

RECEIVED

OCT 16 1998

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Deployment of Wireline Services Offering
Advanced Telecommunications Capability

CC Docket 98-147

**REPLY COMMENTS OF THE COALITION OF UTAH INDEPENDENT INTERNET
SERVICE PROVIDERS**

Donald Weightman
510 C Street, N.E.
Washington D.C. 20002
(202) 544-1458

William J. Evans
PARSONS BEHLE & LATIMER
One Utah Center
201 South Main Street
Suite 1800
Post Office Box 45898
Salt Lake City, Utah
84145-45898
(801) 532-1234

Counsel for CUIISP

October 16, 1998

No. of Copies rec'd
List # 1000

024

**REPLY COMMENTS OF THE COALITION OF UTAH INDEPENDENT INTERNET SERVICE
PROVIDERS**

Table of Contents

Introduction and Summary	1
1. DSL-Based Advanced Services Are Not Competitive When Control Over the Local Loop Gives ILECs the Incentive and Opportunity To Discriminate.	4
2. The Threat Of Anticompetitive Conduct In Supplying DSL Supports the Need For Structural Separation.	7
3. The Commission Should Reject Any Attempt To Exaggerate the Benefits of Integrating DSL With Bottleneck Telephone Services.	11
4. The Commission should Promote Consumer Choice By Affirming ISPs' Rights To Non-Discriminatory Access.	14
Conclusion	16

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Deployment of Wireline Services Offering
Advanced Telecommunications Capability

CC Docket 98-147

**REPLY COMMENTS OF THE COALITION OF UTAH INDEPENDENT INTERNET
SERVICE PROVIDERS**

The Coalition of Utah Independent Internet Service Providers (“Utah Coalition”¹) hereby respectfully submits its reply comments in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

In earlier comments, the Utah Coalition showed how US West Communications, Inc. (“US WEST”), has used its control of the local loop to foreclose competition in Digital Subscriber Line (“DSL”) broadband services in Utah. In particular, US WEST has

- denied or delayed access to various components of DSL, to favor

¹ Coalition members are: ArosNet, Burgoyne Computers Inc., CastleNet, Coastlink, DirecTell, EagleNet Online, Fibernet, I-80, InfoWest, Internet Connect, Internet Technology Systems, inQuo, Konnections, NETConnect, Connect A Net, PCFastNet, PDQ Internet, Redrock Internet, SISNA, Software Solutions, Utah Internet Services, VitrexNet, Vyzynz, Wasatch Communications Group, WebIt!, Web Guy Productions, Western Regional Networks, XMission, XPressweb.

itself and its Internet Service Provider (“ISP”) affiliate over its competitors;

- exploited its control of network and customer information to give its ISP affiliate a head start over competitors in marketing this new service; and
- jointly marketed the new service so as to favor its affiliate at the expense of competitors.

DSL broadband -- which must necessarily run through US WEST’s bottleneck control of the local loop -- is the *only* broadband Internet-related telecommunications service now available in Utah. Because of this structural constraint on the market, and because of US WEST’s conduct, the DSL market in Utah is not fully competitive.

The Utah Coalition respectfully suggests that the record in this proceeding establishes several facts which should be critical to the Commissions deliberations. *First*, the local loop is an essential input to the DSL-based information services. *Second*, the ILECs control the local loop with respect to DSL services. *Third*, that control gives the ILECs market power in DSL-based information services. *Fourth*, the market for DSL services is largely driven by the demand for high speed Internet access. *Fifth*, unlike the balance of the Internet access market, competition in emerging DSL-based Internet connectivity is subverted by ILEC market power. *Sixth*, control of the local loop gives the ILECs like US WEST both the incentive and the opportunity to discriminate against its competitors trying to supply DSL-based high speed

Internet access.²

Such discrimination may take a variety of forms: price squeeze, denial or delay in access to the critical network access points, and abuses of network assets in joint marketing and sales. Although discrimination is in principle prohibited by the Communications Act, and some forms of discrimination are specifically prohibited by the Commission's Computer III rules, the special vulnerabilities of the advanced services market for DSL suggest that the more stringent prophylactic measure of structural separation is appropriate and necessary.

