state via e-mail, to access remote databases, and to interact with Internet websites throughout the country and the world.³⁸ GTE argues that it is well established that the "nature of the communication itself rather than the physical location of the technology determines the jurisdictional classification of a service."³⁹ GTE relies upon several decisions where courts have confirmed that the jurisdictional analysis of a communications service requires an examination

³¹ GTOC Transmittal No. 1148, Description and Justification at 1.

³² GTE Direct Case at n.14.

³³ GTOC Transmittal No. 1148, Description and Justification at 4.

³⁴ GTE Direct Case at 5.

³⁵ *Id.*

³⁶ *Id.*

³⁷ GTOC Transmittal No. 1148, Description and Justification at 2; 47 C.F.R. § 69.2(b).

³⁸ GTE Direct Case at 7.

³⁹ *Id.* at 8 (citing Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation, 7 FCC Rcd 1619, 1621 (1992) (*BellSouth MemoryCall*)).

of "the totality of the communication from its inception to its completion,"⁴⁰ without regard to points of intermediate switching.⁴¹

13. GTE also argues that application of the inseverability doctrine mandates a finding that its ADSL service offering is interstate and subject to federal tariffing requirements because: 1) Internet traffic involves multiple parties throughout the nation and around the world, rendering traditional jurisdictional measures meaningless; and 2) it is not technically possible to segregate and measure Internet traffic based on the geographic location of the parties.⁴² In the alternative, GTE claims that its ADSL service offering, as a dedicated access offering, warrants federal regulation because it exceeds the ten percent *de minimis* threshold set for interstate regulation of special access services.⁴³

14. In addition, GTE asserts that the Commission repeatedly has classified Internet traffic as predominantly interstate, and that, therefore, tariffing its ADSL service offering on the federal level is appropriate.⁴⁴ GTE contends that the Commission's designation of ISPs as "end users" for purposes of assessing access charges does not mean that ISPs are end users for purposes of defining the termination point of an end-to-end communication.⁴⁵ Finally, GTE argues that the alleged risk of an unlawful "price squeeze" provides no basis for the Commission to abdicate its jurisdiction over interstate services.⁴⁶ GTE states that Northpoint's contention that one set of regulators should review both GTE's interstate ADSL rates and GTE's rates for unbundled network elements (UNEs) must fail because the relationship between UNE and service pricing is subject to the dual regulatory structure inherent in the Act.⁴⁷

15. Many competitive LECs and ISPs urge the Commission to treat Internet traffic delivered via GTE's ADSL service offering as one intrastate "local" call terminating at the ISP's

⁴⁰ *Id.* at 8-10 (citing *United States v. AT&T*, 57 F. Supp. 451, 453-5 (S.D.N.Y. 1944), *aff'd*, 325 U.S. 837 (1945)).

⁴¹ *Id.* at 11 (Southwestern Bell Telephone Company, CC Docket No. 88-180, Order Designating Issues for Investigation, 3 FCC Rcd 2339, 2341 (1988) (*Southwestern Bell Telephone Company*)).

⁴² *Id.* at 15.

⁴³ *Id.* at 19.

⁴⁴ *Id.* at 20 (citing *Universal Service Report to Congress*, 13 FCC Rcd at 11572).

⁴⁵ *Id.* at 22.

⁴⁶ *Id.* at 24.

⁴⁷ *Id.*

local server, followed by a second, separate transmission from the ISP server to the Internet.⁴⁸ Specifically, these commenters argue that, for jurisdictional purposes, the end-to-end ADSL communication consists of two distinct components: an intrastate "telecommunications service," which ends at the ISP's local server, and an interstate "information service," which begins where the telecommunications service ends.⁴⁹ In addition, many competitive LECs observe that, because ISPs are permitted to purchase services from incumbent LECs under the same intrastate tariffs available to end users, ISP traffic delivered via GTE's ADSL service offering constitutes local traffic for separations purposes.⁵⁰ Therefore, competitive LECs argue that such traffic must terminate at the ISP's point of presence.⁵¹ Finally, several commenters maintain that GTE's ADSL service offering must be tariffed on the state level, because it does not qualify as an "access service" under section 69.2 of the Commission's rules.⁵²

III. DISCUSSION

16. We agree that GTE's DSL Solutions-ADSL service offering is an interstate service that is properly tariffed at the federal level.⁵³ Section 2(a) of the Act grants the Commission

⁴⁸ See, e.g., ICG Opposition at 4; ALTS Opposition at 5; Hyperion Opposition at 8; Intermedia/e.spire Opposition at 4; and RCN Comments at 5, see also Washington Commission Comments at 1.

