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April 24, 2000

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Daisy Crockron, Chief of Docketing  
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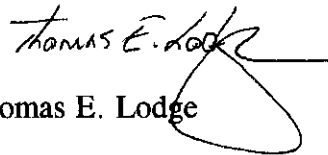
Re: In the Matter of the Commission Investigation Into the Treatment of  
Reciprocal Compensation for Internet Service Provider Traffic ,  
PUCO Case No. 99-941-TP-ARB

Dear Ms. Cockron:

Enclosed are an original and ten (10) copies of the Reply Brief of GTE North  
Incorporated, to be filed in connection with the above-referenced matter:

Thank you for your assistance. If you have any questions, please feel free to call.

Very truly yours,

  
Thomas E. Lodge

TEL/tjh

cc: Jeffrey R. Jones, Attorney Examiner  
Parties of Record

Enclosures

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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	)	

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**REPLY BRIEF OF GTE NORTH INCORPORATED**

As addressed in the Attorney Examiner's Entry of April 6, 2000 in this matter, GTE North Incorporated ("GTE") hereby submits its Reply Brief 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").

**Summary**

As GTE established in its Initial Brief, the Bell Atlantic decision stands for one, and only one proposition: in issuing its Declaratory Ruling concerning ISP traffic,<sup>1</sup> the FCC had not adequately explained itself. Consequently, and for that reason alone, the Bell Atlantic decision vacated the Declaratory Ruling and directed the FCC to reconsider and re-issue a decision concerning the nature of ISP traffic. See Bell Atlantic 2000 U.S.App. LEXIS 4685 at \*26.

In light of this result, GTE submits, this Commission's course should be clear. First, because the FCC can be expected to address this issue promptly, and because the federal courts will almost certainly address it thereafter, this Commission should allow

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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 FCC and the federal courts to determine the nature of ISP traffic. Nonetheless, this Commission should go forward with this case, and consider the policy issues that are certainly this Commission's to decide.

The Initial Briefs of the non-ILEC parties to this case<sup>2</sup> show less concern for an accurate description of the Bell Atlantic decision and far more concern for their true object: to prevent any discovery relevant to the other issues of this case. Almost uniformly, the CLECs contend that the Bell Atlantic decision conclusively decided (1) that ISP traffic is local, (2) that this Commission need go no farther in the inquiry, and (3) that no discovery in this case is necessary.<sup>3</sup>

GTE submits that the CLECs are wrong on all counts. In the argument that follows, these contentions are addressed in turn.

#### Argument

##### 1. Bell Atlantic

The Bell Atlantic decision, like all legal decisions, has only one dispositive holding. It was, unquestionably, that 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, Bell Atlantic, 2000 U.S.App. LEXIS at \*22, and for this reason, the Court "vacate[d] the ruling and remand[ed] the case to the Commission." Id.

No other observations of the Bell Atlantic court are or should be meaningful to this Commission, because this holding resulted in the current state of things: the FCC's Declaratory Ruling is now vacated and the FCC must now reconsider the matter.

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<sup>2</sup>AT&T Communications of Ohio, Inc./TCG Ohio ("AT&T"), MCI Worldcom, Inc. ("MCI"), ICG Telecom Group ("ICG"), Intermedia Communications, Inc., Telecommunications Resellers Association and Time Warner Telecom of Ohio, L.P. (collectively, "Intermedia"). This group is collectively referred to as the "CLECs."

Contentions of the CLECs to the contrary are inaccurate at best. AT&T contends that the Court's "**findings** lead to one inevitable conclusion," AT&T Brief at 6 (emphasis by AT&T), but ignores the facts that (a) an appellate court on review cannot make "findings," and, (b) in any case, given that the FCC will (as directed by the Court) review the matter anew, those "findings" are irrelevant. The Intermedia brief shows meaningful uncertainty -- while stating categorically that "dial up calls to internet service providers ('ISPs') are local traffic," Intermedia brief at 1, it also concedes that the Bell Atlantic decision "did not explicitly conclude that dial up ISP-bound traffic is local," Intermedia Brief at 6. ICG likewise notes correctly that vacatur was ordered for want of an adequate explanation, ICG Brief at 3. Yet, in the next breath, ICG oversells the decision several times over, contending that the court found "the only relevant question is whether ISP-bound traffic is telephone exchange service," ICG Brief at 4, when in fact the holding of the court relies on other grounds. MCI similarly mischaracterizes the decision, stating that "the Court held that calls to ISPs are no different than other local calls," MCI Brief at 10.

