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BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Commission )  
Investigation Into the Treatment of )  
Reciprocal Compensation for Internet ) Case No. 99-941-TP-ARB  
Service Provider Traffic )

**INITIAL BRIEF OF GTE NORTH INCORPORATED  
CONCERNING ISSUES TO BE CONSIDERED AND  
IMPACT OF DECISION**

On behalf of GTE North Incorporated ("GTE"), this Initial Brief responds to the Attorney Examiner's Entry of April 6, 2000 in this matter, which called for briefs concerning the issues to be considered by the Commission in this proceeding, as well as the impact of the decision in Bell Atlantic Telephone Companies, et al., v. Federal Communications Commission, Case No. 99-1094, 2000 U.S.App. LEXIS 4685 (D.C. Cir. March 24, 2000) ("Bell Atlantic").

**Discussion**

GTE submits that the jurisdictional issue previously before this Commission should be determined at the federal level, but that the "Issues List" of this case is otherwise unaffected by Bell Atlantic. Accordingly, this case should proceed on an agreeable schedule to determine the remaining issues.

**Previous Issues**

In the Entry of March 15, 2000, the following general issues were identified for resolution in this case:

- a. The extent of the Commission's jurisdiction, in light of applicable federal proceedings, as well as the timing of any resulting Ohio decision;

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- b. The identification of ISP traffic on the network, and the ability, desirability and legality of doing so;
- c. The overall cost of a dial-up ISP call, and the variations thereof that different networks may cause;
- d. Compensation mechanisms, existing and proposed, for dial-up ISP calls as well as other calls, and the implementation timing thereof in light of federal developments; and
- e. Policy implications of alternative compensation mechanisms.

### Bell Atlantic

The Bell Atlantic decision achieved one, and only one, legal result: it vacated the FCC's previous Declaratory Ruling<sup>1</sup> and remanded the issues determined in that administrative decision for more thorough explanation. In that analysis, the D.C. Circuit vacated in whole the Declaratory Ruling on the ground that the FCC had failed to explain adequately why ISP-bound traffic is interstate traffic and thus not subject to the reciprocal compensation obligation of 47 U.S.C. §251(b)(5). See Bell Atlantic 2000 U.S.App. LEXIS 4685 at \*26. The FCC had determined in the Declaratory Ruling that, under its existing precedents, Internet calls were interexchange (long-distance) calls rather than local calls because they "do not terminate at the ISP's local server . . . but continue to the ultimate destination or destinations, specifically at an Internet website that is often located in another state." See Declaratory Ruling ¶ 12. See also id. ¶ 26 n.87 ("ISP-bound traffic is non-local interstate traffic."). According to the FCC, this conclusion was compelled by the fact that "communications should be analyzed on an end-to-end basis, rather than by breaking the transmission into component parts," id. ¶ 15.

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<sup>1</sup> In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; In the Matter of Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 F.C.C.R. 3689 (1999) ("Declaratory Ruling")

The D.C. Circuit did not categorically reject the FCC's analysis. Rather, it vacated the order because the FCC had not adequately explained its application of the end-to-end method of analysis for determining whether ISP-bound traffic came within the Act's provision for reciprocal compensation. See Bell Atlantic, 2000 U.S.App. LEXIS at \*22. For this reason, the Court "vacate[d] the ruling and remand[ed] the case to the Commission." Id.

Consequently, the Bell Atlantic decision resolved none of the issues identified by this Commission in this proceeding. The Bell Atlantic decision did not consider or determine the ability of any network to distinguish ISP traffic, the cost of ISP traffic in the abstract or in reality, or the propriety or wisdom of any compensation mechanisms. Most significantly, the Bell Atlantic decision neither determined nor directed the jurisdictional nature of ISP traffic; it concluded only that the FCC had failed adequately to explain its determination. As a result, the FCC will revisit and determine that question in the near future.

#### Recommendation

GTE submits, therefore, that the Commission should refrain from addressing purely legal issues relating to its jurisdictional authority. As noted, that issue will not be decided by the Commission, but rather will be decided by the FCC and, if necessary, the D.C. Circuit on appeal.