⁴⁹ See, e.g., Focal Comments at 4-5 ("The telecommunications from the end user to the ISP terminates at the ISP because the ISP is an end user of telecommunications and a provider of information services. . . . The *information service* provided by the ISP is wholly separate from the local exchange *telecommunications service* provided by the local exchange carrier.") (Emphases in original); see also Washington Commission Comments at 1; ICG Opposition at 4-6; ALTS Opposition at 5; Hyperion Opposition at 3; MCI/Worldcom Comments at 5; and ITC/KMC Opposition at 3. The Act defines "information services" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20) (emphasis added). "Telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used." 47 U.S.C. § 153(46).

⁵⁰ See, e.g., CompTel Opposition at 2-3; CLX Comments at 3; ICG Opposition at 5; ALTS Opposition at 5; Washington Commission Comments at 1; and Hyperion Opposition at 5, 8.

⁵¹ See, e.g., CompTel Opposition at 2-3; CLX Comments at 3; ICG Opposition at 5; ALTS Opposition at 5; and Hyperion Opposition at 5, 8.

⁵² See ALTS Opposition at 4, 18-19; see also ICG Opposition at 6-7; Hyperion Opposition at 3; and ITC/KMC Opposition at 3.

⁵³ See, e.g., GTE Direct Case at 7; Ameritech Comments at 9; Time Warner Comments at 4; US West Comments at 1; Southwestern Bell, *et al.*, Comments at 1; and Bell Atlantic Comments at 2. See also Northpoint Comments at 1; USTA Comments at 2; ACI/Firstworld Comments at 4.

jurisdiction over "all interstate and foreign communication by wire."⁵⁴ Traffic is deemed interstate "when the communication or transmission originates in any state, territory, possession of the United States, or the District of Columbia and terminates in another state, territory, possession, or the District of Columbia."⁵⁵

17. As many commenters note,⁵⁶ the Commission traditionally has determined the jurisdictional nature of communications by the end points of the communication and consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers. In *BellSouth MemoryCall*, for example, the Commission considered the jurisdictional nature of traffic that consisted of an incoming interstate transmission (call) to the switch serving a voice mail subscriber and an intrastate transmission of that message from that switch to the voice mail apparatus.⁵⁷ The Commission determined that the entire transmission constituted one interstate call, because "there is a continuous path of communications across state lines between the caller and the voice mail service."⁵⁸

18. Similarly, in *Teleconnect*, the Bureau examined whether a call using Teleconnect's "All-Call America" (ACA) service, a nationwide 800 travel service that uses AT&T's Megacom 800 service, is a single, end-to-end call.⁵⁹ Generally, an ACA call is initiated by an end user from a common line open end; the call is routed through a LEC to an AT&T Megacom line, and is then transferred from AT&T to Teleconnect by another LEC.⁶⁰ At that point, Teleconnect routes the call through the LEC to the end user being called.⁶¹ The Bureau rejected the argument that the (ACA) 800 call used to connect to an interexchange carrier's (IXC's) switch was a

⁵⁴ 47 U.S.C. § 152(a).

⁵⁵ Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd 8776, 9173 (1997) (*Universal Service Order*); see also *Universal Service Report to Congress*, 13 FCC Rcd at 11555.

⁵⁶ See, e.g., GTE Direct Case at 11-14; PacBell Rebuttal at 6-7; see also Ameritech Comments at 7; Time Warner Comments at 3-4; GTE Rebuttal at 2; USTA Comments at 3; U S West Comments at 5; Bell Atlantic Comments at 5; MCI/Worldcom Comments at 5; Covad Comments at 3; and ACI/Firstworld Comments at 4.