These objections to the CLEC briefs are not law-school semantics -- they are fundamental to the current mission of this Commission. Again, the Bell Atlantic court vacated the Declaratory Ruling and sent it back to the FCC for decision. What the FCC will do in response remains to be seen, but (despite suggestions otherwise in these briefs) the court did not direct any agency to reach the results argued by the CLECs here. Accordingly, this Commission should allow the FCC to do what the court has ordered it to do: decide the nature of ISP-bound traffic. Certainly, nothing in the Bell Atlantic decision directs, or even suggests, that the Commission should do otherwise.

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<sup>3</sup> The Initial Brief of Buckeye Telesystems does not so contend.

2. Summary Disposition

As their initial Motion suggested, several of the CLECs also now contend that the Commission must, in light of the Bell Atlantic decision, summarily dispose of this case. AT&T Brief at 12; Intermedia Brief at 10; ICG Brief at 8; MCI Brief at 13. Such gun-jumping must be rejected.

First, the FCC can be expected to accomplish what the Court has ordered – a new decision – in the near future. It can also be expected to act, as it did in the Declaratory Order, in preemptive fashion. Thus, for this Commission to summarily decide this case is to invite yet further proceedings in the future.

Second, the best guess of the FCC's next decision is not – as the CLECs would have it – that ISP traffic is local. To the contrary, shortly after the Bell Atlantic decision was entered, the Chief of the FCC's Common Carrier Bureau said in an interview that he "remained convinced that calls to ISPs should be considered interstate calls."

Telecommunications Reports, "FCC Stands By Conclusion That Calls to ISPS Are Interstate, Despite Court's Nixing 1999 Order" (March 27, 2000)(emphasis supplied). Thus, if that conviction extends to the FCC itself, the contentions of the CLECs will be proven wrong shortly.

Third, if this Commission were to order as the CLECs request, and were then to be reversed by federal action, continuing mischief would result. The best examples of this phenomenon appear in the CLEC briefs – even though this Commission took explicit care to limit its prior ISP decisions to the contracts before it,<sup>4</sup> the CLEC briefs maintain

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<sup>4</sup> As noted in GTE's Initial Brief, the Commission used identical language in three different orders as follows:

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 . . .

that "Calls to ISPs are local as has been determined by this Commission in numerous proceedings," Intermedia brief at 3 (emphasis supplied), and that the "state of the law currently is that this Commission has held . . . that FCC precedent and the nature of the traffic compelled recovery of reciprocal compensation for traffic terminated to ISP providers pursuant to Section 251(b)(5) of the Telecom Act and the Local Service Guidelines," MCI Brief at 5 (emphasis supplied). As the Commission well knows, the "state of the law currently" is otherwise.

The Commission should await the FCC's decision on the issues remanded for its consideration, and should proceed with the policy issues properly before this Commission. Accordingly, summary disposition of this case is altogether inappropriate.

3. Discovery

The heart of the CLEC concerns, as reflected in the briefs of several CLECs, is discovery by the ILECs (or at least by Ameritech) of information germane to the issues described in this Commission's March 15 Entry. See AT&T Brief at 10, Intermedia Brief at 8; ICG Brief at 9. Yet, as noted in GTE's Initial Brief, nothing in the Bell Atlantic decision renders the issues of the March 15 Entry as moot, and certainly nothing in that decision determined the appropriate discovery in this case. To the contrary, GTE submits that in identifying those issues for consideration in this case, this Commission properly determined that the costs of the CLECs to terminate ISP traffic, along with the other matters pursued in the discovery of GTE and the other ILECs, are relevant inquiries of these proceedings.

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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.

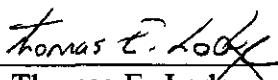
Given that some analysts have estimated that the reciprocal-compensation "gravy train" may yield arbitrage results exceeding 4,000 percent,<sup>5</sup> the reticence of the CLECs to disclose such information is perhaps understandable. Yet, because identification of ISP traffic is difficult, because the costs of delivering and terminating it appear to vary, and because the appropriate method for recovering those costs is controversial, such discovery is essential. The contentions of the CLECs should be rejected.

Conclusion

For the foregoing reasons, and for those expressed in its Initial Brief, GTE submits that the Commission should defer jurisdictional issues for determination by the FCC, but that the "Issues List" of this case is otherwise unaffected by the Bell Atlantic decision, and that this case should proceed on an agreeable schedule and within its existing framework.

Respectfully submitted,

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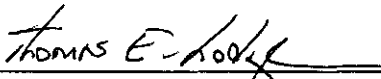
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<sup>5</sup> Legg Mason Technology Team, "Reciprocal Comp for Internet Traffic – Gravy Train Running Out of Track (June 24, 1998)(Attached).

**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 24<sup>th</sup> day of April, 2000.

  
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