The Utah Coalition ISPs experience these forms of discrimination as facts of market life; these Reply Comments will rebut US WEST's contentions to the contrary. Consequently, the Utah Coalition will also argue that the RBOCs, as well as disregarding the risks of anticompetitive conduct, have overstated the benefits of unregulated integration of advanced services with telecommunications services. Economies of scope appear to be insignificant compared with the anticompetitive effects of discriminatory joint local telephone and Internet operations. Economies of scale appear to reside in the network, rather than in the provision of information exchange access and information services. And the RBOCs' own conduct rebuts

² The Coalition respectfully submits that these enumerated facts should lead the Commission to reconsider the suggestion in ¶10 of the Memorandum Opinion and Order and Notice of Proposed Rulemaking, CC 98-147, FCC No. 98-188 (Aug. 7, 1998) ("Advanced Wireline (Order or NPRM)") that advanced services markets such as DSL are competitive. That suggestion, which the Coalition believes to be incorrect as to the DSL market in Utah, has been relied on heavily by the RBOCS, but should not be the premise of any Commission action.

their argument that innovation and investment will somehow be stifled unless they are deregulated.

Finally, the Coalition submits that these and others' arguments reinforce the need for ISPs to receive parity of treatment with respect to access and unbundling rights.

1. DSL-Based Advanced Services Are Not Competitive When Control Over the Local Loop Gives ILECs the Incentive and Opportunity To Discriminate.

Economic literature on network effects in competitive downstream markets -- relied on by this Commission³ -- predicts that an incumbent monopolist which is also competing in a market for a complementary good has strong incentives to raise costs and to degrade the quality of its own good when selling into that complementary market at wholesale.⁴ The Utah Coalition ISPs find themselves in the odd, precarious position of living out these predictions. The Utah Coalition need not recapitulate the rigorous arguments in the economists' analyses here because those arguments have been confirmed by experience. ISPs' costs have been raised

³ Non-accounting Safeguards (First Report and Order) 11 FCC Rcd 21905 ¶12 and n.21 (1996), citing S.C. Salop and D.T. Scheffman, Raising Rivals' Costs, 73 Am. Econ. Rev. Papers & Proc. 267 (1983); T.G. Krattenmaker and S.C. Salop, Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power over Price, 96 Yale L.J. 209 (1986).

⁴ See Economides, Raising Rivals' Costs in Complementary Goods Markets: LECs Entering Into Long Distance and Microsoft Bundling Internet Explorer (Discussion Paper EC-98-03, Stern School of Business)(March 19, 1998), available at <<http://raven.stern.nyu.edu/networks/papers.html>>

by delayed access, inferior customer information, and US West's exploitation of network assets when giving competing ISPs a second tier position in marketing.⁵

In particular, US West refused to interconnect with CLECs in providing the data transport component of DSL service.⁶ Although there is longstanding Commission precedent holding that nondiscriminatory access is a "continuing obligation",⁷ US West admits that

[wholesale DSL] services were designed and deployed as an end-to-end product offering from US WEST. As a result, the associated systems were not designed to allow for the presence of another carrier.

706 Reply Comments at Attachment page 16 (emphasis supplied). US WEST's DSL service

⁵ The price squeeze problem (which was set out in the Non-accounting Safeguards (First Report and Order)) is discussed below.

⁶ The Utah Coalition first raised these concerns about the DSL market in Utah to the Commission in Comments in the companion section 706 NOI CC Docket 98-146. In its Reply Comments ("706 Reply Comments") in that docket US WEST purported to respond to these concerns. Because the response includes information and admissions critical to the Commission's deliberations in this docket, the Utah Coalition will discuss the 706 Reply Comments here. Excerpts from the US WEST 706 Reply Comments are enclosed in pertinent part as Attachment A.

⁷ See Memorandum Opinion and Order and Notice of Proposed Rulemaking, CC 98-147, FCC No. 98-188 (Aug. 7, 1998) ("Advanced Wireline (Order or NPRM)") Advanced or NPRM ¶37; see also 47 USC §202(a) AT&T Frame Relay Service, 10 FCC Red 13717, 13725 (1995), citing Computer II, 77 FCC 2d 384, 475 (1980); Computer III, 104 FCC 2d at 1036. Notwithstanding its conduct to the contrary, US WEST does not appear to contest the applicability of the principle. See 706 Reply Comments Attachment at 5.

was thus designed in defiance of this Commission's requirements, and with a clear and admitted intent to exclude access to other carriers, which are, of course, potential rivals.

US WEST withdrew its LADS service (access to an unbundled copper loop from the independent ISP to the US West customer which could be used for xDSL data communications) in 12 of its 14 in-region states in 1997, just as it was preparing its DSL service. Withdrawing the LADS service deprived ISPs of access to the local loop, thus denying them yet another area in which to compete with US WEST. In the words of the Editor of Boardwatch Magazine, this was "one of the most viciously anti-competitive acts we've seen from regional Bell operating companies."