⁵⁷ *BellSouth MemoryCall*, 7 FCC Rcd at 1620.

⁵⁸ *Id.*

⁵⁹ *Teleconnect Company. v. Bell Telephone Company of Penn.*, E-88-83, 10 FCC Rcd 1626, 1628 (1995) (*Teleconnect*).

⁶⁰ *Id.* at 1627.

⁶¹ *Id.* at 1627-28.

separate and distinct call from the call that was placed from that switch.⁶² The Commission affirmed, noting that "both court and Commission decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete such communications. According to these precedents, we regulate an interstate wire communication under the Communications Act from its inception to its completion."⁶³ The Commission concluded that "an interstate communication does not end at an intermediate switch. . . . The interstate communication itself extends from the inception of a call to its completion, regardless of any intermediate facilities."⁶⁴ In addition, in *Southwestern Bell Telephone Company*,⁶⁵ the Commission rejected the argument that "a credit card call should be treated for jurisdictional purposes as two calls: one from the card user to the interexchange carrier's switch, and another from the switch to the called party" and concluded that "switching at the credit card switch is an intermediate step in a single end-to-end communication."⁶⁶

19. Consistent with these precedents, we conclude 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 user.⁶⁷ The fact that the facilities and apparatus used for GTE's ADSL service offering may be located within a single state does not affect our jurisdiction. As the Commission stated in *BellSouth Memory Call*, "this Commission has jurisdiction over, and regulates charges for, the local network when it is used in conjunction with the origination and termination of interstate calls."⁶⁸ Indeed, in the vast majority of cases, the facilities that incumbent LECs use to provide interstate access are located entirely within one state.⁶⁹

⁶² *Id.* at 1629.

⁶³ *Id.* (citing *NARUC v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984) (concluding that a physically intrastate in-WATS line, used to terminate an end-to-end interstate communication, is an interstate facility subject to Commission regulation)). See also *United States v. AT&T*, 57 F. Supp. 451, 454 (S.D.N.Y. 1944); *New York Telephone Company*, 76 FCC 2d 349, 352 (1980).

⁶⁴ *Id.*

⁶⁵ *Southwestern Bell Telephone Company*, 3 FCC Rcd at 2339.

⁶⁶ *Id.* at 2341.

⁶⁷ See, e.g., Ameritech Comments at 9; Bell Atlantic Comments at 5; see also ¶ 21, 26, *infra*.

⁶⁸ *BellSouth Memory Call*, 7 FCC Rcd at 1621 (citing *MTS/WATS Market Structure*).

⁶⁹ *NARUC v. FCC*, 746 F.2d 1492, 1499 (D.C. Cir. 1984) ("The dividing line between the regulatory jurisdictions of the FCC and states depends on the 'nature of the communications which pass through the facilities [and not on] the physical location of the lines.'" (citations omitted)).

20. We disagree with those commenters who argue that, for jurisdictional purposes, an end-to-end ADSL communication must be separated into two components: an intrastate telecommunications service, provided in this instance by GTE, and an interstate information service, provided by the ISP.⁷⁰ As discussed above, the Commission analyzes the totality of the communication when determining the jurisdictional nature of a communication.⁷¹ The Commission previously has distinguished between the "telecommunications services component" and the "information services component" of end-to-end Internet access for purposes of determining which entities are required to contribute to universal service.⁷² Although the Commission concluded that ISPs do not appear to offer "telecommunications service," and thus are not "telecommunications carriers" that must contribute to the Universal Service Fund,⁷³ it has never found that "telecommunications" ends where "enhanced" information service begins. To the contrary, in the context of open network architecture (ONA) elements, the Commission stated that "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."⁷⁴ Under the definition of information service added by the 1996 Act, an information service, while not a telecommunications service itself, is provided via telecommunications.⁷⁵ As explained in the *Universal Service Report to Congress*, because information services are offered via telecommunications, they necessarily require a transmission component in order for users to access information.⁷⁶ We, therefore, analyze ISP traffic as a continuous transmission from the end user to a distant Internet site.

⁷⁰ See, e.g., Focal Comments at 4-5; ICG Opposition at 6; Splitrock Opposition at 3.