Nonetheless, the Commission can and should proceed to address the other issues set forth in the March 15 Entry. Any delay in doing so could deprive GTE and others of

their opportunity to explore those issues and to demonstrate an appropriate regulatory approach.<sup>2</sup>

Furthermore, the contentions of the CLEC Group concerning the effects of both the Bell Atlantic decision and this Commission's prior decisions are vastly overstated. No "summary judgment" should even be considered in this case. As noted, nothing in the Bell Atlantic decision determined the jurisdictional nature of ISP traffic, and the CLEC Group cannot and does not cite to any such determination. Rather, the CLEC Group argues that the now-vacated Declaratory Ruling was "the only basis upon which the Commission could have concluded that [ISP traffic] should be subject to a compensation scheme other than reciprocal compensation."<sup>3</sup> Such diversion ignores the obvious: nothing in the Bell Atlantic decision leads to that result.

The CLEC Group further argues that this case should now be "perfunctory and should be limited to a ruling . . . affirming the Commission's prior rulings that NECs and ILECs must compensate each other for ISP-bound traffic at the LEC's TELRIC-based reciprocal compensation rates."<sup>4</sup> Again, the premise is nonsense – no prior decisions of this Commission have decided that all ISP traffic is subject to reciprocal compensation. Rather, in each case in which the Commission has considered the matter, the Commission

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<sup>2</sup> Certainly, neither the CLEC Group nor the Bell Atlantic decision provide any compelling reason for such delay. Indeed, although parties argued to the D.C. Circuit that the Act precludes state commissions from requiring carriers to pay reciprocal compensation for the termination of ISP-bound traffic, the court specifically declined to address that issue, explaining that such review is premature because there presently is "no adequately explained classification of these communications" from the FCC. Bell Atlantic, 2000 U.S.App. LEXIS 4685 at \*26. In light of this ruling, it is now clear that the issue of state commission authority to regulate in this area has not been resolved by the D.C. Circuit; it will instead be resolved by the FCC in the near future.

<sup>3</sup> CLEC Group Motion to Modify Procedural Schedule or Motion for Summary Judgment (March 31, 2000) at 5.

<sup>4</sup> CLEC Group Motion to Modify Procedural Schedule or Motion for Summary Judgment (March 31, 2000) at 6-7.

has carefully limited its decision to the contract before it and to the presumed intention of the parties.<sup>5</sup> Indeed, the CLEC Group's argument otherwise acknowledges as much, citing the Commission's recent decision to again defer a "generic" decision to this very proceeding. In the Matter of ICG Telecom Group's Petition for Arbitration, Case No. 99-1153-TP-ARB, Award (February 24, 2000) at 9.

In short, except for jurisdictional issues to be resolved at the federal level, this Commission should consider the issues of this case. Obviously, the "summary judgment" sought by the CLEC Group is inappropriate and obviously discovery is necessary. If the proceedings in this case to date have proven nothing else, they have proven that ISP-bound traffic is a slippery subset of network traffic. Its identification appears to be difficult. The costs of delivering and terminating it appear to vary. The appropriate method for recovering those costs is controversial. Thus, evidence must be developed and taken and "summary judgment" must be rejected.

### Conclusion

Except for jurisdictional issues to be determined by the FCC, GTE submits that the "Issues List" of this case is unaffected by the Bell Atlantic decision, and that this case should proceed on an agreeable schedule and within its existing framework. GTE

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<sup>5</sup> Indeed, the Commission used identical language in three different orders to make this point:


In making this determination [that reciprocal compensation is payable] we specifically note that we are deciding this case solely on our interpretation of what the parties understood at the time the Agreement was negotiated. This decision should not be viewed by anyone as an opinion on the broader policy implications involved . . .

In the Matter of the Complaint of ICG Telecom Group, Case No. 97-1557-TP-CSS, Opinion and Order (August 27, 1998) at 8; In the Matter of the Complaint of Time Warner Communications, Case No. 98-308-TP-CSS, Opinion and Order (October 14, 1998) at 7; In the Matter of the Complaint of MCI Metro Access Transmission Services, Case No. 97-1723-TP-CSS, Opinion and Order (October 14, 1998) at 6. All three decisions were sustained in a collective Entry on Rehearing issued May 9, 1999.

reserves its rights to respond to the briefing of other parties submitted in response to the Attorney Examiner's Entry of April 6, 2000 in this matter.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing, has been served upon all parties listed on the attached Service List, by hand-delivery or regular U.S. mail, postage prepaid, this 14<sup>th</sup> day of April, 2000.

  
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