Thus, locking out competitors was intrinsic to US WEST's planned DSL service: access would be denied both for data transport and at the local loop itself. The practices appear to be systematic.⁸ Similar "end-to-end" exclusionary conduct was found to violate the antitrust laws

⁸ See, e.g., In the Matter of an Investigation into US WEST Communications, Inc.'s Provision of MegaBit Services, Docket No. P421/EM-98-471, Complaint of the Department of Public Service and the Office of Attorney General (September 10, 1998). See also Pacific Bell Request to Introduce a New Product, Asymmetrical Digital Subscriber Line (ADSL) Service, California PUC, Telecommunications Division, Resolution No. T-16191 (rel. Sept. 17, 1998); Failure of US WEST Communications, Inc. to File Notice of Its Promotion for Its Megabit Services, Docket No. P421/C-98-997, Comments of the Minnesota Department of Public Service at 2 (July 9, 1998); In the Matter of US WEST Communications, Inc.'s Asynchronous Digital Subscriber Line Service, Oregon PUC Docket No. UT 144, Order No. 98-362, (September 1, 1998); Docket No. 98-199-TC – In the Matter of US WEST's Proposed Tariff Revision to Its Advanced Services Tariff § 8, MegaBit Services, Prepared Direct Testimony of Dan W. Hall (Utility Economist in the Telecommunications Division of the New Mexico State Corporation Commission) at 4-7 (June 15, 1998) ("New Mexico Complaint"); Docket No. UT-98-416 -- In

in Otter Tail Power Co. v. U.S., 410 U.S. 366 (1973) (use of monopoly power to destroy threatened competition violates the Sherman Act).

The Utah Coalition previously pointed out that providing DSL presents an unparalleled opportunity for the RBOCs to discriminate against affiliates ISP competitors, because the customers seeking DSL service will primarily be seeking it to obtain better Internet connectivity.⁹ The competitive information service is thereby marketed at the point of sale for the bottleneck telecommunications service. To the Coalition's knowledge, this point is not contested.

2. The Threat Of Anticompetitive Conduct In Supplying DSL Supports the Need For Structural Separation.

The Commission has suggested that the ILECs might participate in advanced services markets without regulation if they opt to do so through a separate subsidiary. The Utah Coalition submits that its experience with DSL shows that structural separation should be a required protective measure, rather than an option. The experience in question includes a

the Matter of the Filings of US WEST Communications, Inc. for Approval of a New Digital Subscriber Line Service Offering Denominated as "MegaBit Service," Order Setting Banded Rate Provisions of MegaBit Services Tariff with Conditions and Order Instituting Investigation (Apr. 22, 1998) ("Washington Complaint").

⁹ Comments in this proceeding at 3-4.

problem with potential price squeeze,¹⁰ and other forms of service discrimination.¹¹

The Utah Coalition's continuing but incomplete review of US WEST's prices for DSL services underlines the need for protection through structural separation or similar stringent safeguards against anticompetitive price discrimination.¹² US WEST has offered aggressively low retail prices for DSL, while wholesale prices for upstream services, like data transport (from DSLAM switch to Internet access equipment) are high enough to create the potential for a severe price squeeze for the ISPs.

¹⁰ Such price squeezes are inconsistent with Commission precedent. See Non-accounting Safeguards (First Report and Order) at ¶12 & n.21; INFONXX, Inc., v. New York Telephone Co., 13 FCC Rcd 3589, 3598, ¶18 (1997); In the Matter of International Settlement Rates, 12 FCC Rcd 19806, 19901 ¶¶ 208-09 (1997); RBOC Petitions for Waiver of Section 64.702 of the Commission's Rules (Computer II), 100 FCC 2d 1057, 1060 ¶¶ 6-7 (1985)

¹¹ US WEST claims in its 706 reply Comments, at 15 & n.32, that the Utah Coalitions reports of discrimination are unfounded. It also claims, with no citation or support, that "the Utah Commission decided there was no basis for pursuing the complaint." *Id.* at n.32. This statement is quite false. Neither the Utah Coalition ISPs nor US WEST has ever requested or received a decision, as US WEST states; instead, the complaint is still pending.

The Coalition has not chosen to pursue the state claim aggressively at this time because the only remedy apparently available under current Utah law appears to be revocation of US WESTs authority to offer DSL. See Utah Code Ann. §54-8b-2.3. This is not a result that the Coalition believes to be desirable for its members or their customers. The Coalition has suggested, in the 706 NOI docket, that the Commission should consider preempting such state laws inimical to free and fair competition in advanced services.

