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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION

In the Matter of)
)
Deployment of Wireline Services Offering)
Advanced Telecommunications Capability)

CC Docket No. 98-147

REPLY COMMENTS OF U S WEST COMMUNICATIONS, INC.

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SUMMARY

Many of the CLEC commenters approach this proceeding as if the Commission were offering them a grab bag of regulatory goodies. Whether they propose new collocation and loop-related obligations or onerous structural separation measures, the new entrants ask the Commission to tilt the playing field in their direction. CLECs make scant mention of the primary purpose of this proceeding, which is to facilitate the deployment of advanced services to all Americans by removing regulatory barriers to investment. And when the record here is examined in light of *that* objective, there is a compelling case for avoiding new regulatory burdens that will only stymie delivery of advanced services to smaller communities.

In this reply, U S WEST shows that the Commission should fulfill its mandate under section 706 by refraining from imposing new unbundling and discounted resale obligations on incumbent LECs. A proper application of sections 251(d)(2) and 251(c)(4) requires that result. Permitting incumbents to provide advanced services and traditional voice services on an integrated basis and unencumbered by new regulatory burdens is the surest way to deliver broadband to the mass market in a timely fashion. As many commenters recognize, offering incumbents the chance to avoid additional regulatory burdens by establishing structurally separate data affiliates is no option at all. The costs and inefficiencies associated with the resulting duplicative operations would simply eliminate the economies that make widespread deployment possible. Moreover, the Commission's reliance on a particularly rigid separation model and the NPRM's expressed disinclination to preempt state law would conspire to make the NPRM's structural separation proposal unworkable.

However the Commission decides to implement section 706 of the Act, it should *not* accede to CLEC demands for a spate of new regulations. Far from encouraging the rollout of

advanced services to the smaller communities that lack access to them, CLEC proposals would frustrate that objective by adding new layers of regulatory complexity and burden. And new entrants are unable to supply a procompetitive (as opposed to *procompetitor*) justification for throttling incumbent LECs' ability to deploy advanced services. The existing negotiation and arbitration regime Congress prescribed in the 1996 Act is more than adequate to ensure access for all competitors to the essential inputs used to provide advanced services. What is more, many of the regulatory favors CLECs seek disregard either technical feasibility or express statutory language (or both).

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U S WEST Communications, Inc. ("U S WEST") hereby submits this reply to the comments filed in the above-captioned docket.

PRELIMINARY STATEMENT

As Congress acknowledged in enacting section 706, regulations impose significant costs. In particular, forcing incumbents to turn over to competitors *nonbottleneck* advanced services equipment destroys both the incumbents' and the CLECs' incentives to invest in new facilities, and in turn stands in the way of widespread deployment of advanced services. Accordingly, Congress imposed unbundling and discounted resale obligations *only* with respect to the essential facilities and services to which new entrants need access in order to compete. Incumbents' broadband data services and their underlying electronics plainly do not fit that description.

While the Commission's structural separation proposal certainly recognizes this fact — it acknowledges that CLECs are fully able to obtain advanced services equipment on the open market and requires them to do so — it would do more harm than good. In its comments, U S WEST documented that such separation introduces vast inefficiencies and thus would

hamper the rollout of advanced services to the mass market. Indeed, this was the very reason why the Commission stepped back from requiring structural separation of enhanced services, and nobody has articulated a difference between enhanced and xDSL services that would justify reversing course. In stark contrast to its retreat from requiring separate affiliates for enhanced services, the Commission here contemplates an especially rigid separation model. While any version of separation would be ill-advised, the NPRM's blueprint, together with the its tentative disinclination to preempt state law, would ensure the failure of the structural separation proposal.

Many commenters agree with U S WEST that the best means of delivering the benefits of broadband services to all Americans is to adopt a deregulatory approach that allows incumbent LECs themselves, rather than separate data affiliates, to provide advanced services. Perhaps most tellingly, groups speaking for advanced services *customers* recognize that structural separation in fact would be counterproductive, because it would deprive incumbents of the efficiencies that would make widespread deployment of advanced services possible and would force them to expend scarce resources on internally duplicative operations.

Most CLECs, by contrast, favor maximal incumbent LEC regulation. Although they cannot show that they would be hampered in their ability to compete if they were required to obtain advanced services facilities on the open market rather than from incumbent LECs, they nevertheless urge the Commission to shackle incumbents with new unbundling and discounted resale duties. Notwithstanding the deregulatory thrust of this proceeding, many CLECs present the Commission with a wish list of additional regulatory burdens for incumbent LECs — all designed to promote their narrow interests rather than the availability of advanced services.

In this reply, U S WEST shows that, contrary to the CLECs' views, the Commission should apply sections 251(d)(2) and 251(c)(4) — consistently with Congress's

intent and their plain text — to refrain from imposing new unbundling and discounted resale obligations on incumbent LECs with respect to *nonbottleneck* facilities and services. This is *not* a question of *forbearing* from applying section 251(c); rather, section 251(c) does not (and should not) require unbundling of nonbottleneck equipment and services in the first place. Permitting incumbents to provide advanced services both on an integrated basis with traditional voice telephony and without inappropriate network access requirements is the surest way to deliver broadband to the mass market in a timely fashion. The Commission should pursue this deregulatory course not as a trade-off for new regulatory duties but, as Commissioner Powell has said, as an end that will further congressional policy in its own right:

[W]e should not withhold deregulation until after competition has matured to some ill-defined level. . . . [T]his approach [wrongly] suggests that deregulation should not be pursued for its own benefits but only as a reward or inducement for promoting (or coercing) behavior in private markets.¹⁷

The Commission also should reject CLEC demands for a spate of new federal requirements concerning collocation and loop-related issues. Like structural separation, these CLEC proposals would only slow the deployment of advanced services to smaller communities. And these new regulatory requirements, too, are entirely unnecessary. Congress reached a delicate balance between the promotion of competition and ILECs' private property rights, and it relied on a system of *individualized* negotiations and arbitrations at the state level to work out the inevitable kinks caused by the inherent tension between these two objectives. The Commission must be careful not to upset the careful structure Congress created: Congress's approach is far

¹⁷ See "Somewhere Over the Rainbow: The Need for Vision in the Deregulation of Communications Markets," Remarks of Commissioner Michael K. Powell before the Federal Communications Bar Association, at 4-5 (May 27, 1998).

more likely than centrally imposed mandates to deal successfully with the myriad site-specific variations attendant to collocation, subloop unbundling, and related issues. What is more, many of the regulatory favors CLECs seek disregard either technical feasibility or express statutory language, or both.

I. MANY COMMENTERS AGREE THAT THE COMMISSION SHOULD ALLOW INCUMBENT LECs TO PROVIDE ADVANCED SERVICES FREE FROM ANY NEW UNBUNDLING AND DISCOUNTED RESALE OBLIGATIONS.

Section 251(d)(2) permits the Commission to require unbundling *only* of bottleneck (or essential) network facilities. As many commenters demonstrate, and as the NPRM's separate affiliate proposal necessarily recognizes, DSLAMs, routers, and other advanced services electronics are simply not bottleneck facilities that can be obtained only from an incumbent LEC. Ruling that incumbent LECs are under no obligation to unbundle these electronics is not a question of forbearing from section 251(c)(3); that provision does not require unbundling in the first place. Likewise, section 251(c)(4) by its terms does not apply to advanced services to the extent that they are offered on a wholesale basis; no additional authority is needed to acknowledge that fact.

A. Congress Directed the Commission To Require Unbundling Only of Essential Facilities, and xDSL Electronics Simply Are Not Essential.

Section 251(d)(2) gives the Commission the discretion to "determin[e] what network elements should be made available" among those potentially subject to unbundling. 47 U.S.C. § 251(d)(2). Congress specified two facts that the Commission "*shall* consider, at a minimum": whether the failure to provide access to a particular network element would impair the ability of requesting carriers to provide service and, in the case of a proprietary element,

whether unbundled access to that element is “necessary.” *Id.* As U S WEST showed in its comments, the impairment standard in section 251(d)(2) entitles a new entrant to obtain an element of an incumbent’s network under section 251(c)(3) *only* when it cannot reasonably obtain a substitute facility elsewhere or build the facility itself.^{2/} U S WEST pointed out that, in light of the ready availability of DSLAMs, ATM switches, transport links, and routers on the open market, and because incumbents already must make loops and collocation available, these facilities do *not* meet Congress’s criteria for mandatory unbundling.^{3/}

Other commenters agree that section 251(d)(2) should prevent the Commission from unbundling nonbottleneck advanced services equipment. Most significantly, the Internet Access Coalition — a group made up of prominent ISPs such as America Online and EarthLink, equipment manufacturers such as Apple Computer, Compaq, Dell, IBM, and Intel, associations such as the Information Technology Association of America, and even CLECs such as Covad^{4/} — states:

Competitive LECs will depend on collocation and unbundled loops to deploy advanced services; as long as ILECs are complying with those rules, competitive LECs can deploy electronics as quickly and efficiently as ILECs. Moreover, *the quality of service a competitive LEC can offer, absent access to the advanced services electronics, will not decline if the ILEC’s electronics are not offered on an unbundled basis* nor will the cost of providing the service rise. Furthermore, eliminating unnecessary unbundling obligations could encourage ILECs to deploy advanced services.^{5/}

^{2/} U S WEST at 5-8.

^{3/} *Id.* at 7.

^{4/} Internet Access Coalition at 2 n.4.

^{5/} *Id.* at 21 (emphasis added).

Similarly, GTE observes that, “[a]s § 251(d)(2) makes clear, the unbundling mandate was not meant to require ILECs to hand over all of their innovative offerings and capabilities to competitors.”^{6/} In this context, because xDSL “equipment can be obtained through a variety of sources,” “an ILEC’s failure to provide access to its electronics would in no way ‘impair’ the ability of the CLEC to offer advanced services.”^{7/}

Some CLECs nevertheless assert that the Commission should require incumbent LECs to provide access to advanced electronics on an unbundled basis. Covad, for one, asks the Commission to order incumbent LECs to unbundle “DS-3 Links,” which it defines to include all equipment, features, and functionality of a “two-point, 45 Mbps digital channel” connecting a customer and a PoP or collocation node.^{8/} MCI WorldCom similarly asserts that it needs access to incumbents’ “xDSL electronics, including DSLAMs of any type and splitters.”^{9/} Both commenters fail utterly to explain why they need to obtain such facilities *from incumbent LECs*. They offer no reason why they should not be required to buy from the same suppliers from which incumbents purchase such equipment, and there is none. MCI WorldCom simply asserts that, “[u]nder almost any conceivable definition of ‘impair,’ the CLECs will be impaired in their

^{6/} GTE at 104.