⁷¹ See *United States v. AT&T*, 57 F. Supp. 451, 453-55 (S.D.N.Y. 1944), *aff'd*, 325 U.S. 837 (1945).

⁷² *Universal Service Order*, 12 FCC Rcd at 9180, 9181.

⁷³ *Id.* at 9180. We confirmed this view in the *Universal Service Report to Congress*. *Universal Service Report to Congress*, 13 FCC Rcd at 11522.

⁷⁴ See *Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd 1, 141 (1988) ("when an enhanced service is interstate (that is, when it involves communications or transmissions between points in different states on an end-to-end basis), the underlying basic services are subject to Title II regulation.") See, e.g., *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 2 FCC Rcd 3072, 3080 (1987) ("carriers must provide efficient nondiscriminatory access to the basic service facilities necessary to support their competitors's enhanced services. . .") See also *BellSouth MemoryCall*, 7 FCC Rcd at 1621 (rejecting "two call" argument as applied to interstate call to voicemail apparatus, even though voicemail is an enhanced service).

⁷⁵ See 47 U.S.C. § 153(20) ("Information service" means "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . .") (emphasis added); see also 47 C.F.R. § 64.702(a) (enhanced services are provided "over common carrier transmission facilities used in interstate communications.")

⁷⁶ *Universal Service Report to Congress*, 13 FCC Rcd at 11529.

21. Nor are we are persuaded by competitive LEC arguments that, because the Commission has treated ISPs as end users for purposes of the ESP exemption, an Internet call must terminate at the ISP's point of presence.⁷⁷ As discussed above, GTE's ADSL service offering is designed to be used by ISPs as part of their end-to-end Internet access service.⁷⁸ The Commission traditionally has characterized the link from an end user to an ESP as an interstate access service.⁷⁹ In the *MTS/WATS Market Structure Order*, for instance, the Commission concluded that ESPs are "among a variety of users of access service" in that they "obtain local exchange services or facilities which are used, in part or in whole, for the purpose of completing interstate calls which transit its location and, commonly, another location in the exchange area."⁸⁰ The fact that ESPs are exempt from certain access charges and purchase their PSTN links through local tariffs does not transform the nature of traffic routed to ESPs. That the Commission exempted ESPs from access charges indicates its understanding that they in fact use interstate access service; otherwise, the exemption would not be necessary.⁸¹ We emphasize that the Commission's decision to treat ISPs as end users for access charge purposes does not affect the Commission's ability to exercise jurisdiction over such traffic.

22. Having concluded that the jurisdictional treatment of GTE's ADSL service offering is determined by the nature of the end-to-end transmission between an end user and the Internet website accessed by the end user, we now must decide whether that transmission does in fact constitute an interstate telecommunication. Generally, a call that originates and terminates in a single state is jurisdictionally intrastate, and a call that originates in one state and terminates in a different state (or country) is jurisdictionally interstate.⁸² An Internet communication does not necessarily have a point of "termination" in the traditional sense. In a single Internet communication, an Internet user may, for example, access websites that reside on servers in

⁷⁷ See, e.g., CompTel Opposition at 3; PacWest Direct Case at 6-10.

⁷⁸ GTE Direct Case at 4.

⁷⁹ See, e.g., *MTS/WATS Market Structure Order*, 97 FCC 2d at 711; Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, 2 FCC Rcd 4305 (1987).

⁸⁰ *Id.*; see also Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Notice of Proposed Rulemaking, 2 FCC Rcd at 4305 (1987) ("We . . . intended to impose interstate access charges on enhanced service providers for their use of local exchange facilities to originate and terminate their interstate offerings."); *ESP Exemption Order*, 3 FCC Rcd at 2635 n.8, 2637 n.53 (1988) ("we granted temporary exemptions from payment of access charges to certain classes of exchange access users, including enhanced service providers.")

⁸¹ See, e.g., *id.* See also Access Charge Reform, Notice of Proposed Rulemaking, Notice of Inquiry, 11 FCC Rcd 21354, 21478 (1996) ("although ESPs may use incumbent LEC facilities to originate and terminate interstate calls, ESPs should not be required to pay interstate access charges.") (emphasis added).