Nevertheless, the Coalition believes that the informal complaint presents an accurate picture of US WESTs anticompetitive conduct. The suggestion by US WEST that the Utah Commission found the complaint to be without merit is simply untrue.

¹² The Coalitions review is necessarily incomplete because the cost data for US WEST is unavailable.

At present the Utah Coalition wishes to reserve further factual argument on this point until it has had a chance to review and analyze the available information more fully.¹³ However, even at this preliminary stage it is clear that a critical part of the potential price squeeze involves US WEST's price for the data transport service, a service which itself has been unlawfully bundled under the Utah tariff with the other non-competitive, local loop component of DSL. This poses a grave risk -- control of the local loop is being used to foreclose competition in two markets at once: the data transport service via bundling, and broadband Internet access service via what appears to be a price squeeze. Although the Utah Coalition certainly supports the reporting and procedural measures proposed by others,¹⁴ the more certain protective use of structural separation should also be required.

The Utah Coalition has previously established that US WEST has also abused three kinds of assets arising from regulated services: customer information used to attract US WEST customers to its Internet access affiliate, joint marketing functions (abusive tactics ranging from slamming to discriminatory sales tactics when inquiries are made about DSL services), and the special advantage conferred by US WEST's use of the corporate brand name for its ISP affiliate.

¹³ Because much of the information involves confidential cost and market data, a submission under ¶0.459 of the Commissions Rules of Practice may be appropriate, as suggested in ¶90 of the Section 706 NOI.

¹⁴ See the Comments of the Commercial Internet eXchange Association ("CIX) in this docket, at 17.

Each of these amounts to discriminatory use of the assets of the regulated company.¹⁵

In its 706 Reply Comments (at 17), US West has responded to the Coalition's arguments about joint marketing by claiming that such marketing is permitted for certain advanced services under Computer III. This does not end the matter; the issue is pending before the Commission in Computer III Further Remand Proceedings, 13 FCC Rcd 6040 (1998).

US West does not, however, deny that joint marketing is discriminatory. The practice gives its affiliate unequal access to US West's own local exchange customer base.¹⁶ Instead, it points to certain limited reforms. 706 Reply Comments at 17-19 & Attachment at 12-17. These

¹⁵ In its 706 Reply Comments US West has purported to respond to these issues in detail. Considerations of time and space preclude a full reply here, but the fact that particular US WEST arguments are not addressed in these comments does not mean that the Utah Coalition believes that such arguments have merit.

¹⁶ It is of considerable importance that the checks on market power relied on by the Commission to permit joint marketing in Computer III are not presented for DSL services in Utah. See generally 104 FCC 2d 958 (1986). First, there the Commission noted, 104 FCC 2d at 1010 ¶96, the availability of bypass. Here the Utah Coalition ISPs cannot bypass the local loop to serve customers desiring DSL Internet connectivity. Second, specifically as to joint marketing, there the Commission noted that there were "significant competitors" (presumably with comparable resources to absorb "significant costs") seeking to provide the enhanced services in question. 104 FCC 2d at 1012 ¶99. Here, while the Utah Coalition ISPs are proud of their competitive record, their resources are not comparable to those of US WEST, a company with annual revenues in eleven figures. Third, there the Commission assumed that equal access to the network would be available. 104 FCC 2D at 1011 ¶97. Here US WEST has denied access to CLECs for data transport, and the ISPs have no statutory access or unbundling rights available to them as information service providers.

minimal changes still leave independent ISPs in as second class customer choices as compared with its affiliate. US WEST also claims that it acted in good faith is a safeguard in this area. 706 Reply Comments at 19. However, US WEST, as it now admits, was designing its DSL service without its competitors' rights in mind, the Utah Coalition does not believe that good faith is or will be an adequate safeguard against systematically discriminatory conduct, not least in joint marketing. In this area, structural separation would both be more likely to prevent discrimination and would serve to detect abuses like those suffered by those of the Utah Coalition's members.

3. The Commission Should Reject Any Attempt To Exaggerate the Benefits of Integrating DSL With Bottleneck Telephone Services.

The Utah Coalition believes that the RBOCs overstate the benefits from providing advanced services on an integrated basis. One example is claims made for economies of scope. While there may be some economies of scope in integrating DSL with telephone service, such benefits should not be overestimated. *First*, the RBOC claim that DSL technical functions need not be unbundled because the equipment is widely available implies that there are no scope economies resulting from provisioning this equipment. Moreover, the experience of Covad -- which is expanding aggressively while providing only DSL -- suggests that stand-alone DSL may be competitive. (It will be competitive, that is, if the requisite network access is available.) Therefore, significant economies of scope cannot be presumed for this service, but must instead be shown with concrete evidence.