^{7/} *Id.* at 103. *See also* Alliance for Public Technology at 10; Bell Atlantic at 20-21; BellSouth at 24-27; Cincinnati Bell at 12.

^{8/} Covad at 57 & Attachment 4 at 13. DS-3 links are available on a competitive (and untariffed) basis in 12 of the 14 states in U S WEST’s service region, belying any claim that it is necessary to obtain them from incumbent LECs. Moreover, as discussed more fully in Part III.C below, defining as unbundled network elements such finished services — in this case, what Covad seeks is simply a private line — runs directly contrary to *Iowa Utilities Board*, which remains binding on the Commission. *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997), *cert. granted*, 118 S. Ct. 879 (1998).

^{9/} MCI WorldCom at 75.

ability to provide advanced services if they are deprived access to these elements.”^{10/} This is nonsense. MCI itself has previously conceded that

CLECs can efficiently provide DSL technologies as sufficiently as US West and other BOCs A CLEC can place the DSLAM in a collocated space in the BOC’s CO just as readily as the BOC can place the DSLAM in its own CO. Upfront investment costs to the provider are low.^{11/}

Moreover, in the Notice of Inquiry docket, MCI WorldCom admitted that WorldCom was able to provide competitive xDSL service in 54 ILEC offices, and would soon provide service in 37 more, *without* receiving any electronics at all from the incumbents.^{12/} Likewise, Covad CEO Charles McMinn has acknowledged that Covad is “happy if [incumbent LECs] don’t provide *any* of the electronics, [but instead] let [Covad] put [its] *own* electronics in place, and charge [it] an appropriately low charge just for the copper line.”^{13/} And the Internet Access Coalition, whose comments Covad joined,^{14/} “agrees with those parties who have observed that ‘DSL equipment is readily available to ILECs and competitors alike.’”^{15/} Indeed, the very fact that the Commission is proposing a plan for allowing incumbent LECs to provide advanced services *free* from an unbundling obligation is a recognition that CLECs can provide advanced services adequately

^{10/} *Id.* at 76.

^{11/} Opposition of MCI Telecom. Corp., CC Docket No. 98-26, at 10 n.3 (Apr. 6, 1998).

^{12/} Joint Comments of MCI Communications Corp. and WorldCom, Inc., at 18, CC Docket No. 98-146.

^{13/} “On the Record: Covad CEO Aims To Make DSL as Pervasive as Current Modems,” *Telecom. Reports*, at 44 (June 1, 1998) (emphasis added).

^{14/} Internet Access Coalition at 2 n.4.

^{15/} *Id.* at 21.

even if they do not obtain DSLAMs and other equipment from the incumbent. If that is the case, then those facilities cannot meet Congress's impairment standard and the Commission should not require them to be unbundled *at all*.

Many commenters also agree with U S WEST that not only the plain language of section 251(d)(2) but also the deregulatory spirit animating section 706 warrants the imposition of no new unbundling obligations with respect to facilities used to provide advanced services. Large incumbent LECs uniformly exhort the Commission not to impose any new unbundling obligations in the advanced services context, and explain the virtues of deregulation generally.^{16/} In addition, a range of other commenters also recognize, as Congress did, that market forces will more effectively unleash carriers' potential to deploy advanced services than would any manner of regulation. The Texas Public Utility Commission, for example, counsels that "the FCC should not impose unbundling requirements specific to the provision of advanced services," implicitly acknowledging that an unregulated market will best produce competition.^{17/} A coalition of 18 organizations whose members are potential (but too often overlooked) purchasers of advanced services likewise urges the Commission "to fundamentally alter its policy by removing regulatory barriers and disincentives to new facilities-based competition and

^{16/} *E.g.*, Ameritech at 8-9; SBC at 3-5; Cincinnati Bell at 3, 39-40; Bell Atlantic at 19-21; BellSouth at 14-22; GTE at 105-108.

^{17/} Texas PUC at 15.

investments in the broadband market,”^{18/} and other commenters agree that market forces (not new regulatory requirements) are the preferred means of spurring new infrastructure development.^{19/}

B. The Commission Should Rule That Advanced Services Are Not Subject to the Discounted Resale Obligation in Section 251(c)(4).

Numerous commenters also have advised the Commission against making advanced services subject to the resale requirement in section 251(c)(4). Several of these commenters have confirmed U S WEST’s view that imposing a resale obligation on advanced services creates a significant disincentive for incumbents and new entrants alike to deploy new advanced services facilities.^{20/}

As U S WEST showed in its comments, the text of section 251(c)(4) expressly requires the Commission to refrain from applying the discounted resale obligation to advanced services that are purchased on a wholesale basis.^{21/} In precisely parallel circumstances, the Commission determined that IXCs purchasing wholesale exchange access as an input to their

^{18/} Keep America Connected, et al., at 6. (The additional members of the coalition are United Homeowners Ass’n, Alpha One, American Council on Education, National Braille Press, National Ass’n of Commissions for Women, National Trust for the Development of African American Men, National Ass’n for College and University Business Officers, Latin American Women and Supporters, Harlem Consumer Education Council, National Latino Telecommunications Task Force, Northern Virginia Resource Center for the Deaf and Hard of Hearing, MaineCITE Coordinating Committee, American Telemedicine Ass’n, World Institute on Disability, Massachusetts Assistive Technology Partnership, and National Ass’n of Development Organizations.)

^{19/} See, e.g., ADC Telecommunications at 14; NRTA/OPATSCO at 6.

^{20/} See, e.g., Keep America Connected, et al., at 17 (resale requirement is “obvious disincentive to investment in advanced data services” by both ILECs and CLECs); USTA at 9-10; Cincinnati Bell at 40-42; Alliance for Public Technology at 4; GTE at 111.

^{21/} U S WEST at 13-15.

own services may not obtain such services at a discount.^{22/} ISPs, the most significant class of purchasers of advanced data services, are likewise wholesale buyers because they obtain incumbents' advanced services as an input to their retail end-user services. It is irrelevant that ISPs have not been deemed to be "carriers" for some purposes, because section 251(c)(4) applies only to *retail* services, as the Commission has previously recognized.^{23/}

ALTS is wrong to declare that, unlike exchange access services, advanced services are offered exclusively to end users, *including* ISPs.^{24/} Incumbent LECs' ISP customers in fact are *not* "end users," but rather wholesale purchasers that incorporate the LECs' advanced services into their own retail offerings. Commenters who agree with the NPRM's tentative conclusion that advanced data services are "'fundamentally different' from the exchange access services that the Commission referenced in the *Local Competition Order*" fail to adduce any support for that assertion.^{25/} Other commenters^{26/} accurately recognize that, to the extent that

^{22/} *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 ¶ 874 (1996) ("*Local Competition Order*"), *vacated in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *cert. granted*, 118 S. Ct. 879 (1998)). U S WEST believes that advanced services are *neither* "telephone exchange services" nor "exchange access," and for that reason are not subject to section 251(c)(4). To the extent that the Commission insists on applying one of those two labels, the latter is plainly more appropriate, because incumbent LECs sell *access* to ISPs (albeit not to the circuit exchange).

^{23/} *See Local Competition Order* ¶ 874 (characterizing exchange access as a "fundamentally non-retail service" to which Congress never intended section 251(c)(4) to apply).

^{24/} ALTS at 67-68.

^{25/} *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, FCC 98-188, CC Docket Nos. 98 147, et al., ¶ 61 (rel. Aug. 7, 1998) ("*Advanced Services Order*").

^{26/} *See, e.g.,* BellSouth at 28-29; GTE at 108-112; Internet Access Coalition at 22 n.33.

advanced services are offered to ISPs on a wholesale basis, they are in fact *no* different from exchange access services discussed in that order.^{27/}

II. THE RECORD CONFIRMS THAT STRUCTURAL SEPARATION WOULD BE COUNTERPRODUCTIVE, ESPECIALLY AS ENVISIONED IN THE NPRM.

U S WEST applauds the Commission's interest in "ensuring that incumbent LECs make their decisions to invest in and deploy advanced services based on the market and their business plans, rather than regulation."^{28/} But U S WEST, like many other commenters, remains convinced that structural separation would not accomplish that important objective. In fact, structural separation invariably has failed to live up to its theoretical potential to equalize opportunities for incumbent LEC affiliates and independent service providers.^{29/} It imposes costs on incumbent LEC affiliates that competitors do not bear, and it destroys the efficiencies that are necessary for incumbents to build an economic case for mass market deployment. Structural separation therefore would *discourage* the deployment of advanced services to smaller communities. And it is not necessary to prevent discrimination by incumbent LECs against CLECs or ISPs; the numerous existing safeguards are more than adequate to ensure full and fair competition. If the Commission nevertheless adopts some version of the NPRM's separate

^{27/} See *Local Competition Order* ¶ 874. Treating advanced services as "fundamentally different" from exchange access services for purposes of assigning discounted resale duties also would be anticompetitive. Ruling that ISPs may obtain access services at a discount but IXCs may not would be discriminatory and would create unintended arbitrage opportunities. Particularly in light of the convergence underway among different types of services, the Commission should avoid bringing about such a result.

^{28/} *Advanced Services Order* ¶ 13.

^{29/} See U S WEST at 18-21.

affiliate proposal, it should reject several of the onerous separation requirements contemplated by the NPRM, permit liberal asset transfers from the incumbent LEC to the affiliate, and preempt state law that interferes with that process.