⁸² *Universal Service Order*, 12 FCC Rcd at 9173.

various state or foreign countries, communicate directly with another Internet user, or chat on-line with a group of Internet users located in the same local exchange or in another country,⁸³ and may do so either sequentially or simultaneously. Accordingly, we recognize that some of the ISP traffic carried by GTE's ADSL service may be destined for intrastate or even local Internet websites or databases.

23. GTE argues that its ADSL service is properly tariffed at the federal level on the ground that it is similar to existing special access services that are subject to federal regulation under the mixed-use facilities rule because more than ten percent of the traffic is interstate.⁸⁴ The mixed-use facilities rule was introduced in a 1989 proceeding involving the re-examination of the separations treatment of "mixed-use" special access lines.⁸⁵ Specifically, in the *MTS/WATS Market Structure Order*, the Commission adopted the Joint Board's recommendation that "mixed-use" special access lines (*i.e.*, lines carrying both intrastate and interstate traffic) are subject to the Commission's jurisdiction where it is not possible to separate the uses of the special access lines by jurisdiction.⁸⁶ The Commission found that special access lines carrying more than *de minimis* amounts of interstate traffic to private line systems should be assigned to the interstate jurisdiction.⁸⁷ Interstate traffic is deemed *de minimis* when it amounts to ten percent or less of the total traffic on a special access line.⁸⁸

24. GTE contends that its ADSL service is similar to special access lines currently subject to federal regulation under the mixed-use facilities rule, and, thus, its ADSL service should be similarly regulated at the federal level.⁸⁹ Section 69.2 of the Commission's rules defines "access service" as including "services and facilities provided for the origination or

⁸³ See, e.g., Kevin Werbach, *Digital Tornado: The Internet and Telecommunications Policy*, OPP Working Paper No. 29, at 45 (Mar. 1997).

⁸⁴ See, e.g., GTE Rebuttal at 15.

⁸⁵ MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, 4 FCC Rcd 5660 (1989) (*MTS/WATS Market Structure Separations Order*).

⁸⁶ *Id.*

⁸⁷ *Id.* at 5660, 5661. A private line service is a service for communications between specified locations for a continuous period or for regularly recurring periods at stated hours. 47 C.F.R. Pt 36, App. For example, high volume voice telephony customers purchase private line services as a means of obtaining direct access to interexchange carrier (IXC) networks.

⁸⁸ *Id.* at 5660.

⁸⁹ GTE Direct Case at 19.

termination of any interstate or foreign telecommunication."⁹⁰ There are two categories of access service: switched and special. Switched access services share the local switch to route originating and terminating interstate toll calls. Special access services, by contrast, generally provide a dedicated path between an end user and an IXC's point of presence. The special access category includes a wide variety of facilities and services, such as wideband data, video, and program audio services.⁹¹

25. We agree that GTE's ADSL service is a special access service, thus warranting federal regulation under the "ten percent" rule. Like the point-to-point private line service high volume telephony customers purchase for direct access to IXCs' networks, GTE's ADSL service provides end users with a direct access to their selected ISPs, over a connection that is dedicated to ISP access.⁹² This dedicated access enables end users to avoid the problems associated with circuit-switched, dial-up access, such as long holding times and inability to connect to the Internet due to network congestion. The ADSL service also is similar to traditional private line services in that both services may carry interstate and intrastate traffic, and both services provide direct access from an end user to a service provider's (ISP or IXC) point of presence.

26. We are not persuaded by ALTS's argument that ADSL service does not fall within the definition of special access because it does not constitute "interstate telecommunications."⁹³ As stated above, we disagree with ALTS's suggestion that the "telecommunications" service ends where the "information service" begins.⁹⁴ Furthermore, as discussed above, we conclude that more than a *de minimis* amount of Internet traffic is destined for websites in other states or other countries, even though it may not be possible to ascertain the destination of any particular transmission. For these reasons, we conclude that GTE's ADSL service is subject to federal jurisdiction under the Commission's mixed-use facilities rule.

27. We emphasize that we believe federal tariffing of ADSL service is appropriate where the service will carry more than a *de minimis* amount of inseparable interstate traffic.⁹⁵ Should

⁹⁰ 47 U.S.C. § 69.2(b).

