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March 12, 1999

Ms. Blanca S. Bayo, Director
Division of Records & Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 980986-TP
Complaint of Intermedia Communications Inc. against GTE Florida Incorporated
for breach of terms of Florida Partial Interconnection Agreement under Sections
251 and 252 of the Telecommunications Act of 1996, and request for relief

Dear Ms. Bayo:

Please find enclosed an original and fifteen copies of the Supplemental Testimony of
Steven J. Pitterle on behalf of GTE Florida Incorporated for filing in the above matter.

Service has been made as indicated on the Certificate of Service. If there are any
questions regarding this filing, please contact me at (813) 483-2617.

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Sincerely,

Kimberly Caswell
Kimberly Caswell

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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

**SUPPLEMENTAL TESTIMONY OF
STEVEN J. PITTERLE
ON BEHALF OF
GTE FLORIDA INCORPORATED**

MARCH 12, 1999

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1 **GTE FLORIDA INCORPORATED**

2 **SUPPLEMENTAL TESTIMONY OF STEVEN J. PITTERLE**

3 **DOCKET NO. 980986-TP**

4

5 **Q. ARE YOU THE SAME STEVEN J. PITTERLE WHO FILED DIRECT**
6 **AND REBUTTAL TESTIMONY IN THIS PROCEEDING?**

7 **A.** Yes.

8

9 **Q. WHAT IS THE PURPOSE OF THIS SUPPLEMENTAL TESTIMONY?**

10 **A.** I will explain how the FCC's February 26, 1999 Order on reciprocal
11 compensation affects the Commission's resolution of the issue in this
12 proceeding. (Implementation of the Local Competition Provisions in
13 the Telecomm. Act of 1996, FCC 99-38 (FCC Order).

14

15 **Q. DID THE FCC DETERMINE THE JURISDICTIONAL NATURE OF**
16 **INTERNET-BOUND TRAFFIC IN ITS RECIPROCAL**
17 **COMPENSATION ORDER?**

18 **A.** Yes. It ruled that the traffic bound for Internet service providers (ISPs)
19 "is jurisdictionally mixed and appears to be largely interstate." (FCC
20 Order at para. 1.) Consistent with its past precedents, the FCC
21 concluded that ISP communications "do not terminate at the ISP's
22 local server, as CLECs and ISPs contend, but continue to the ultimate
23 destination or destinations, specifically at an Internet website that is
24 often located in another state." (Id. at para. 12, citations omitted.)
25 The agency explicitly disagreed with CLECs who had argued that
26 ISP-bound traffic could be separated, for jurisdictional purposes, into

1 intrastate telecommunications service and interstate information
2 service components. It pointed to its longstanding practice of
3 analyzing the totality of a communication to determine its jurisdictional
4 nature, and confirmed that "it has never found that
5 'telecommunications' end where 'enhanced' service begins." (*Id.* at
6 para. 13.)

7
8 **Q. IS THE FCC'S RULING CONSISTENT WITH GTE'S POSITION IN**
9 **THIS CASE?**

10 **A.** Yes. GTE interpreted FCC precedent in the same way the FCC did
11 and concluded, as the FCC did, that ISP-bound traffic is largely
12 interstate.

13
14 **Q. DOES THE GTE/ICI AGREEMENT SPECIFY THAT RECIPROCAL**
15 **COMPENSATION SHOULD APPLY TO THIS INTERSTATE**
16 **TRAFFIC?**

17 **A.** No. On the contrary, the GTE/ICI Agreement specifies that the
18 parties "shall compensate each other for the exchange of Local
19 Traffic" (section 3.3.1), which is defined as "traffic that is originated by
20 an end user of one Party and terminates to the end user of the other
21 Party within GTE's then current local serving area" (section 1.20).
22 Under the FCC's ruling, ISP-bound traffic does not "terminate" in
23 GTE's serving area and is not "Local Traffic." Thus, there is no basis
24 for subjecting ISP traffic to the reciprocal compensation provisions in
25 the GTE/ICI local interconnection contract.