A. Structural Separation Would Hamper the Deployment of Advanced Services.

The NPRM's structural separation proposal would not facilitate the deployment of advanced services beyond top-tier markets, and thus would not fulfill the goal of section 706. A broad spectrum of industry commenters agree that the costs and inefficiencies associated with structural separation preclude its use as an agent of progress. One commenter put it particularly well: A choice between integrated operations subject to a full panoply of regulations that are not imposed on competitors, on the one hand, and separation of voice and data operations with its attendant inefficiencies, on the other, is a choice between two "severe competitive disadvantages for broadband service."^{30/} Advanced services customers believe that the NPRM's proposal is effectively "a mandate to create a whole new class of CLECs," which have proved unable or "reluctant to deploy advanced telecommunications services except for high-end business users."^{31/} Another commenter states that, because "construction of separate advanced services networks . . . will not be a realistic possibility for most ILECs [T]he Commission [should] permit incumbent LECs to offer deregulated advanced telecommunications services on an integrated basis By avoiding an unnecessary duplication of personnel and facilities, significant efficiencies could be gained that could be passed on to consumers in the form of

^{30/} NRTA/OPATSCO at 5-6.

^{31/} Keep America Connected, et al., at 7-8.

lower prices.”^{32/} Many other commenters echo these views, including the Florida Public Service Commission,^{33/} rural telephone companies and other incumbent LECs, labor interests, and equipment manufacturers, among others.^{34/}

Structural separation offers no countervailing benefits, because it is not necessary to prevent discrimination against CLECs. The availability of loops and collocation — together with the Commission’s nonstructural safeguards and the Act’s comprehensive negotiation and arbitration mechanisms — ensures the vibrancy of competition.^{35/} Some commenters now advocate *mandatory* structural separation,^{36/} or even *divestiture* of all advanced services equipment and operations.^{37/} These proposals, which neither Congress nor the NPRM even contemplated, are plainly inappropriate for reasons extending beyond patent lack of necessity. They are contrary to section 706, because they would force incumbents to provide advanced services in a manner that is likely to diminish their ability to deliver affordable data services to

^{32/} ADC Telecommunications at 15.

^{33/} Florida PSC at 5-6 (questioning efficacy of NPRM’s separation proposal and noting that “significant economies of scope and scale will be lost by offering the services through a structurally separate affiliate”).

^{34/} See, e.g., Moultrie Independent Tel. Co. at 3-6; National Telephone Cooperative Ass’n at 4; Rural Telecommunications Group at 8; NRTA/OPATSCO at 3-5; Kiesling Consulting at 6-8; Cincinnati Bell at 4-8; Bell Atlantic at 22-32; BellSouth at 14-22; USTA at 4; Communications Workers of America at 3; Nortel at 3-4; Competition Policy Institute at 3.

^{35/} See U S WEST at 21-24.

^{36/} See Covad at 59; Network Access Solutions at 6-9; Transwire at 8.

^{37/} See Level 3 at 4; Mindspring at 12.

smaller communities; and they are contrary to the Act as a whole, which requires structural separation only in defined contexts.^{38/}

Nor is provision of advanced services through a separate affiliate necessary to prevent discrimination against ISPs. Some groups of ISPs and the Minnesota Department of Public Service contend that structural separation is necessary, arguing, for example, that U S WEST has discriminated against independent ISPs in its rollout of xDSL.^{39/} As explained in detail in U S WEST's reply comments in the Notice of Inquiry docket and in the attachment to this reply, several existing regulatory and voluntarily adopted safeguards prevent discrimination against ISPs.^{40/} Most prominently, the Commission's *Computer III* and ONA rules ensure that ISPs have access to all necessary xDSL infrastructure.^{41/} And U S WEST has worked with ISPs and state regulators to develop an ordering process that enables subscribers to connect to whatever xDSL-capable ISP they choose and does not steer them to any particular ISP. U S WEST views the offering of xDSL services to independent ISPs as an important business

^{38/} Moreover, commenters who favor forced separation overlook an inherent contradiction: They argue that section 251 applies to advanced services because advanced services facilities are inextricably part of the local exchange, yet simultaneously contend that advanced services are so different from local exchange services that they cannot be provided through same corporate entity. Mindspring, for example, says that "Internet-based services" should be divested, *id.* at 12, and also that it is not "possible to draw a rational distinction between old 'conventional' services and new 'advanced' services," *id.* at 14, begging the question of how the assets to be divested would be identified.

^{39/} See Washington Ass'n of ISPs at 3 (suggesting that structural separation should be a prerequisite to regulatory relief); Minnesota DPS at 11-12 (endorsing structural separation); Commercial Internet Exchange Ass'n at 6 (same).

^{40/} Reply Comments of U S WEST Communications, Inc., at 14-19 & Attachment (Oct. 8, 1998) in CC Docket 98-146 ("U S WEST NOI Reply Comments").

^{41/} *Id.* at 17-18 & Attachment at 3-7.

opportunity and treats it as such. Structural separation would do little, if anything, to further ISPs interests, but would impose significant costs that, as noted, would dramatically limit U S WEST's ability to deploy advanced services on a widespread basis.

B. If the Commission Nevertheless Pursues Structural Separation, Substantial Modifications to the NPRM Proposal Would Be Required To Give It Any Chance of Success.

While *any* structural separation model would needlessly diminish incumbent LECs' ability to deploy advanced services to the mass market, the NPRM proposal is particularly problematic. If the Commission believes that it must adopt some sort of affiliate plan, it should make substantial changes the proposed blueprint; otherwise, as many commenters agree, the purported relief would be useless. An affiliate created along the lines drawn in the NPRM would, by design, eliminate all integrative efficiencies — a prospect that numerous commenters consider inappropriate.^{42/}

At minimum, a data affiliate should be able to share certain resources with its corporate parent, such as personnel, marketing information, and brand names. Joint operations that do not involve control of bottleneck facilities should be permitted. Several commenters have demonstrated that *Competitive Carrier-Fifth R&O*-type safeguards (arm's length transactions, separate bookkeeping, and no joint ownership of transmission or switching facilities) are

^{42/} See, e.g., Internet Access Coalition at 12 (“the Commission should avoid overly onerous separations requirements that could discourage the reasonable deployment of advanced services by the ILEC.”); *id.* at 1-2 (“Service integration may enable ILECs to deploy new, innovative services efficiently, quickly, and pro-competitively, while keeping prices as low as possible.”); Keep America Connected, et al., at 7-8; Kiesling Consulting at 9-14; Bell Atlantic at 27-32; BellSouth at 33-43; Cincinnati Bell at 8-18; GTE at 34-37; SBC at 5-12.

sufficient to prevent discrimination.^{43/} By contrast, CLECs favoring more stringent separation fail to explain how the increased regulatory burden they propose can be squared with section 706.^{44/}

Of particular importance, as U S WEST demonstrated in its comments, is the issue of asset transfers. Unless incumbent LECs may transfer to the new affiliate nonbottleneck equipment and other assets related to the provision of advanced services, U S WEST and other carriers that have been out front in deploying facilities will be severely penalized.^{45/} No carrier could succeed in the marketplace if required to invest in a duplicative set of facilities, but that is exactly what the NPRM proposal would require of U S WEST (and other early adopters). Chairman Kennard has recognized that there is nothing wrong with “wireline telephone providers hav[ing] a first mover advantage — if [they] make the investments to get to market first” and do

^{43/} See, e.g., Keep America Connected, et al., at 7-8; Kiesling Consulting at 9-14; Bell Atlantic at 27-32; BellSouth at 33-43; Cincinnati Bell at 8-18; GTE at 34-37; SBC at 5-12.

^{44/} See, e.g., ALTS at 17-37; CompTel at 14-35; Telecommunications Resellers Ass’n at 30-37. These CLECs urge the Commission to adopt as rigid a blueprint of separation as could be envisioned, one that mandates outside ownership, prohibits joint marketing and the use of the incumbent’s brand name and service marks, and imposes special disabilities that would apply to no other CLECs. Such special disabilities are discussed in Part III.D below.

^{45/} Contrary to the suggestion of some CLECs, see, e.g., Covad at 38-39 (“[i]t is clear that . . . ILECs are not serious about deployment to all Americans”), U S WEST has aggressively deployed advanced services, not only in larger cities but in places such as Sioux Falls, South Dakota and Rochester, Minnesota. U S WEST is in the process of deploying ADSL services in 225 wire centers in 43 cities across its 14-state region; it already has deployed ADSL in 215 of these wire centers. U S WEST at 29 n.37. When U S WEST announced this rollout, advanced services were offered in only three of those markets — in each case by cable operators. U S WEST NOI Reply Comments at 6 n.9. U S WEST planned this ambitious deployment under the assumption that advanced services and xDSL electronics would not be subject either to new resale and unbundling obligations or to a separate affiliate regime. The costs associated with such requirements necessarily would decrease the scope of future deployments.

not hinder others' efforts to deploy new services.^{46/} Yet the NPRM's tentative plan to prevent virtually all equipment transfers would wipe away whatever hard-earned first-mover advantage U S WEST has been able to achieve.

Many other commenters recognize that liberal asset transfers, including transfers of nonbottleneck advanced services equipment, are a prerequisite to a successful separate affiliate plan. The incumbent LECs that potentially would create data affiliates agree that the ability to transfer such assets is essential.^{47/} Other commenters also acknowledge that, for an affiliate plan to work, the Commission must adopt "less restrictive transfer standards during an initial start-up period that will allow the ILEC to establish a separate affiliate that avoid status as a successor or assign."^{48/} Specifically, the Internet Access Coalition appropriately supports "a one-time transfer of ILEC employees," "a one-time transfer of funds," "the use of the ILEC's brandname by the advanced services affiliate," and the transfer of advanced services "equipment that has already been purchased, whether or not the equipment has been installed, and equipment purchased during the initial start-up period."^{49/} "None of these transfers can skew the competitive playing field and each would permit more rapid, efficient deployment of advanced services by the ILEC."^{50/} Even some commenters that favor an extreme model of structural separation recognize

^{46/} Remarks by Chairman William E. Kennard to USTA, at 4 (Apr. 27, 1998).

^{47/} See, e.g., Bell Atlantic at 28-31; BellSouth at 43, Cincinnati Bell at 17; GTE at 42-50; SBC at 8-9.

^{48/} Internet Access Coalition at 13.

^{49/} *Id.* at 15.