Second, at least one ILEC, US West has outsourced its sales operation, thus showing that there are no gains to be had from integrating that function.

Third, if sales and marketing staff and overhead are in fact being widely and heavily used by the RBOCs in common with their ISP affiliates, then such large joint costs are presumptively discriminatory vis a vis their competitors. Nor is it clear that end user customers (who will only encounter such joint staff in a single, brief transaction) will stand to gain any benefits from economies of scope for these functions.

These considerations also suggest that economies of scale may reside more in the network as such than in the integration of DSL with traditional telephone service using that network. Moreover, as CIX points out, the “economies of scope” assumption underlying Computer III may have been outpaced by the disaggregation of information services embodied in -- and supported by -- the Internet.¹⁷ Accordingly, the Commission should find that the benefits of continued integration are slight compared with the real, undeniable, and serious anticompetitive effects of integration as shown above.

Finally, the RBOCs may also argue that separation (or other variants of the non-discrimination principle) may harm “innovation”. For example, US WEST’s comments in the 706 docket are rife with unsupported assertions that requiring it to treat its competitors fairly will

¹⁷ Comments at 6-7.

stifle innovation. The contention does not withstand scrutiny. In the first place, *this* advanced service -- DSL -- was largely pioneered by ISPs, not by US WEST or any of its Bell siblings. Moreover, US WEST's actual practice betrays its argument when it points out that this broadband technology is available off the shelf: "US WEST buys its advanced data equipment from outside suppliers..."¹⁸ There is nothing particularly innovative about a purchase order. Therefore, the Commission has no basis to find that requiring such purchase orders to come from a truly separate affiliate rather than from an in-house subsidiary will stifle any real world -- as opposed to hypothetical -- innovation.

The RBOCs' argument that deregulation is necessary to stimulate investment in advanced services should likewise be rejected. They and other ILECs were, are, and will be permitted and encouraged to build broadband networks and offer advanced services, free of the unbundling and interconnection requirements of which they complain so vociferously, outside of the footprint of their monopoly networks. That they have not done so is fatal to their claim that only these reasonable regulatory requirements stand in their way. Moreover, the in-region roll-out of DSL services where the (imperfect) regulations are now in force shows that deregulation is not what is necessary to deployment of these services.

¹⁸ Comments in this docket at 7.

4. The Commission should Promote Consumer Choice By Affirming ISPs' Rights To Non-Discriminatory Access.

At the heart of the RBOC arguments here and in the various 706 proceedings is a common theme and purpose: the desire to corral the growing and increasingly sophisticated array of communications and information services into a single, tightly-fenced bundle, to be brought to the end-user by the local telephone company. In such a world, there would be convenience, at the expense of competition and choice.¹⁹ The bundled services, limited choices, and discriminatory conduct experienced by the Utah Coalition ISPs show what happens when monopoly power is applied to once-competitive markets in pursuit of that vision of the single “end-to-end” provider. However, the single-provider approach was decisively rejected by Congress when it enacted the 1996 statute. Instead, the appropriate objective is the promotion of choice, by encouraging new entry and competition at as many of the nodes of the network as possible.

The existence of robust competition in the ISP market promotes consumer choice, in the dimensions of price, service quality and support. These latter dimensions are critical, for they define the niche in which many independent ISPs, including members of the Utah Coalition, find their competitive place. The service and support offered by independent ISPs have brought the Internet to individual computer users in millions of American homes and small businesses. Service

¹⁹ See, e.g., CIX Comments at 9.

and support will be even more important in bringing the constellations of information services made possible by broadband to these actual and potential customers. The independent ISPs can do this with network access rights equivalent to those available pursuant to section 251.

Unbundling and antidiscrimination requirements are needed for information services as well.

Hence the response to the query in ¶¶ 37 and 49 of the Advanced Wireline NPRM should be to extend these requirements to ISPs. The Commission can do so by adopting the suggestion made earlier this year, that non-CLEC, independent ISPs have the same “section 251-type unbundling” access rights as CLECs. Computer III Further Remand Proceedings, 13 FCC Rcd 6040, 6091 (1998).

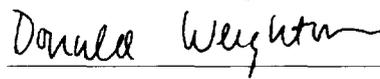
CONCLUSION

DSL-based advanced services are not competitive when control over the local loop gives ILECs the incentive and opportunity to discriminate. The Commission should reject any attempt to exaggerate the benefits of integrating DSL with bottleneck telephone services, and should promote competition by requiring structural separation for DSL services and consumer choice by affirming ISPs' rights to non-discriminatory access.