26

1 **Q. IS THE FCC ORDER CONTRARY TO ICI'S THEORY OF ITS CASE**
2 **HERE?**

3 **A.** Yes. The FCC Order unequivocally confirmed that ICI misinterpreted
4 FCC precedent to conclude that "traffic to an ISP is local traffic." (ICI
5 Complaint at 10.) ICI's argument that it is due reciprocal
6 compensation under the contract is based on contentions that the
7 FCC has explicitly disapproved. ISP traffic does not, as ICI argues,
8 "terminate" within GTE's local serving area; ISP traffic is not, as ICI
9 asserts, severable into local exchange telecommunications and
10 interstate information service components; and the FCC's
11 longstanding exemption of ISPs from access charges does not, as ICI
12 believes, indicate that ISP-bound traffic is local.

13
14 **Q. IS THIS COMMISSION'S PAST INTERPRETATION OF FCC**
15 **PRECEDENT CONSISTENT WITH THE FCC ORDER?**

16 **A.** I'm afraid not. As I discussed in my Direct Testimony, the
17 Commission interpreted FCC precedent in ruling on a number of
18 reciprocal compensation complaints against BellSouth (Order No.
19 PSC-98-1216-FOF-TP, Sept. 15, 1998 (BellSouth Order)). While the
20 Commission seemed to believe that the question of whether ISP
21 traffic is local or interstate was a close call, it ultimately (and
22 mistakenly) interpreted FCC precedent to find that such traffic was
23 local. It opined that the FCC seemed to be "leaning toward" the
24 notion that an ISP communication could be severed into
25 telecommunications and information service components. (BellSouth
26 Order at 18.) The FCC Order proved this opinion to be ill-founded.

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Q. SHOULD THE COMMISSION'S RULING IN THE BELLSOUTH CASE CONTROL THE OUTCOME OF THIS DISPUTE?

A. No. In fact, I believe the Commission is obliged to reach a different result here. Obviously, the Commission cannot continue to rely on an interpretation of FCC precedent that the FCC itself has refuted. Furthermore, the Commission assertedly did not resolve any generic questions in the BellSouth case, but confined its decision to the particular disputes before it. (BellSouth Order at 4.) There is no reason the Commission cannot reach a different result here (that is, refuse to order reciprocal compensation for ISP traffic), especially since the contract and intent evidence here are different.

The Commission may, in any event, choose to reconsider its BellSouth Order. Indeed, the FCC recognized that its "conclusion that ISP-bound traffic is largely interstate might cause some state commissions to re-examine their conclusion that reciprocal compensation is due to the extent that those conclusions are based on a finding that this traffic terminates at an ISP server." (FCC Order at para. 27.) Because this Commission made such a finding in the BellSouth case, reconsideration is probably justified. But whether or not the Commission undertakes a re-assessment of its BellSouth Order, different findings are warranted in this case.

Q. DID THE FCC ADOPT RULES FOR RECIPROCAL COMPENSATION FOR ISP TRAFFIC?

1 A. Not yet. While the FCC settled the dispute about the jurisdictional
2 nature of ISP traffic, it felt it lacked an adequate record to establish a
3 mechanism for inter-carrier compensation for delivery of this traffic.
4 (FCC Order at para. 28.) Rather, it issued a notice of proposed
5 rulemaking seeking comment on two proposals embodying the
6 Commission's strong judgment that commercial negotiations, rather
7 than regulatory mandates, "are the ideal means of establishing the
8 terms of interconnection contracts." (Id.)