^{50/} *Id.* The Internet Access Coalition also sensibly recognizes that "the separate affiliate should be allowed to leave installed equipment in place at the ILEC premises." *Id.* at 16. (continued...)

that their proposals would be unworkable unless *some* incumbent LEC assets could be transferred during the startup phase.^{51/}

A few CLECs wrongly assert that *any* transfer of resources would make affiliate an assign.^{52/} But they simply ignore the governing standard: An affiliate is not an assign unless it is a “substantial continuation” of the parent corporation — that is, unless “the business of both [entities] is essentially the same; . . . the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and . . . the new entity has the same production process, produces the same products, and basically has the same body of customers.”^{53/} An affiliate that takes possession only of advanced services electronics, has a largely independent work force, and provides distinct services plainly would not be an incumbent LEC’s successor or assign. AT&T has it backwards when it asserts that the purpose underlying section 251 requires treating a data affiliate as an assign.^{54/} To the contrary, because the incumbent LEC would, under an affiliate plan, continue to make available all essential inputs, without interruption, the market-opening goals of section 251 would be fulfilled.

^{50/} (...continued)

As U S WEST pointed out in its comments, requiring a data affiliate to remove and reinstall equipment would needlessly disrupt customer service. U S WEST at 43.

^{51/} Information Technology Ass’n of America at 12.

^{52/} See e.spire at 20 (the Commission should not allow “any transfer, under any circumstances”); Westel at i (data affiliate should be an assign “if it receives any advantage whatsoever”); CompTel at 10 (same); ALTS at 30 (same); RCN Telecom Services at 4 (same).

^{53/} *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987).

^{54/} See AT&T at 7.

Finally, commenters also have recognized that inconsistent state law could threaten the Commission's resolution of the transfer issue, and that the Commission's affiliate proposal could very well fail unless the Commission preempts state transfer regulation.^{55/} Even many CLECs that oppose deregulated provision of advanced services through a separate affiliate acknowledge that a failure to preempt inconsistent state law would render the Commission's plan unworkable (although these commenters ask the Commission to preempt state law that is more *lenient* with respect to asset transfers).^{56/} Moreover, some CLECs, which simply assume that an incumbent LEC could stop providing tariffed services after establishment of a data affiliate, highlight the need to preempt state law that would impose continuing service obligations on incumbents that opt to provide advanced services through an affiliate.^{57/}

III. THE GRAB-BAG APPROACH OF SOME CLECS TO THIS PROCEEDING DISREGARDS THE *DEREGULATORY THRUST* OF SECTION 706, THE PLAIN TEXT OF SECTION 251, AND TECHNICAL REALITY.

CLECs bombard the Commission with requests for new federal requirements that would impose significant costs on incumbent LECs and thereby throttle their ability to deploy advanced services beyond top-tier markets. The CLECs repeatedly overreach: They pay no mind to the purpose of section 706, the Act's structure or explicit requirements, or, in many cases, even technical feasibility. Many CLECs even ask the Commission to impose additional

^{55/} See, e.g., Cincinnati Bell at 18; GTE at 56-57. Cf. SBC at 12 (the Commission must work with state commissions to prevent inconsistent state regulatory treatment).

^{56/} See KMC Telecom at 12, Allegiance Telecom at 25-26, Network Plus at 7-8, RCN Telecom Services at 11.

^{57/} See, e.g., See First Regional TeleCOM and FirstWorld Communications at 16.

onerous burdens only on incumbents' data CLECs, making no pretense of their Orwellian view that some CLECs should be more equal than others.^{58/}

A. The Grab-Bag Approach Is Contrary to the Deregulatory Purpose of Section 706 and This Proceeding and to the Decentralized Dispute Resolution Scheme Congress Created.

Congress instructed the Commission to encourage the deployment of advanced telecommunications services and, if conditions warrant, to take immediate action to accelerate such deployment by reducing barriers to investment. Act § 706. Most CLECs do not deny that advanced services are being deployed almost exclusively to larger communities and big businesses; they instead appear intent on diverting the Commission's attention from that fact — and the objective of section 706 — by demanding a host of new federal regulations.

Many commenters recognize, however, that the Commission should by no means *add* to incumbent LECs' regulatory burden; to do so would diminish their ability to meet the advanced telecommunications needs of smaller communities, because it would increase the costs of providing such service.^{59/} And imposing new collocation and loop-related requirements is simply unnecessary, in light of the existing negotiation and arbitration procedures that Congress devised to address these very issues. Contrary to CLECs' suggestions that those procedures are

^{58/} See, e.g., Transwire Communications at 16 (“Transwire strongly contends that a level of regulation for the advanced affiliates higher than that for other competitive LECs is justified and necessary during the period of transition to a competitive market.”); cf. Covad at 38 (“[i]t is not enough for CLECs to be grudgingly granted simple *parity* in the use of loops with ILECs”).

^{59/} E.g., Ameritech at 32-37; SBC at 14-15; National Telephone Cooperative Ass'n at 8; Cincinnati Bell at 19, 26-29; Bell Atlantic at 32, 45-46; BellSouth at 45-46; GTE at 58-61, 80-81.

not working properly,^{60/} the thousands of pages of comments filed in this proceeding include virtually no requests by state commissions for federal supplementation of the measures adopted in 1996 in the *Local Competition Order*. To the contrary, some state commissions have echoed U S WEST's statement that federal intervention is unwarranted. The New York Department of Public Service, for example, concurs that no "additional national requirements are necessary."^{61/} The Commission should bear in mind Commissioner Powell's observation that "regulation tends to stifle innovation and impede the beneficial operation of market forces,"^{62/} and accordingly refrain from imposing new duties on incumbent LECs, particularly in light of Congress's fundamental directive to pursue a *deregulatory* path.

As an example of just how far the CLECs reach in their comments, Covad asserts that "[i]t is not enough for CLECs to be grudgingly granted simple *parity* in the use of loops with ILECs."^{63/} Consistent with that mentality, Covad's wish list, which amounts to 13 single-spaced pages of new collocation and unbundling rules, includes the following proposals:

^{60/} CLECs' scorn for the congressionally prescribed scheme of negotiation and arbitration is manifest. Some CLECs propose, for example, the forced reopening of *all* existing interconnection agreements. ALTS at 53-54; GST Telecom at 32. Covad argues that, because of the "tremendous bargaining power disparity between CLECs and ILECs," the Commission should preempt state authority to avoid "serial battles of attrition before state regulatory commissions." Covad at 15-16. Any effort to impose centralized solutions to all local competition problems simply would not work, as Congress well understood. In any event, if these commenters believe a different implementation and enforcement regime is warranted, they should address those views to Congress, not the Commission.

^{61/} See NYDPS at 9; *id.* at 14; *see also* Texas PUC at 10 (the Commission should leave security-related issues to the states).

^{62/} *Advanced Services Order*, Separate Statement of Commissioner Michael K. Powell, at 1.

^{63/} Covad at 38 (emphasis added).

- Incumbent LECs not only should condition loops for CLECs but should bear the costs of removing certain bridged taps (at 12 n.25);
- “CLECs must be able to compel the construction of their own remote DSLAMs” (at 15 n.30);
- Incumbent LECs in all cases should be ordered to permit cageless collocation, within 45 days of any request, regardless of any site-specific issues that may make doing so infeasible. (at 27-28);
- Incumbent LECs should be required to report to the Commission on the availability and functionality of their DSLAMs and disclose their business plans for deploying DSLAMs. (at 40).
- Incumbent LECs should be required to install “a suitable digital line card of the CLEC’s choosing at a remote terminal and provide demultiplexing capability at the relevant central office.” (at 54)
- Incumbent LECs should be barred from installing DSLAMs of *their* choosing; rather, they should be compelled to deploy DSLAMs that are compatible with technologies used by competitors such as Covad. (at 55);
- “All ILEC provision of *any* DSL service (regardless of integration/separation status) prior to the general availability of xDSL-capable loops to CLECs throughout the service territories of that ILEC . . . would be considered a per se violation of discrimination standards, ultimately punishable by forfeiture and other Commission enforcement tools.” (at 61).

This last suggestion, in particular, illustrates how Covad’s (and other CLECs’) proposals would turn section 706 on its head: If the Commission were to heed Covad’s advice, deployment of advanced services by incumbent LECs could be *frozen*, and consumers denied the benefits of Information Age technology, until all CLECs decided that they were ready to compete. Plainly, the Commission should not take such action when it is charged with encouraging such deployment in a timely fashion.^{64/}

^{64/} See also 47 U.S.C. § 157(a) (“It shall be the policy of the United States to encourage the provision of new technologies and services to the public.”).

Many of Covad’s demands also overlook the Eighth Circuit’s holding that section 251(c)(3) “requires unbundled access only to an incumbent LEC’s *existing* network — not to a yet unbuilt superior one.”^{65/} Covad would have the Commission compel incumbents to reengineer their networks to suit CLECs’ chosen uses, and bar them from taking their own business needs into account.^{66/} And, by forcing incumbents to bear the costs of complying with several of its demands,^{67/} Covad essentially asks the Commission to take incumbents’ property. Indeed, most of Covad’s demands appear to be founded on the belief that incumbents’ networks are not *really* private property (or at least *should* not be), but rather a “valuable national resource.”^{68/}

Congress knew better, and took account of the need to develop competition *and* to avoid infringing on incumbents’ property rights. That balance is reflected in the principle that the Commission may compel incumbents to turn over only *bottleneck* facilities to their competitors (*see supra* Part I.A). Moreover, as discussed in Part III.B below, Congress provided that CLECs may obtain physical collocation space only where *necessary* for interconnection or access to unbundled network elements.^{69/}

Congress further understood that interactions between CLECs and incumbents would present too many site-specific issues to be governed primarily through centrally imposed

^{65/} *Iowa Utils. Bd.*, 120 F.3d at 813.

^{66/} Covad at 15 n.30, 54, 55.

^{67/} *See, e.g., id.* at 12 n.25, 15 n.30, 54.

^{68/} *Id.* at 51.

^{69/} 47 U.S.C. § 251(c)(6).

mandates. Virtually all of the new rules that Covad and other CLECs propose address technical questions that are better resolved through negotiations and in state arbitration proceedings. Those processes can determine which particular interconnection and unbundling arrangements are most appropriate in light of CLECs' varying interconnection needs and the actual facilities that incumbent LECs have deployed in central offices and remote terminals. U S WEST discusses below several of the particular statutory and technical problems with CLECs' grab-bag requests.