Respectfully submitted,

Coalition of Utah Independent Internet
Service Providers

By its attorneys



Donald Weightman
510 C Street, N.E.
Washington D.C. 20002
(202) 544-1458

William J. Evans
PARSONS BEHLE & LATIMER
One Utah Center
201 South Main Street
Suite 1800
Post Office Box 45898
Salt Lake City, Utah
84145-45898
(801) 532-1234

October 16, 1998

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

Inquiry Concerning the Deployment of Advanced)
Telecommunications Capability to All Americans)
in a Reasonable and Timely Fashion, and Possible) CC Dkt. No. 98-146
Steps To Accelerate Such Deployment Pursuant to)
Section 706 of the Telecommunications Act of 1996)

REPLY COMMENTS OF U S WEST COMMUNICATIONS, INC.

William T. Lake
John H. Harwood II
Lynn R. Charytan
Jonathan J. Frankel
Matthew A. Brill
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

Of Counsel:
Dan L. Poole

Robert B. McKenna
Jeffry A. Brueggeman
U S WEST, INC.
1020 19th Street, N.W.
Washington, DC 20036
(303) 672-2861

Counsel for U S WEST Communications, Inc.

October 8, 1998

ATTACHMENT A

SUMMARY

The comments filed in this proceeding support U S WEST's observation that technological convergence is creating a single, unified market for broadband services that is making existing regulatory classifications obsolete. They agree that this progress, if allowed to proceed unhindered, will prevent any one provider from having bottleneck control of the "last mile" and make regulation of the marketplace unnecessary. They also recognize that a failure to adapt regulation to the reality of convergence will thwart this progress by discouraging carriers from investing the facilities needed to compete in other segments of the market and by distorting the marketplace in favor of those providers who, by historical accident, compete in the advanced services market unhindered by legacy regulation.

In this reply, U S WEST argues that the Commission must encourage intermodal competition and achieve regulatory parity by *deregulating* all providers of competitive data services and nonbottleneck network facilities. First, the evolving single market for broadband services makes the forward extension of old regulatory classifications untenable. Second, Commission regulations, most notably network access and discounted resale rules, diminish network providers' incentives to invest in infrastructure and deploy advanced capability; accordingly, the Commission should limit the application of these regulations to those few facilities and services for which no functional substitutes are available in the marketplace. Finally, the Commission should reject the ISPs' demand for new regulations of incumbent LECs. There are already extensive protections in place — the *Computer III* and ONA rules — that the Commission has long deemed sufficient to safeguard the interests of enhanced service providers; and the ISPs' unsubstantiated and inflammatory accusations of discrimination obscure the fact that U S WEST has, voluntarily and in good faith, gone well beyond its *Computer III* and ONA obligations to work with state public utility commissions and the ISP community to accommodate ISP concerns.

upgrades,^{27/} and they ask the Commission to “isolate” cable-modem services from Title II regulation in order to “foster the development of competitive broadband and advanced communications.”^{28/} There is no reason to think that incumbent LECs respond to regulatory incentives and disincentives differently than companies in these other segments, and Section 706 does not direct the Commission to encourage the deployment of advanced telecommunications capability *only* by parties other than incumbent LECs. Therefore, if the Commission hopes to make good on its “commit[ment]” to “ensur[e] that incumbent LECs make their decisions to invest in and deploy advanced telecommunications services based on the market and their business plans, rather than regulation,”^{29/} it must be prepared to limit its regulation of incumbent LECs, just as it has done for other segments of the marketplace.

III. THE ISPS OBSCURE THE FACT THAT THERE ARE EXTENSIVE SAFEGUARDS IN PLACE TO ENSURE THAT THEY ARE TREATED EVENHANDEDLY BY INCUMBENT LECs.

Several individual Internet service providers and coalitions of ISPs accuse the incumbent LECs of deploying advanced telecommunications capability in a way that favors their own enhanced services or enhanced-service affiliates, and they call on the Commission to adopt sweeping new regulations of the incumbents.^{30/} Some of these commenters make undocumented

^{27/} See, e.g., Nat’l Cable Television Ass’n at 2-4; Progress & Freedom Foundation at 40-42.

^{28/} AT&T at 39 (quoting Barbara Esbin, *Internet over Cable: Defining the Future in Terms of the Past*, OPP Working Paper Series 30, at 86 (1998)).

^{29/} *Advanced Services Order* ¶ 13.