⁹¹ See Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I and Phase II, Part I, FCC 85-70, 57 Rad. Reg. 2d 1459, 1465 (Com. Car. Bur. 1985).

⁹² GTOC Description and Justification at 1.

⁹³ See ALTS Opposition at 4, 18-19; see also ICG Opposition at 6-7; Hyperion Opposition at 3; and ITC/KMC Opposition at 3.

⁹⁴ See ¶ 20, *supra*.

⁹⁵ See, e.g., GTE Rebuttal at 15 (GTE will ask every ADSL customer to certify that ten percent or more of its traffic is interstate).

GTE or any other incumbent LEC offer an xDSL service that is intrastate in nature, for example, a "work-at-home" application where a subscriber could connect to a corporate local area network, that service should be tariffed at the state level.⁹⁶

28. Several parties further argue that because it is difficult, if not impossible, to separate intrastate and interstate Internet traffic, federal regulation of this traffic is appropriate pursuant to the inseverability doctrine.⁹⁷ Under the inseverability doctrine, pre-emption of state regulation is permissible "where it is not possible to separate the interstate and the intrastate components of the asserted FCC regulation."⁹⁸ The Commission bears the burden of demonstrating that state regulation "negates the exercise by the FCC of its own lawful authority over interstate communications."⁹⁹ In light of our finding that GTE's ADSL service is subject to federal jurisdiction under the Commission's mixed use facilities rule and properly tariffed as an interstate service, we need not reach the question of whether the inseverability doctrine applies.

29. Many commenters urge the Commission to clarify that any conclusion on the jurisdictional nature of GTE's ADSL service has no bearing on the jurisdictional nature of circuit-switched traffic, particularly dial-up calls to the local ISP platform.¹⁰⁰ These parties contend that characterizing GTE's ADSL service as interstate would allow incumbent LECs to avoid their obligations to pay reciprocal compensation to competitive LECs for the transport and termination of circuit switched, dial-up calls from end users to ISPs.¹⁰¹ As stated above, our decision in this proceeding relates only to the jurisdictional treatment of the high speed access connection between an end user subscriber and an ISP, as described in GTE's tariff. We make no

⁹⁶ See GTE Rebuttal at 15-16 (if ADSL "traffic warrants state tariffing, GTE will do so").

⁹⁷ GTE Direct Case at 18; Time Warner Comments at 2; USTA Comments at 6-7; Covad Comments at 3-7; and Bell Atlantic Comments at 3-4.

⁹⁸ *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986); see also *North Carolina Utils. Comm'n v. FCC*, 537 F.2d 787 (4th Cir.), cert. denied, 429 U.S. 1027 (1976); *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036 (4th Cir.), cert. denied, 434 U.S. 874 (1977).

⁹⁹ *NARUC v. FCC*, 880 F.2d 422, 429 (D.C. Cir. 1989) (citing *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036, 1043 (4th Cir.) (where Commission acted within its authority to permit subscribers to provide their own telephones, pre-emption of inconsistent state regulation prohibiting subscribers from connecting their own phones unless used exclusively in interstate service upheld since state regulation would negate the federal tariff), cert. denied, 434 U.S. 874 (1977)).

¹⁰⁰ See, e.g., ICG Opposition at 11; ALTS Opposition at 22; Intermedia/e.spire Opposition at 5; Splitrock Opposition at 3; Time Warner Comments at 2, 9; ITC/KMC Opposition at 8; Ohio Commission Comments at 7; and AT&T Opposition at 8.