9
10 Q. **DOES THE FCC'S RULING PURPORT TO ALLOW THE STATES**
11 **TO DECIDE RECIPROCAL COMPENSATION DISPUTES UNTIL**
12 **THE FCC CAN ADOPT A COMPENSATION MECHANISM?**

13 A. Yes. The FCC indicated that until it adopts a compensation rule,
14 states may continue to determine whether reciprocal compensation
15 provisions of interconnection agreements apply to ISP traffic in
16 particular cases. In this regard, "parties may voluntarily include this
17 traffic within the scope of their interconnection agreements under
18 sections 251 and 252 of the Act, even if these statutory provisions do
19 not apply as a matter of law. Where parties have agreed to include
20 this traffic within their section 251 and 252 interconnection
21 agreements, they are bound by those agreements, as interpreted and
22 enforced by the state commissions." (FCC Order at para. 22.) Even
23 though ISP-bound traffic is jurisdictionally interstate, "parties
24 nonetheless may have agreed to treat the traffic as subject to
25 reciprocal compensation." (Id. at para. 23.)

26

1 **Q. DOES GTE BELIEVE THE FCC'S DIVESTMENT OF ITS**
2 **AUTHORITY OVER INTERSTATE MATTERS IS VALID?**

3 **A.** No. The FCC has determined that the ISP traffic at issue is
4 jurisdictionally interstate. Therefore, as GTE's lawyers have advised
5 me, the FCC cannot lawfully divest itself of its jurisdiction over this
6 traffic. The FCC cannot find that ISP communications are interstate,
7 but at the same time leave the states to determine the appropriate
8 intercarrier compensation to be applied to this traffic. GTE will
9 discuss this legal issue more extensively in its Posthearing Statement
10 in this proceeding.

11

12 **Q. DID GTE INTEND TO INCLUDE INTERSTATE ISP TRAFFIC**
13 **WITHIN ITS LOCAL INTERCONNECTION AGREEMENT WITH ICI?**

14 **A.** Absolutely not. As I stated above, the GTE/ICI Agreement, by its
15 terms, requires reciprocal compensation for only local, not interstate,
16 traffic. There is no basis for finding that GTE intended something
17 other than what is plainly stated in the Agreement. GTE did not
18 "voluntarily agree to include this traffic" within the scope of the
19 contract. GTE has always correctly understood that the traffic at
20 issue is jurisdictionally interstate, and thus outside the scope of the
21 reciprocal compensation obligations in local interconnection contracts.
22 Indeed, as I discussed in my Direct Testimony, GTE's longstanding
23 corporate position with regard to the jurisdictional nature of ISP traffic
24 is a prominent matter of public record. The FCC's first ruling directly
25 analyzing the jurisdictional nature of ISP traffic was rendered in the
26 context of GTE's ADSL tariff filing at the FCC (ADSL provides for a

1 dedicated connection to an ISP's point-of-presence). (GTE Tel.
2 Operating Cos. GTOC Tariff No. 1, GTOC Transmittal No. 1148, FCC
3 98-292, Memorandum Op. & Order (Oct. 30, 1998).) GTE filed its
4 ADSL tariff in the federal jurisdiction because it correctly understood
5 that ISP traffic is jurisdictionally interstate.

6
7 Given GTE's correct understanding of FCC precedent at the time it
8 executed the ICI contract, it would have made no sense for GTE to
9 seek exclusion of interstate ISP traffic from contract obligations
10 specifically applicable to only local traffic. On the contrary, consistent
11 with the FCC's language, GTE would have had to affirmatively seek
12 to include this traffic in the scope of its agreement with ICI for this
13 Commission to find that it is subject to reciprocal compensation
14 obligations under that contract.

15
16 In addition, as I pointed out in my prefiled testimony, GTE would
17 never have agreed to apply reciprocal compensation to ISP traffic
18 when it would stand to lose millions of dollars a year in doing so.
19 ALECs serving ISPs wildly skew the fundamental premise of
20 reciprocal compensation arrangements—that the traffic between the
21 two networks will be roughly balanced. While ISPs do not generally
22 make calls, they generate a huge volume of inbound calls that,
23 moreover, typically last much longer than the average voice call.
24 (Pitterle Direct Testimony at 13.)