^{30/} See Retail Internet Service Providers (“Retail ISPs”) at 10; Coalition of Utah
(continued...)

(and unverified) allegations of discrimination by U S WEST, attach unadjudicated complaints from state public utility commission proceedings,^{31/} or recycle allegations from a complaint that a state commission specifically *declined* to pursue.^{32/} At the same time, at least one of these critics properly recognizes that the only reason that ISP complaints appear to center on U S WEST is that it is the company that has deployed xDSL services most widely.^{33/}

The new regulations that the ISPs propose are entirely unnecessary. U S WEST views the offering of xDSL services to independent ISPs as a business opportunity and treats it as such. Moreover, incumbent LECs such as U S WEST do not provide advanced services in a vacuum. Unlike cable operators, who are now entirely free to bundle Internet access with their

^{30/} (...continued)

Independent Internet Service Providers (“Utah Coalition”) at 4, 9; Commercial Internet eXchange Association at 17-18.

^{31/} The Retail ISPs attach a complaint filed with the Minnesota Public Utilities Commission by the Department of Public Service and Office of the Attorney General. The complaint has not yet been investigated, let alone adjudicated, and the Commission is in the middle of hearing arguments on a motion to dismiss it. Moreover, as explained *infra*, the bulk of the complaint concerns sales and provisioning practices that U S WEST adopted either to comply with the Commission’s *Computer III* and ONA rules or to accommodate the specific concerns of ISPs and that the Washington and Oregon state public utility commissions approved.

^{32/} The Utah Coalition spends much of its comments rehashing allegations that were the subject of an informal complaint it made to the Utah Public Service Commission in May 1998. See Utah Coalition at 3-6. After a preliminary investigation, however, the Utah PSC decided there was no basis for pursuing the complaint. The Utah Coalition blames this decision on a state statute that gives LECs greater pricing and tariffing flexibility in deploying advanced new services, *id.* at 6, but the PSC has never suggested that the statute disables it from investigating or taking action against alleged discrimination in the marketplace.

^{33/} Retail ISPs at 9 n.12 (“The Retail ISPs have no reason to think that U S West’s conduct regarding the deployment of xDSL and its relations with its ISP affiliate are any more or less abusive than would be the case with any other ILEC. U S West is simply farther along in its xDSL rollout than any of the other ILECs.”).

cable modem services, U S WEST may provide information services only in accordance with the Commission's *Computer III* and ONA rules.^{24/} These rules are designed to ensure that BOCs give unaffiliated enhanced service providers (such as the ISP commenters) the same access to their basic telecommunications facilities and services that they provide to their own enhanced services or affiliates. For example, the rules require U S WEST to unbundle all of the basic service elements it uses to provide enhanced services; sell these elements to its affiliate (or impute their prices to its own enhanced services) from the same tariffs that unaffiliated providers use; and provision, install, and maintain these elements for their own enhanced services and independent ESPs on equivalent timetables. U S WEST must issue periodic reports to show that it is meeting these obligations and filling all providers' orders in an equally timely fashion. U S WEST must also give unaffiliated information service providers advance notice and technical documentation of all network changes, and may not use these new capabilities itself until after

^{24/} See Amendment of Section 64.702 of the Commission's Rules and Regulations ("Computer III"), Report and Order, Phase I, 104 FCC 2d 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").

they have been disclosed and made available to unaffiliated providers.^{35/} Importantly, given the ISPs' complaints about U S WEST's methods of marketing its MegaBit xDSL and its Internet access offerings, the Commission's rules *permit* BOCs to jointly market their regulated telecommunications and unregulated information services as long as they observe proper cost allocation principles.^{36/}

As the attached description of U S WEST's practices demonstrates, U S WEST offers its xDSL and Internet services in strict compliance with the ONA and *Computer III* rules.^{37/} U S WEST's affiliated ISP, USWEST.net, takes MegaCentral (the connection that allows hosts to receive subscribers' xDSL traffic) on the same terms as it is available to unaffiliated ISPs. USWEST.net waits in the same line for facilities and services as unaffiliated ISPs, and its orders are filled no faster or slower than orders of comparable complexity from other ISPs. U S WEST conducted the necessary network disclosures before tariffing MegaBit services; indeed, it went beyond what Commission rules require by contacting independent ISPs and inviting them to information sessions to explain exactly how they could provide xDSL service to their subscribers. USWEST.net is not permitted to order MegaCentral until other ISPs can place their orders, although many ISPs waited until well after the starting date to submit their

^{35/} See also 51 C.F.R. § 51.325-.335.