¹⁰¹ See, e.g., ICG Opposition at 11; ALTS Opposition at 22; Intermedia/e.spire Opposition at 5; Splitrock Opposition at 3; Time Warner Comments at 2, 9; ITC/KMC Opposition at 8; and AT&T Opposition at 8.

determination in this Order concerning whether incumbent LECs should be required to pay reciprocal compensation when they exchange Internet traffic with competitive LECs.¹⁰²

30. Finally, we reject the argument advanced by some commenters that the Commission should defer the tariffing of DSL services to the states in order to lessen the possibility of a price squeeze.¹⁰³ These commenters argue that federal tariffing of DSL services will subject competitors to a price squeeze, because the federally tariffed DSL rate may be lower in some states than the sum of the prices of unbundled network element inputs, such as loops and collocation, that competitive LECs must purchase to offer competing services.¹⁰⁴ They suggest that the Commission should either: (1) require GTE to impute to its ADSL service charges for loops, collocation, and transport elements that it imposes on its competitors; or (2) defer tariffing of DSL services to the states, which have jurisdiction over the pricing of network elements.¹⁰⁵

31. We do not agree that the possibility of a price squeeze warrants transfer of our ratemaking authority over DSL services to the states. First, it is not clear that fear of a price squeeze is well-founded. Northpoint's argument is premised on its assertion that GTE's rate for its ADSL service "is less than the price it charges competitive LECs for the loops, collocation and transport necessary to provide DSL service,"¹⁰⁶ but this is not an apt comparison. When a requesting carrier purchases these unbundled network elements, the facilities in question are capable of supporting a variety of services in addition to ADSL, such as local exchange service and access services. Competitors need not recover their costs from ADSL service alone; they have the same opportunity as GTE to recover the costs of network elements from all of the services they offer using those facilities.¹⁰⁷ Thus, a carrier choosing to offer only data service over a facility that is capable of carrying more, such as GTE's ADSL offering, may not reap the entire revenue stream that the facility has to offer. Moreover, taken to its logical conclusion, Northpoint's reasoning would suggest that all interstate access services be regulated by the states, because those services can be provided by competitors through the use of unbundled network

¹⁰² See ¶ 2, *supra*.

¹⁰³ See, e.g., Northpoint Response at 5; ALTS Opposition at 14.

¹⁰⁴ Northpoint Response at 3.

¹⁰⁵ *Id.* at 4-5.

¹⁰⁶ *Id.* at 4.

¹⁰⁷ See e.g., Bell Atlantic Comments at 11.

elements priced by the states.¹⁰⁸ Such an outcome is neither necessary nor contemplated by the Act.¹⁰⁹

32. This Commission is well-versed in addressing the price squeeze concerns of new entrants and has in the past successfully forestalled attempts by incumbent LECs to shift costs to monopoly services in order to justify rates that effect a price squeeze.¹¹⁰ We have ample authority under the Act to conduct an investigation to determine whether rates for DSL services are just and reasonable.¹¹¹ Moreover, although states have jurisdiction to determine the prices of unbundled network elements, those prices are a matter of public record that the Commission may examine in the context of determining the reasonableness of DSL rates or in the event of a complaint alleging a price squeeze. We conclude, therefore, that federal tariffing of interstate DSL services, such as the one at issue here, is appropriate, and we will address any price squeeze concerns as they arise.

IV. ORDERING CLAUSES

33. Accordingly, IT IS ORDERED, pursuant to Section 204(b) of the Communications Act of 1934, 47 U.S.C. § 204(b), that GTOC Transmittal No. 1148, proposing to offer GTE DSL Solutions-ADSL Service, is an interstate access service subject to this Commission's jurisdiction.

34. IT IS FURTHER ORDERED, that the investigation and accounting order imposed by the Common Carrier Bureau in CC Docket No. 98-79 with respect to GTE for the designated issues as discussed herein IS TERMINATED.

¹⁰⁸ GTE Direct Case at 25-26; Ameritech Comments at 26.

¹⁰⁹ See, e.g., *Competitive Telecomms. Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) (upholding Commission decision to allow incumbent LECs for interim period to collect access charges from interconnecting carriers for all interstate minutes traversing the incumbent LECs' local switches, for which the carriers pay unbundled local switching charges).

¹¹⁰ See, e.g., *INFONXX, Inc. v. New York Telephone Company*, Memorandum Opinion and Order, 13 FCC Rcd 3589 (1997); *In the Matter of Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, Report and Order, 12 FCC Rcd 15668 (1997); see also ACI/Firstworld Comments at 9.