25

1 Q. DOES THE COMMISSION AGREE THAT CONSIDERATION OF
2 THE LAW AT THE TIME OF CONTRACT EXECUTION IS
3 RELEVANT TO DISCERNING PARTIES' INTENT?

4 A. Yes. While the Commission views reciprocal compensation
5 complaints as contract disputes, it has recognized that the central
6 question in these cases—that is, what is local traffic?—cannot be
7 settled without reference to controlling law and regulation. (Pitterle
8 Direct Testimony at 5.) The Commission thus made its BellSouth
9 rulings on “the basis of the plain language of the Agreement and of
10 the effective law at the time the Agreement was executed.”
11 (BellSouth Order at 18-19.)

12
13 ICI witness Strow agrees that the Commission will address the
14 general jurisdictional question “as necessary to show what parties
15 might reasonably have intended at the time they entered into their
16 contracts.” (Strow Direct Testimony at 10.)

17
18 Q. DURING NEGOTIATIONS, DID ICI SEEK TO INCLUDE ISP
19 TRAFFIC WITHIN THE SCOPE OF THE RECIPROCAL
20 COMPENSATION OBLIGATIONS FOR LOCAL TRAFFIC?

21 A. No. ICI states that its largest customer was an ISP when the parties
22 executed their contract, so “presumably GTE was aware” that
23 reciprocal compensation requirements were “significant” to ICI.
24 (Strow Direct Testimony at 11.) ICI did not inform GTE of the
25 “significance” of reciprocal compensation requirements for ISP traffic

1 during negotiations and GTE cannot be expected to have known that
2 ICI had misapprehended FCC precedent.

3
4 **Q. DOES GTE OPPOSE ANY KIND OF INTERCARRIER**
5 **COMPENSATION FOR ISP TRAFFIC?**

6 **A.** Not necessarily. But GTE believes that the FCC is the only
7 appropriate body to establish the compensation terms to be applied
8 to this interstate traffic. In this regard, the FCC has already reached
9 a tentative conclusion that reciprocal compensation is an inefficient
10 compensation method for ISP traffic. (FCC Order at para. 29.)

11
12 As I explained in my Direct Testimony (at 15-16), the reciprocal
13 compensation scheme ICI advocates here results in nothing more
14 than a non-cost-based windfall for the terminating carrier and gross
15 marketplace distortions that will undermine rational local competition.
16 In a recent decision rendered after the FCC Order, the Public Utilities
17 Commission of Nevada pointed to the "huge disparity" between ISPs'
18 inbound and outbound communications and concluded that
19 companies were "setting up in part as CLECs to reap the windfall of
20 potential payouts by Nevada Bell for reciprocal compensation.
21 Nevada Bell would receive little, if any revenue from [the CLECs]
22 because their primary focus would be on the provision of call
23 termination services to ISPs, paging companies, and other companies
24 generating large volumes of inbound traffic. [Citation omitted] As a
25 result, Nevada Bell would be forced to essentially subsidize Internet
26 Service. This is not just or reasonable." (Petition of Pac-West

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Telecomm, Inc. for arbitration and Petition of Advanced Telecom Group, Inc. for arbitration, Arbitration Decision in Nevada PUC Dockets 98-10015 and 98-1007, Mar. 4, 1999, at 13-14.)

It would, likewise, be unjust and unreasonable—as well as inconsistent with relevant legal precedent—to order reciprocal compensation for the ISP traffic at issue in this case.

Q. DOES THIS CONCLUDE YOUR SUPPLEMENTAL TESTIMONY?

A. Yes.

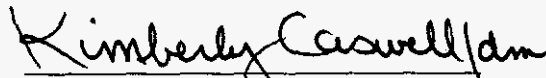
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the Supplemental Testimony of Steven J. Pitterle on behalf of GTE Florida Incorporated in Docket No. 980986-TP were hand-delivered(*) or sent via U.S. mail(**) on March 12, 1999 to the following:

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