B. CLECs' Collocation Wish Lists Disregard Section 251 and Technical Constraints.

Almost every CLEC urges the Commission to require the physical collocation of virtually *any* kind of telecommunications equipment. ALTS, for example, opposes "restrictions of any kind on the kind of equipment that can be collocated by a carrier."^{70/} Other CLECs and aligned organizations take comparable positions.^{71/} As U S WEST and other commenters have shown, however, requiring the collocation of switching equipment and other equipment that need not be collocated for purposes of interconnection or access to UNEs violates 251(c)(6) and *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).^{72/} In asking for permission to

^{70/} ALTS at 43.

^{71/} See, e.g., MCI at 53; e.spire at 27; ICG Telecom at 17; Florida Digital Network, Inc. at 7-8; US Xchange at 8; Network Plus at 8; McLeodUSA at 9; Allegiance Telecom at 3; RCN Telecom Services at 12; KMC Telecom at 14-15; CompTel at 39. See also Qwest at 54 (proposing to require collocation of enhanced services equipment, in addition to telecommunications facilities).

^{72/} U S WEST at 36-38; Ameritech at 39 - 40; Bell Atlantic at 37-38; GTE at 61-64; Sprint at 11.

set up shop on incumbents' premises, these CLECs would improperly substitute a test of mere convenience for the strict statutory standard of necessity.

CLECs also ignore technical constraints in proposing that incumbents be required to provide unfettered access to remote terminals.^{73/} As U S WEST noted in its comments, most remote equipment cabinets were designed to accommodate only the equipment they presently house.^{74/} Carriers and states will have to work out alternative arrangements, taking into account space and power specifications, zoning restrictions, and other site-specific issues. The Commission should not impose a one-size-fits-all solution that simply cannot be implemented. CLECs' eagerness to define technical feasibility in terms of what theoretically *could* be accomplished, rather than what incumbents *actual networks* will allow, runs counter to the Eighth Circuit's binding interpretation of section 251. Whereas Covad, for example, asserts that "technical feasibility . . . does *not* depend on whether the ILEC has actually chosen to deploy a particular service,"^{75/} as noted above, the *Iowa Utilities Board* court expressly held otherwise, and no party has sought further review of that determination.^{76/}

C. CLECs' Loop-Related and UNE Requests Likewise Disregard Section 251 and Technical Constraints.

The proposals of many new entrants to require incumbents to unbundle loop spectrum similarly assume a technical state of affairs that simply does not exist. Contrary to some CLECs' unsupported assertions that "loop sharing would not create significant technical

^{73/} See, e.g., Covad at 53; e.spire at 44-45; xDSL Networks at 7.

^{74/} U S WEST at 49 n.48.

^{75/} Covad at 51-52 (emphasis added).

^{76/} *Iowa Utils Bd.*, 120 F.3d at 813.

difficulties,”^{77/} U S WEST’s comments demonstrate that it lacks the ability to permit two different CLECs to provide services over the same loop.^{78/} Other incumbent LECs agree that spectrum unbundling is not technically feasible at this time,^{79/} and additional commenters argue that it would be inappropriate to compel spectrum unbundling even if it were feasible.^{80/} U S WEST agrees with those commenters who propose that incumbent LECs and CLECs alike should be *permitted* — but not *required* — to allow loop sharing, if and when they develop the systems to do so.^{81/}

In addition, the CLECs ask the Commission to define a host of new elements for incumbents to unbundle. In submitting their Christmas lists, however, the CLECs never bother to go through the analysis that Congress prescribed for determining whether the unbundling of any given facility is appropriate. The CLECs make no effort to demonstrate that their ability to provide xDSL service would actually be “impair[ed]” without access to these elements,^{82/} nor could they make such a showing: As noted above, WorldCom has told the Commission that it has successfully deployed xDSL-based services from tens of incumbent LEC central offices *without* any of these elements.^{83/} In particular, the Commission should be very skeptical of

^{77/} Allegiance Telecom at 8. *See also* e.spire at 36-37; Network Access Solutions at 31; MachOne Communications at 3-9; Copper Mountain Networks at 1-2; xDSL Networks at 9.

^{78/} U S WEST at 47-48 & Attachment D.

^{79/} *See, e.g.*, Bell Atlantic at 50-51; Cincinnati Bell at 32; GTE at 86-90.

^{80/} *See, e.g.*, CompTel at 47 (noting cost-allocation problems); Sprint at 24-25.

^{81/} *See* Ameritech at 21-32; AT&T at 62-64; Kiesling Consulting at 21.

^{82/} 47 U.S.C. § 251(d)(2)(B)

^{83/} *See supra* at 7-8.

CLEC demands for unbundled packet-switched point-to-point transport,^{84/} as the CLECs and IXC consistently tell the Commission when trying to downplay the need for BOC entry into the Internet backbone market,^{85/} routers and transport links are readily available from a multiplicity of competing sources, and the barriers to entering the packet-switched transport business are nil. Indeed, many of the same CLECs now claiming that they absolutely must receive unbundled ATM transport from the incumbent LECs are the same ones who protested when U S WEST considered including such transport as part of its MegaCentral services offered to ISPs; they insisted that they wanted (and had the ability) to use their own networks to provide this transport to ISPs, and U S WEST has agreed to reconfigure MegaCentral to allow them to do so.^{86/}

Similarly, the CLECs make no effort to limit their unbundling demands to the actual constituent “elements” of incumbents’ networks and services. Several CLECs attempt to “obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and . . . resale on the other”^{87/} by requesting “elements” that are in fact nothing more than relabeled finished services. CompTel’s concept of the “shared data channel” UNE — which extends from a customer’s premises through

^{84/} See, e.g., ALTS at 54 (“broadband interoffice transport”); CompTel at 46 (“shared data transport”).

^{85/} See, e.g., Intermedia at 69; Joint Comments of MCI Communications Corp. and WorldCom, Inc., at 19, CC Docket No. 98-146 (acknowledging that TCP/IP routers, switches, and modems “are readily available from a variety of third-party vendors. Any telecommunications carrier or ISP could obtain the necessary hardware and software and become an Internet backbone provider.”).

^{86/} See Attachment at 16-17.

^{87/} *Iowa Utils. Bd.*, 120 F.3d at 813.

the incumbent's DSLAM and over its ATM network to a CLEC-designated aggregation point^{88/} — is exactly equivalent to a retail xDSL service. Likewise, the CLECs' dedicated "extended link" from a customer's premises through one central office to a CLEC PoP in a second office is in reality just a finished private line.^{89/} By calling these preassembled sets of multiple network features and functions unitary "elements," the CLECs are simply hoping to evade Congress's requirement that they themselves perform the work of designing and building networks,^{90/} and to obtain these services at a cost-based UNE price rather than one discounted from resale. Indeed, Intermedia does not disguise its intention: It urges the Commission outright to define "single UNE[s]" that actually "incorporate a series of discrete functions that are themselves defined as UNEs" specifically to prevent incumbents from taking advantage "of the decision by the Eighth Circuit Court of Appeals that ILECs cannot be compelled to combine UNEs."^{91/}

Finally, the CLECs make these demands without regard to network realities. It simply is technically impossible to provide some of the requested network elements, given U S WEST's current network configuration. No matter how useful such unbundling would be to a CLEC, for example, U S WEST has no way to provide "broadband signal grooming"^{92/} or to unbundle transport beginning at the "back-end" of a DSLAM or individual DSLAM and ATM

^{88/} CompTel at 46-47. As U S WEST understands it, the misnamed "virtual loop unbundling" concept is the same thing.

^{89/} See, e.g., e.spire at 41-42; Intermedia at 47-49. Intermedia itself concedes that the extended link is "a combination of discrete UNEs," which "combine[s] unbundled loops with transport, and multiplexing as necessary." Intermedia at 47 (emphasis added).

^{90/} See *Iowa Utils. Bd.*, 120 F.3d at 813.

^{91/} Intermedia at 47.

^{92/} ALTS at 54.

ports.^{23/} Each of the DSLAMs U S WEST has deployed is directly connected to an ATM switch through a single, dedicated, unchannelized DS-3 link that does not allow a single customer connection to be broken out. There is no place to connect another DS-3 to the DSLAM. Of course, the solution some CLECs propose is to force incumbents to redesign their networks solely for the CLECs' benefit,^{24/} but that is not one that the Telecommunications Act permits: The Act "requires unbundled access only to an incumbent LEC's existing network — not to a yet unbuilt superior one," and it certainly "does not mandate that incumbent LECs cater to every desire of every requesting carrier."^{25/}

The mismatch between the CLEC wish lists and network realities once again illustrates the danger of trying to set generic nationwide unbundling rules abstracted from any actual incumbent network or CLEC entry plans. The degree to which unbundling is technically feasible in a given network depends on its particular architecture and the actual facilities it contains, not Commission fiat. Rather than try to divine the platonic network and its constituent elements, the Commission should continue to leave these issues to individualized negotiations and arbitrations. An incumbent with a real network and a CLEC with a real deployment plan will be in a far better position to work out realistic accommodations.

D. CLECs' Proposed Restrictions on Incumbent LECs' Data Affiliates Are Discriminatory and Unjustified.

Some CLECs openly abandon the notion of parity of opportunity between CLECs and an incumbent LEC's data affiliate, instead calling on the Commission to saddle the ILEC

^{23/} See, e.g., CompTel at 46.

^{24/} See, e.g., Covad at 15 n.30, 54.

^{25/} *Iowa Utils. Bd.*, 120 F.3d at 813.

affiliate with unique disabilities. Qwest, for example, asserts that an ILEC data affiliate should not be able to own *any* network facilities.^{96/} At the same time, several new entrants argue that an ILEC affiliate should be barred from buying UNEs or obtaining any of the incumbent's services for resale.^{97/} Such overt discrimination cannot possibly be justified. As the Internet Access Coalition observes, there is "no statutory or policy basis for attempting to impose limitations on the availability of UNEs [or resale] to all carriers. . . . More importantly, [such] limitations appear to be unnecessary. . . ."^{98/} And as GTE points out, these limitations "would give competing carriers an artificial competitive advantage over the ILECs and their affiliates."^{99/} To be sure, that is precisely what CLECs hope to achieve: to tilt the playing field in their favor, rather than to ensure that it is level.