¹¹¹ E.g., 47 U.S.C. §§ 204-205.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A

Comments

ACI Corp.
America Online
Ameritech
Association for Local Telecommunications Services (ALTS)
AT&T Corp.
Bell Atlantic
BellSouth Corporation
Commercial Internet eXchange Association
Competitive Telecommunications Association (CompTel)
Covad Communications Company (Covad)
e.spire Communications, Inc.
Firstworld Communications, Inc.
Florida Digital Network, Inc.
Focal Communications Corporation
Hyperion Telecommunications, Inc.
GTE Service Corporation
GST Telecom Inc.
ICG Telecom Group
Intermedia Communications, Inc.
Internet Service Providers' Consortium (ISPC)
ITC^Delta Communications, Inc. (ITC)
KMC Telecom, Inc.
MediaOne Group, Inc.
MCI/Worldcom, Inc. (MCI)
National Association of Regulatory Utility Commissioners (NARUC)
New York Department of Public Service Commission
Northpoint Communications, Inc. (Northpoint)
Pacific Bell Telephone Company (PacBell)
Pac-West Telecomm, Inc.
Pennsylvania Public Utility Commission
Public Utility Commission of Texas
Public Utility Commission of Oregon
RCN Telecomm Services, Inc.
Southwestern Bell Telephone Company, Nevada Bell Telephone Company (SBC)
Splitrock Services, Inc.
Sprint Corporation
Time Warner Communications

United States Telephone Association (USTA)
U S West, Inc.
Washington Utilities and Transportation Commission
Virginia State Corporation Commission

October 30, 1998

**Separate Statement of
Commissioners Harold Furchtgott-Roth and Gloria Tristani,
Dissenting in Part**

We support today's decision finding that GTE's DSL tariff includes an interstate service offering properly filed at the federal level. We write separately, however, to express our unwillingness to address the broader issues related to the jurisdictional nature of ISP traffic in this proceeding. That broader issue seems to be of enormous importance to many businesses, industries and consumers today, and doubtlessly many more tomorrow. The Commission faces no statutory deadline on the broader issue of the jurisdictional nature of ISP traffic, and thus we would prefer caution.

The Commission does face a statutory deadline on the GTE tariff, but we could have allowed that tariff to go into effect as a lawful provision of a private service without addressing these broader questions. Such a result would not have reached the broader issue of whether ISP traffic over this DSL service is inherently interstate. Neither would such a decision have required the Commission to determine that "the communications at issue here do not terminate at the ISP's local server, as some CLECs and ISPs contend, but continue to the ultimate destination or destinations, very often at a distant Internet website accessed by the end user."¹ Nor would we need to conclude that "[t]he fact that the facilities and apparatus used for GTE's DSL service offering may be located within a single state does not affect our jurisdiction."² Such sweeping statements about this agency's jurisdiction -- and even more importantly the logical application of that framework -- could have broad and even unintended implications for many state commission decisions. Despite the majority's attempt to insulate State commission decisions, we are concerned that the logical application of that framework could have broader implications, and that is why we would urge greater caution and a narrower decision. Of course, we urge all parties to exercise caution pending the Commission's decision next week.

The majority's decision to address the jurisdictional nature of ISP traffic has the unfortunate consequence of necessitating a discussion of the relationship between today's decision and existing state commission decisions concerning reciprocal compensation. That analysis by the Commission could have major ramifications for incumbent LECs, CLECs, state commissions, and consumers. At this point, we are uncertain of how to characterize the impact, if any, of today's Order on state commission decisions. In our judgment, such a discussion should have been deferred until next week when we will address reciprocal compensation issues more comprehensively.

¹ Memorandum Opinion and Order at para. 19.

² *Id.*

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We think that it is important to reach a well-reasoned solution, and one that can withstand the inevitable weight of both close judicial scrutiny and market reaction. If we proceed rapidly with a solution that has not been fully vetted, we will create even greater uncertainty in the market, raising the specter of possible defeat in court, and exacerbating an already difficult market condition. Such a result will have benefitted no one but the litigation profession.

As a narrower resolution of the tariff before us is possible, we would have preferred to meet that deadline in a manner that does not precommit this agency to a scheme whose logic could dictate a resolution of some of the reciprocal compensation issues that we are not prepared to endorse.

* * * *