^{36/} See *Phase I Order* ¶¶ 96-97.

^{37/} As has been previously noted, U S WEST's Internet access service is offered in compliance with three separate CEI plans that are on file with the Commission for on-line database services, protocol conversion, and electronic messaging. These plans contain specific procedures and safeguards that implement the requirements of *Computer III*, many of which are listed in the text and in the attachment to these comments.

requests, which delayed the provisioning of their connections.^{38/} Unanticipated demand for xDSL services (combined with the failure of many ISPs to provide U S WEST with demand forecasts) resulted in some facilities shortages, but those shortages affected USWEST.net and unaffiliated ISPs equally.

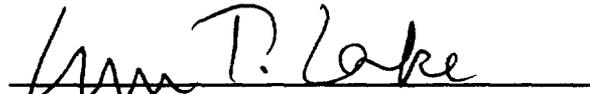
U S WEST has also gone well beyond these *Computer III* and ONA safeguards to work with ISPs and state regulators to develop an ordering process that enables potential subscribers to connect to whatever xDSL-capable ISP they choose and does not steer them to any particular ISP. As detailed in the attachment to this reply, U S WEST gives unaffiliated ISPs several ways for their subscribers to order xDSL service without ever going through a U S WEST representative or even hearing about USWEST.net; ISPs can place orders for their subscribers by submitting electronic letters of authorization to U S WEST, for example, or give potential subscribers a “safe harbor” toll-free number to call where USWEST.net is never mentioned. Even if a potential customer does call the U S WEST sales channel, he can be transferred to the “safe harbor” at any time. U S WEST designed these and other safeguards at the request of several ISPs and with the approval of the Oregon and Washington public utility commissions. U S WEST continues to monitor the sales and ordering processes and will modify them as necessary.

^{38/} Although several state public utility commissions did postpone U S WEST’s offering of its retail subscriber xDSL services to enable some of these unaffiliated ISPs to catch up, *cf.* MCI and WorldCom at 29, this does not change the fact that the ISPs’ delays in receiving MegaCentral connections were due to their failure to order service in a timely fashion, combined with the routine vagaries inherent in any facilities installation.

This is not to say that U S WEST's rollout of MegaBit services and its efforts to coordinate with unaffiliated ISPs have been entirely free from glitches; as with any new service (and especially with one deployed so quickly and on such a broad scale), there were a few missteps at the start, described both in the ISP comments and in the attachment to this reply. But U S WEST has made a good-faith effort to work with unaffiliated ISPs and state regulators to correct course as necessary, and the safeguards described in the previous paragraphs are intended to ensure that the early mistakes are not repeated. Moreover, the benefits to consumers of having xDSL services available on a wide scale and on a greatly accelerated basis far outweighs the minimal harm that any missteps caused. Importantly, the parties have been able to work these issues out within the context of *existing* enhanced service rules; there is no need to layer yet another set of regulations on these services. It would of course be manifestly inappropriate to do

so as a result of this proceeding, where the Commission is supposed to be looking at ways to *lift* regulatory barriers to investment.

Respectfully submitted,



William T. Lake
John H. Harwood II
Lynn R. Charytan
Jonathan J. Frankel
Matthew A. Brill
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Of Counsel:
Dan L. Poole

Robert B. McKenna
Jeffry A. Brueggeman
U S WEST, INC.
1020 19th Street, N.W.
Washington, D.C. 20036
(303) 672-2861

October 8, 1998

Counsel for U S WEST Communications, Inc.

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

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.

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 Interprise receives a MegaSubscriber order from its sales channel, it transfers control of that order out of sales for processing. When an Interprise 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

I, Donald Weightman, hereby certify that copies of the foregoing were served on this 16th day of October by hand to the following:

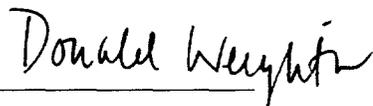
Magalie R. Salas
Secretary
Federal Communications Commission
Room 222
1919 M Street NW
Washington DC 20554
(Original and four copies)

Janice Miles
Common Carrier Bureau
Policy and Program Plannin Division
Federal Communications Commission
Room 544
1919 M Street NW
Washington DC 20554 (with diskette)

ITS
1231 20th St. NW
Washington DC 20037 (diskette only)

US WEST, Inc.
William T. Lake
WILMER, CUTLER & PICKERING
2445 M St. NW
Washington D.C. 20037 (by first class mail)

Robert B. McKenna
US WEST, Inc.
1020 19th Street NW
Washington DC 20036 (by first class mail)



Donald Weightman