Other examples of CLEC overreaching abound. Some CLECs assert that an ILEC affiliate should be barred from using virtual collocation,^{100/} while another commenter says that an ILEC affiliate should be *forced* to use virtual collocation.^{101/} e.spire asserts that an ILEC affiliate should be prohibited from making any volume commitments in an interconnection agreement with its affiliated incumbent ILEC.^{102/} Numerous CLECs would have the Commission impose

^{96/} Qwest at 40.

^{97/} See MCI at 42; e.spire at 18; ICG Telecom at 14; Qwest at 43; RCN Telecom Services at 7; CompTel at 24-27; AT&T at 28-30.

^{98/} Internet Access Coalition at 6.

^{99/} GTE at 51.

^{100/} ALTS at 25; AT&T at 31; Transwire at 17.

^{101/} America's Carriers Telecommunications Ass'n at 16.

^{102/} e.spire at 15-16. This insistence on the lowest common denominator, like some
(continued...)

preapproval and reporting requirements on ILEC data affiliates that would not apply to any other CLECs.^{102/} Finally, some ISP commenters ask the Commission to subject ILEC data affiliates to *Computer III*-type restrictions — which would not apply to other CLECs that provide both xDSL and ISP services — in addition to the stringent structural safeguards the NPRM proposes.^{104/}

None of these proposals should be adopted. If the Commission authorizes incumbent LECs to create data affiliates that must function as CLECs, then those affiliates should be regulated no differently from other CLECs. Those that seek to use regulatory devices to hamstring incumbent LECs and their affiliates would elevate the interests of individual competitors over competition and sacrifice the goal of section 706 (and, by extension, this proceeding). As Commissioner Powell has observed, the Commission “cannot relegate BOCs or other big companies to the sidelines in the data services ‘race’ unless [it is] prepared to deny the economy and consumers of the benefits of these companies’ expertise and capital.”^{105/}

CONCLUSION

The Commission should take full advantage of the opportunity this proceeding presents to fulfill its mandate under section 706 of the Act. The Commission will best comply with that provision by ruling that incumbent LECs’ provision of advanced services is not subject

^{102/} (...continued)
other CLEC proposals discussed above, would turn section 706 on its head.

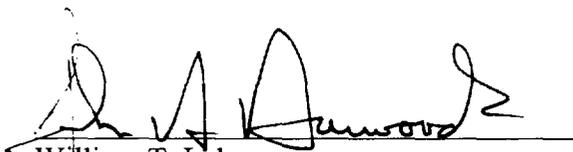
^{103/} MCI at 43-45; CTSI at 6; RCN Telecom Services at 9-10; KMC Telecom at 10; CompTel at 16-17; ALTS at 27; AT&T at 18.

^{104/} AOL at 8-9; Commercial Internet Exchange Ass’n at 21.

^{105/} *Advanced Services Order*, Separate Statement of Commissioner Michael K. Powell, at 1.

to any new unbundling or discounted resale obligations. The NPRM's separate affiliate plan, while well intentioned, would not encourage the deployment of advanced services to all Americans. And structural separation, like the myriad new regulations demanded by CLECs, simply is not necessary to protect competition. The statutory negotiation and arbitration processes were designed for just that purpose.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'William T. Lake', written over a horizontal line.

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Attachment to U S WEST Communications, Inc.'s Reply Comments

**REGULATORY AND VOLUNTARY SAFEGUARDS APPLICABLE
TO U S WEST'S ADVANCED NETWORKING SERVICES**

U S WEST offers data services and products subject to a variety of regulatory and self-imposed safeguards that fully protect the interests of unaffiliated Internet service providers. Some ISPs have nevertheless expressed concerns in their comments on the Commission's Notice of Proposed Rulemaking that the BOCs' — and, in particular, market leader U S WEST's — provision of information services threatens to curtail unaffiliated ISPs' opportunities to compete. U S WEST has carefully considered such concerns in designing and deploying its advanced data services; ISPs are not simply competitors of the USWEST.net ISP service, but valued customers of U S WEST's MegaBit service. U S WEST accordingly has gone to great lengths to ensure that all ISPs have unfettered access to customers of U S WEST's advanced telecommunications services.

U S WEST's voluntary safeguards are an overlay on the Commission's *Computer* rules, which on their own prevent discriminatory interconnection arrangements and cross-subsidization of unregulated activities by regulated ones. To supplement these mandatory protections, U S WEST has, among other things, (1) met with unaffiliated ISPs at an early juncture in each state in which it has deployed advanced services to make them aware of ordering and provisioning requirements; (2) taken prompt action wherever possible to alleviate the effects of provisioning delays; (3) created a "safe harbor" in its sales channel so that sales consultants will not pitch USWEST.net to customers who are not interested in the service; and (4) gone so far as to establish, at significant expense, joint marketing procedures that allow independent ISPs to cut U S WEST out of the sales process entirely, should they wish to serve as a customer's only point of contact.

I. Structure of the U S WEST !nterprise Networking Organization

U S WEST !nterprise Networking (“!nterprise”) is a product-development and service-support organization for data products and services offered by U S WEST !nterprise America, Inc. (“!nterprise America”) and U S WEST Communications, Inc. This organization includes both regulated and unregulated products and services. !nterprise’s MegaBit offering illustrates how a service may include both regulated and unregulated components. The transport and switching associated with MegaBit are regulated and fall under the aegis of U S WEST Communications, Inc. At the same time, the CPE associated with MegaBit — the DSL-capable modem and, where needed, network interface card — are unregulated and are provided by !nterprise America, U S WEST’s entity that concentrates on unregulated products and services within U S WEST’s 14-state region and on out-of-region data service initiatives.

!nterprise America also offers USWEST.net, an unregulated service that provides Internet access (with or without the MegaBit service). USWEST.net purchases facilities and services, such as transport facilities and billing and collection services, from U S WEST Communications, Inc. pursuant to published tariffs. Like other ISPs, USWEST.net cannot order any tariffed product or service until the effective date of the tariff.

To the extent that personnel employed by a regulated entity within U S WEST’s corporate structure perform any functions relating to unregulated services, their time and expenses are accounted for in accordance with nonstructural separation safeguards imposed by the Commission and the states.

II. The Commission's *Computer Rules*

The Commission has developed a detailed set of rules — collectively known as the *Computer rules* — that govern U S WEST's joint provision of basic common carrier services and enhanced services (such as Internet access).^{1/} At bottom, the *Computer rules* prohibit U S WEST from exploiting an integrated operation to the detriment of competitors who must rely on U S WEST's basic transmission services in order to serve their own customers. The Commission has identified two principal types of anticompetitive conduct: discriminatory interconnection and cross-subsidization. Notably, U S WEST *may* achieve business efficiencies through joint marketing, one-stop shopping, joint research and product development, and joint realization of overall service efficiencies without unfairly disadvantaging competitors; indeed, depriving U S WEST of such benefits would unjustifiably harm the company and its customers.^{2/} Thus, comments asserting that U S WEST has acted inappropriately by creating a “clear and unmistakable link between DSL and

^{1/} See Amendment of Section 64.702 of the Commission's Rules and Regulations (“*Computer III*”), Report and Order, CC Docket No. 85-229, Phase I, 104 FCC2d 958 (1986) (“*Phase I Order*”), recon., 2 FCC Rcd 3035 (1987) (“*Phase I Recon. Order*”), further recon., 3 FCC Rcd 1135 (1988) (“*Phase I Further Recon. Order*”), second further recon., 4 FCC Rcd 5927 (1989) (“*Phase I Second Further Recon.*”), *Phase I Order and Phase I Recon. Order*, vacated, *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (“*California I*”); Phase II, 2 FCC Rcd 3072 (1987) (“*Phase II Order*”), recon., 3 FCC Rcd 1150 (1988) (“*Phase II Recon. Order*”), further recon., 4 FCC Rcd 5927 (1989) (“*Phase II Further Recon. Order*”), *Phase II Order* vacated, *California I*, 905 F.2d 1217 (9th Cir. 1990); *Computer III Remand Proceedings*, 5 FCC Rcd 7719 (1990) (“*ONA Remand Order*”), recon., 7 FCC Rcd 909 (1992), *pets. for review denied*, *California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) (“*California II*”); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards*, 6 FCC Rcd 7571 (1991) (“*BOC Safeguards Order*”), recon. dismissed in part, Order, CC Docket Nos. 90-623 and 92-256, 11 FCC Rcd 12513 (1996); *BOC Safeguards Order vacated in part and remanded*, *California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (“*California III*”), cert. denied, 115 S. Ct. 1427 (1995) (referred to collectively as the *Computer III* proceeding).

^{2/} See Phase I Order, 104 FCC2d 958, at ¶¶ 96-97.

USWEST.net” through its marketing campaign are entirely unfounded; U S WEST is expressly permitted to establish such a link.^{3/}

The Commission initially adopted a two-phase system of nonstructural safeguards designed to permit BOCs to provide basic and enhanced services on an integrated basis.^{4/} Phase one required the BOCs to obtain Commission approval of a service-specific comparably efficient interconnection (“CEI”) plan in order to offer a new enhanced service.^{5/} In these plans, the BOCs were required to explain how they would offer to ESPs all the underlying basic services the BOCs used to provide their own enhanced service offerings, subject to a series of “equal access” parameters.^{6/} Phase two required the BOCs to develop and implement open network architecture (“ONA”) plans.^{7/} ONA plans explained how a BOC would unbundle and make available to unaffiliated ESPs network services in addition to those the BOC used to provide its own enhanced services; the plans were required to meet a defined set of criteria in order to release a BOC from a previously applicable structural separation requirement.^{8/}

^{3/} Coalition of Utah Independent Internet Service Providers (“Utah Coalition”) at 4.

^{4/} *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review — Review of Computer III and ONA Safeguards and Requirements and Further Notice of Proposed Rulemaking*, 13 FCC Rcd 6040 ¶ 10 (1998) (“1998 Biennial Review”).

^{5/} *Id.*

^{6/} *Id.*

^{7/} *Id.* ¶ 11.

^{8/} *Id.*

Following a series of appeals and the passage of the Telecommunications Act of 1996, the *Computer III/ONA* rules are in a state of flux.^{9/} But key nonstructural safeguards intended to prevent discrimination and cost misallocation remain in effect.^{10/}

The Commission's rules that prevent discriminatory interconnection include the following:

- **Network Disclosure.** These rules prevent U S WEST's information services affiliate from gaining an unfair competitive advantage by virtue of advance knowledge of changes in U S WEST's basic telecommunications network.^{11/} Before offering any new network interface, U S WEST must disclose to the industry the new interface (including deployment information).^{12/} Competitors have certain testing rights and the right to participate in some technical trials.^{13/}
- **Equal Provisioning.** U S WEST may not discriminate against competing providers of information services in the actual provisioning of basic telecommunications services.^{14/} Provisioning equality applies to timing of service delivery and repair as well as to service quality.^{15/} U S WEST files

^{9/} See, e.g., *id.* ¶ 7.

^{10/} See generally *1998 Biennial Review*.

^{11/} See *1998 Biennial Review*, 13 FCC Rcd 6040, at ¶¶ 117, 122; *Local Competition Second R&O*, 11 FCC Rcd 19392, at ¶¶ 171-173.

^{12/} *Id.*

^{13/} See *BOC Joint Petition*, 10 FCC Rcd 13578, at ¶ 42; *Phase I Order*, 104 FCC2d at 1041.

^{14/} See 47 U.S.C. § 202(a); *1998 Biennial Review*, 13 FCC Rcd 6040, at ¶¶ 43-48; *Phase I Order*, 104 FCC2d at 1036 (“[W]e require the basic service functions utilized by a carrier-provided enhanced service to be available to others on an unbundled basis, with technical specifications, functional capabilities, and other quality and operational characteristics, such as installation and maintenance times, equal to those provided to the carrier's enhanced services.”).

^{15/} See *1998 Biennial Review*, 13 FCC Rcd 6040, at ¶¶ 112-113; *BOC Joint Petition*, 10 FCC Rcd 13578, at ¶¶ 37-42; *Phase I Order*, 104 FCC2d at 1039-41.

reports with the Commission on a regular basis comparing its service intervals to its own enhanced services with service provided to competitors.^{16/}

- Collocation. The network connections U S WEST offers its own enhanced services via collocated space must be comparable to connections available to competitors; moreover, if connections are priced on a distance-sensitive basis, U S WEST's enhanced service offering must include an imputed charge for interconnection based on the rate that would apply if the collocated space were two miles from the central office.^{17/}

To foreclose the opportunity for cross-subsidization of a competitive enhanced service offering by basic telecommunications services, the Commission has adopted comprehensive cost allocation rules. These rules attribute to unregulated accounts both the direct costs of provisioning the enhanced service and a portion of all joint and common costs for facilities and activities supporting both regulated and unregulated activities.^{18/} U S WEST's particular cost allocation procedures are set forth in detail in its Cost Allocation Manual, on file with the Commission. U S WEST's cost allocation is also subject to annual audit by the Commission or an outside auditor.^{19/}

Whenever a U S WEST enhanced service uses a U S WEST service that is offered at tariff, the enhanced service must incorporate the tariffed price into its own service

^{16/} See *Bell Atlantic Telephone Companies' Offer of Comparably Efficient Interconnection to Intranet Management Service Providers*, 1998 WL 514173, DA 98-1655, at ¶ 27 (CCB 1998) ("*Bell Atlantic CEI Plan*"); *1998 Biennial Review* ¶¶ 112-113; *Phase II Order*, 2 FCC 2d 3072, at ¶ 100.

^{17/} See *Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd 1, at ¶¶ 168 (1988).

^{18/} See 47 C.F.R. §§ 64.901-903.

^{19/} See *id.* § 64.904(a).

rates.^{20/} When U S WEST transfers assets or services between its regulated common carrier operation and any corporate affiliate, similar accounting rules apply.^{21/} Assets must be transferred from the regulated entity to the affiliate at the higher of net book cost or market value, and from an affiliate to the regulated entity at the lower of these two amounts.^{22/} Services are accounted for based on cost allocation principles that are comparable to those that govern integrated operations.^{23/}

III. Additional Safeguards Relating to Provisioning and Sales of MegaCentral and MegaSubscriber

In addition to these safeguards imposed by the Commission, U S WEST subjects the MegaBit service to additional safeguards to ensure fair treatment of unaffiliated ISPs and to enable them to obtain facilities from other carriers. MegaBit comprises two components: End users may purchase MegaSubscriber, which provides xDSL connectivity from the end user's premises to the serving central office, and ISPs seeking to serve such end users must obtain a MegaCentral connection, which supplies them with ATM functionality and DS-1 or DS-3 connections from the ATM switch to their premises (the bandwidth choice depending on anticipated volume). MegaCentral and MegaSubscriber are provisioned and marketed according to detailed methods and procedures. Parts A and B below summarize these safeguards for MegaCentral and MegaSubscriber, and Part C reviews the measures U S

^{20/} See *id.* § 64.901(b)(1).

^{21/} See *id.* § 32.37.

^{22/} See *id.* § 32.37(b).

^{23/} See *id.* § 32.27(c).

WEST has taken to allow ISPs to serve MegaSubscriber customers even if they use other carriers' transport facilities.

A. MegaCentral Provisioning Safeguards

All MegaCentral orders, whether placed by an independent ISP or USWEST.net, are handled uniformly.^{24/} Upon receipt of an order, the external sales channel prepares an executive summary and forwards it to the MegaBit Product Manager (for DS-1 orders) or the ATM Product Manager (for DS-3 and above orders) for approval. If the order is approved, the sales channel contacts the contract development group with instructions to prepare a contract for delivery to the customer. Once the fully executed contract is provided to U S WEST, the order form is completed and sent to Interprise for order issuance and project tracking by either an account consultant or project leader within the Interprise organization. Within one or two days after Interprise receives a MegaCentral order, a notice of that order is posted on a special web site that may be accessed by unaffiliated ISPs.

In general, orders for MegaCentral connections are filled on a first-come, first-served basis. Inevitably, however, some orders take longer than others to fill, no matter when U S WEST personnel *initiate* the provisioning process. For example, a MegaCentral order that does not require any construction or addition of power in a central office will be provisioned more quickly than one that does necessitate either of those steps. The provisioning of DS-1 and DS-3 links also entail different methods and procedures that take different amounts of time to complete. Because DS-3 connections generally are fiber-based,

^{24/} Comments implying that U S WEST processes its own ISP's orders before processing unaffiliated ISPs' orders are simply incorrect. *See, e.g.*, Retail Internet Service Providers ("Retail ISPs") at 10 & Attached Complaint of Minnesota Department of Public Service ¶¶ 17-26.

and DS-1 connections are copper-based, DS-3 links typically entail more time-consuming construction.

Accordingly, commenters who assert that U S WEST routinely installs USWEST.net's MegaCentral facilities sooner than it fills unaffiliated ISPs' orders overlook salient facts.^{25/} Because the time it takes for !nterprise to provision MegaCentral services is a function of a variety of factors, the company cannot guarantee that every ISP will receive a MegaCentral connection within a specified time frame. Provisioning disparities typically result from differing construction requirements, not discrimination.

Indeed, !nterprise has gone to great lengths to work with unaffiliated ISPs to make them aware of provisioning requirements. ISPs are valued customers and potential customers of MegaCentral, and !nterprise is careful to consider their needs. Accordingly, U S WEST personnel met with ISPs in advance of filing a MegaBit tariff in each state in which !nterprise has introduced MegaBit services. The purpose of these meetings was to acquaint the ISPs with the features of the new services and to make certain that ISPs fully understood what they needed to do in advance of the rollout in order to serve as a MegaSubscriber customer's ISP. In addition to explaining MegaBit services to ISPs, U S WEST requested forecasts of demand from the ISPs so that such information could be factored into the deployment schedule for DSLAMs in the serving central offices.

With respect to DS-3 links in particular, U S WEST explained in these meetings that ISPs planning to order DS-3 MegaCentral connections needed to get their orders in as quickly as possible to leave sufficient time for necessary construction.

^{25/}

See Retail ISPs at Attached Complaint ¶¶ 23-26; Utah Coalition at 3-4.

Moreover, to help ISPs overcome delays associated with DS-3 orders, U S WEST has permitted ISPs to order DS-3 access links before the MegaCentral tariff became effective, has offered in several instances to provide service over DS-1 facilities while the ISP awaits installation of the DS-3 link, and even has supplied (on an interim basis) the necessary terminating equipment at no charge.

Notwithstanding U S WEST's efforts to encourage ISPs to order MegaCentral connections far enough in advance for them to serve MegaSubscriber customers as soon as the service became available, many ISPs have failed to submit orders in time for that to occur. This failure has produced variances in dates of deployment of MegaCentral to USWEST.net and to some unaffiliated ISPs — variances that, as noted above, these ISPs (and a few state commissions) have interpreted as evidence of preferential treatment.^{26/} In fact, such variances often have been caused by ISPs' own inaction.

There undoubtedly have been some isolated glitches — as occurs with the rollout of any new service — for which ISPs were not responsible. In general, problems have resulted from the large demand for high-speed services such as MegaBit, which in turn has caused facilities shortages. Critically, such shortages have affected USWEST.net as well. In Seattle, for example, USWEST.net waited in line for a MegaCentral connection alongside unaffiliated ISPs; and it was one of those unaffiliated ISPs — not USWEST.net — that was first to have its service activated.

Some other problems have been harder to predict. U S WEST encountered not only demand-induced shortages but also quality problems with the DSLAMs it has

^{26/} See Retail ISPs at 10 & Attached Complaint ¶¶ 23-26; Utah Coalition at 3-4.

purchased. U S WEST demanded a swift response by the manufacturer, and the problems were resolved in short order. U S WEST now closely monitors DSLAM capacity in each serving central office and provisions additional equipment once 25 percent of the ports are utilized. Moreover, because some Utah customers were unable to sign up for service when DSLAM capacity became temporarily exhausted, and therefore missed out on U S WEST's offer of a free modem (regardless of the subscriber's choice of ISP), U S WEST agreed to honor the offer after its expiration date to make sure that no unaffiliated ISP would shoulder any blame for the delays. Far from acting anticompetitively,^{27/} or "shamelessly discriminat[ing],"^{28/} U S WEST has been uncommonly solicitous to unaffiliated ISPs.

In sum, while the rollout of MegaCentral has not been flawless, U S WEST has done everything possible to accommodate unaffiliated ISPs' interests. U S WEST has given ISPs clear notice that provisioning takes time and must be planned accordingly. Where problems such as facilities shortages have occurred, U S WEST has taken prompt action to ensure equal and fair treatment of all ISPs, and it remains committed to addressing any future problems quickly and cooperatively. U S WEST also voluntarily conducts parity analyses regarding the provisioning of facilities to unaffiliated ISPs and to USWEST.net and files quarterly reports on the results with the Commission. If any report indicates a statistically significant variance in favor of USWEST.net, U S WEST will conduct an investigation and take appropriate steps to correct the situation.

^{27/} See Utah Coalition at 3-4.

^{28/} Retail ISPs at 10.

B. MegaSubscriber Marketing and Provisioning Safeguards

1. Marketing

U S WEST also has voluntarily undertaken measures to give ISPs unfettered access to MegaSubscriber customers, and even has taken itself out of the sales loop where an ISP seeks to serve as a customer's single point of contact. The fact that the Minnesota Department of Public Service has filed a complaint concerning U S WEST's sales practices reflects its unfamiliarity with the lengths to which U S WEST has gone to ensure fairness;^{29/} ironically, several of the practices about which Minnesota complains were adopted at the behest of another state commission.

To assuage concerns of independent ISPs and state regulators that USWEST.net is unfairly advantaged by its affiliation with Interprise, U S WEST has undertaken or negotiated to undertake the following safeguards, at significant expense, which far exceed any legal requirement:

- U S WEST has hired an outside sales vendor to handle orders for MegaSubscriber services. U S WEST requires that sales consultants complete comprehensive training regarding all of its policies and procedures, including its Code of Conduct and Business Ethics policies. All sales consultants must be retrained at least annually.
- Sales consultants in all channels also receive regular updates as soon as procedures change. At least two of these updates about MegaBit have reminded consultants of their obligation to honor customers' choice of an ISP.
- The sales channel uses a voice response unit ("VRU") that gives callers dialing the toll-free "888-MEGAUSW" number the option to select either USWEST.net or any MegaCentral-equipped ISP. The VRU directs callers to select "1" for service with USWEST.net or "2" for service with any other ISP.

^{29/}

See Retail ISPs at Attached Complaint ¶¶ 27-37.

- Any caller that selects option 2 (an ISP other than USWEST.net) is immediately directed to a sales consultant in a separate “safe harbor” group that is under strict orders to make no further attempt to market USWEST.net. Rather, sales consultants follow carefully prescribed steps to preserve neutrality. They first ask the caller to designate an ISP. If the ISP of choice is unavailable, the consultant offers to read a list of ISPs that do support MegaBit services. The Methods and Procedures given to sales consultants states: “If your potential customer already has an ISP or indicates they will be using another ISP and that ISP is a MegaCentral host, you must connect that customer to their existing ISP. It is imperative that the customer is advised of all ISPs listed” Consultants are also instructed to remind customers: “We want to assure you that U S WEST will provide the same high-quality service, installation, and maintenance regardless of where you purchase your Internet service.”^{30/} These scripts have been reviewed by state commissions and altered in light of their concerns.
- U S WEST has offered to establish and pay for a separate toll-free number that bypasses the VRU and routes callers directly to the “safe harbor” sales group.^{31/}
- U S WEST directly monitors compliance with the safe harbor mechanism. U S WEST employees have dialed into the VRU to ascertain whether safe harbor consultants market USWEST.net; no such screening exercise has yet to uncover any misconduct. U S WEST also takes ISP complaints very seriously: When a Utah ISP reported an instance of inappropriate sales behavior concerning the “safe harbor,” U S WEST investigated the matter and later terminated the sales consultant in question.

In addition to these safeguards, U S WEST has been working with unaffiliated ISPs in several states to develop a joint marketing program. This program was launched in

^{30/} The existence of this safe harbor, combined with U S WEST’s joint marketing rights, makes the propriety of the VRU unassailable. The Minnesota DPS nevertheless has alleged that “[t]his type of recording gives an unfair advantage to USWEST.NET service over competitive ISPs. . . .” Retail ISPs at Attached Complaint ¶ 28. *See also* Utah Coalition at 4 (wrongly contending that U S WEST’s toll-free ordering system is anticompetitive).

^{31/} The Minnesota DPS has charged that a two-number system, no less than a single number with two options, is discriminatory. *See* Retail ISPs at Attached Complaint ¶¶ 36-37. But the fact that U S WEST is willing to provide this independent sales channel for unaffiliated ISPs — and pay for it — negates any charge that its sales practices are anticompetitive.

Minnesota in September 1998 and will soon be duplicated in other jurisdictions. This joint effort includes the following key features:

- U S WEST has been working to assist ISPs in determining whether there is a sound business basis for purchasing MegaCentral services; to this end, U S WEST has performed batch loop qualifications and promulgated guidelines for sizing MegaCentral connections.
- In addition to the separate toll-free number described above, U S WEST will implement an online web ordering tool (“MegaWOT”), which enables ISPs and customers to perform loop qualification and order services on line, thereby completely avoiding the necessity of talking with a U S WEST sales consultant.
- ISPs also may cut U S WEST sales consultants out of the MegaSubscriber sales process by obtaining a letter of authorization from the customer and placing the MegaSubscriber order on the customer’s behalf. Letters of authorization are now available in electronic form for ISPs’ convenience.
- U S WEST has designed and installed, at its own expense, a dedicated MegaCentral web page with hot links directly to ISPs’ home pages. U S WEST also has agreed to encourage customers through advertisements to link to ISPs’ home pages.
- U S WEST has adopted a series of financial incentives for all ISPs — except USWEST.net — to sign up MegaSubscriber customers.
- U S WEST MegaBit promotions, including free modems, are offered to MegaSubscriber customers regardless of whether they select USWEST.net or another ISP.
- U S WEST also provides technical assistance to ISPs, including discounted training.

Both the sales channel safeguards and the joint marketing program have been tailored to meet the specific concerns articulated by state commissions and ISPs.^{32/} These

^{32/} As noted above, U S WEST’s willingness to pay for the promotion of competing ISPs’ services undermines the Retail ISPs’ and Utah Coalition’s charges of discrimination. Similarly, U S WEST’s voluntary inclusion of unaffiliated ISPs in its modem giveaways and other promotions demonstrates its concern for the ISPs’ competitiveness, contrary to the assertions in these groups’ comments.

substantial commitments reflect U S WEST's belief that its relationship with independent ISPs is symbiotic; both U S WEST and ISPs will thrive if they work together. Where advanced services are rolled out by cable providers, by contrast, there is often no role at all for independent ISPs, because the provider of a cable modem generally allows no unaffiliated ISPs to offer service through that high-speed pipe. U S WEST continues to be willing to modify its safeguards and procedures if ISPs raise new legitimate concerns.

2. Provisioning

Finally, U S WEST takes several measures in provisioning MegaSubscriber to ensure that a customer's choice of ISP is honored. After Enterprise receives a MegaSubscriber order from its sales channel, it transfers control of that order out of sales for processing. When an Enterprise representative calls the subscriber to schedule installation, the representative confirms the ISP choice and ensures that the order form contains the proper notation. In addition, the installation technician verifies the customer's ISP selection a second time before installing MegaSubscriber. Unaffiliated ISPs have been informed of these procedures and have acknowledged their satisfaction.

U S WEST adopted these detailed checks after complaints arose in Minnesota that some customers had been mistakenly directed to USWEST.net.^{33/} U S WEST investigated the alleged errors and determined that two order takers in fact had copied "USWEST.net" onto blank order forms where the customer's ISP selection is indicated. U S WEST promptly corrected the erroneous designations and appropriately disciplined the two responsible individuals. Notably, the MegaSubscriber customers whose ISP selections were

^{33/}

See Retail ISPs at Attached Complaint ¶ 45.

initially disregarded were not prevented from connecting with their ISP of choice through a dial-up connection; rather, they were temporarily unable to access that ISP only through the MegaSubscriber service. Nevertheless, U S WEST took the complaints very seriously and adopted the above-described procedures to ensure that they will not be repeated.

C. Procedures Permitting ISPs To Obtain Facilities from Other Carriers

Initially, MegaBit Services were designed and deployed as an end-to-end product offering from U S WEST. As a result, the associated systems — testing, monitoring, reporting, and the like — were not engineered to allow for the presence of another carrier. Nor were the added costs associated with having multiple carriers provide the needed facilities and functions factored into the rates for MegaCentral or MegaSubscriber services. Moreover, with end-to-end provisioning over U S WEST-provided facilities, U S WEST retained the ability to troubleshoot, often in advance of a customer complaint, and therefore avert service breakdowns. If trouble was reported, U S WEST could examine the entire circuit, and easily isolate and repair the problem.

Permitting a competing carrier to supply the access link into the ATM switch thus presents several costs and complications. Despite U S WEST's concerns that permitting a CLEC to provide this access link might decrease service quality and increase customer costs, the company nevertheless has indicated its willingness to amend tariffs where necessary to make MegaCentral available other than as an end-to-end service in order to accommodate some of its ISP customers.^{34/} In fact, the Company is currently developing

^{34/} The Utah Coalition avoids mention of this fact, erroneously asserting that U S WEST persists in preventing CLECs from providing data transport services. *See* Utah Coalition at 1-2.

procedures and conducting appropriate cost studies in order to accomplish these amendments. As soon as the additional costs (if any) are quantified, U S WEST will file the necessary amendments to the tariffs to formalize this new option. In the meantime, the Company is working to enable customers in GTE's territory to subscribe to MegaCentral through a "meet point" arrangement and has expressed its willingness to work with any CLEC that wishes to provide the MegaCentral access link.

**Certificate of Service
(CC Docket No. 98-147)**

I certify that a copy of the foregoing Reply Comments of US West Communications, Inc. has been served upon the following parties either by hand delivery or by first class U.S. mail, postage prepaid this 16th day of October, 1998


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