ORIGINAL

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

In the Matters of	)	
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
Petition of Bell Atlantic Corporation For Relief from Barriers to Deployment of Advanced Telecommunications Services	)	CC Docket No. 98-11
	)	
Petition of U S WEST Communications, Inc. For Relief from Barriers to Deployment of Advanced Telecommunications Services	)	CC Docket No. 98-26
	)	
Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Technology	)	CC Docket No. 98-32
	)	
Petition of the Alliance for Public Technology Requesting Issuance of Notice of Inquiry and Notice of Proposed Rulemaking to Implement Section 706 of the 1996 Telecommunications Act	)	CCB/CPD No. 98-15 RM 9244
	)	
Petition of the Association for Local Telecommunications Services (ALTS) for a Declaratory Ruling Establishing Conditions Necessary to Promote Deployment of Advanced Telecommunications Capability Under Section 706 of the Telecommunications Act of 1996	)	CC Docket No. 98-78
	)	
Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell Petition for Relief from Regulation Pursuant to Section 706 of the Telecommunications Act of 1996 and 47 U.S.C. § 160 for ADSL Infrastructure and Service	)	CC Docket No. 98-91

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COMMENTS OF LEVEL 3 COMMUNICATIONS, L.L.C.

Pursuant to the Public Notice released September 9, 1999 in this proceeding,[1] Level 3 Communications, L.L.C. ("Level 3"), by undersigned counsel, hereby submits its comments concerning the remand of the Commission's August 1998 *Advanced Services Order* from the United States Court of Appeals for the District of Columbia Circuit.[2] The Commission must make clear that digital subscriber line ("DSL") services are telephone exchange services subject to the requirements of Section 251 of the Communications Act of 1934, as amended.[3]

DSL Services are Telecommunications Services

DSL services are enhancements to local loop transmission technologies to enable information to pass over standard twisted-pair copper loops at vastly higher speeds than can be transmitted using analog voice-grade technologies. DSL services involve placing a DSL modem at the end user's premise, connecting the local loop to a Digitial Subscriber Line Access Multiplexer ("DSLAM") in the central office serving the local loop, and sometimes conditioning the loop to remove devices attached to the loop that impede the high-speed transmission of data. The transmission from the DSLAM to the Internet service provider ("ISP") (or other recipient of data using DSL technologies

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[1] *Comments Requested in Connection with Court Remand of August 1998 Advanced Services Order*, Public Notice, CC Docket Nos. 98-11, 98-26, 98-32, 98-78, 98-91, 98-147, DA 99-1853, released September 9, 1999; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, CC Docket No. 98-147, FCC 98-188, released August 7, 1998 ("*Advanced Services Order*").

[2] *US WEST Communications, Inc. v. Federal Comm. Comm'n*, No. 98-1410, (D.C. Cir.)

[3] 47 U.S.C. §151 et seq.

over the local loop) employs asynchronous transfer mode or frame relay technologies. Therefore, DSL services, in combination with other packet-switching technologies, provide a transmission path from the subscriber to the subscriber's designated destination, typically an ISP.

DSL Services are not Exchange Access Services

The Commission asked for comment whether DSL services are either exchange access or telephone exchange service as those terms are defined in the Telecommunications Act of 1996. DSL service is not exchange access. For a service to be "exchange access" under the Act, it must be offered "for the purpose of the origination or termination of telephone toll services."[4] Telephone toll services are defined as a form of "telephone service,"[5] which the Commission has interpreted to mean a telecommunications service.[6] Telecommunications services are mutually exclusive from information services.[7] Because ISPs provide information services and not telecommunications services, they do not provide telephone toll service, and therefore, do not obtain exchange access. This is the same conclusion the Commission reached in the *Non-Accounting Safeguards Order*: "[b]ecause ISPs do not provide telephone toll services, and therefore are not telecommunications

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[4]47 U.S.C. § 153(16).

[5]47 U.S.C. § 153(48).

[6]*Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended,* First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-149 (rel. Dec. 24, 1996) ("*Non-Accounting Safeguards Order*") at ¶ 248.

[7]*See, e.g., Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, Report to Congress, ¶ 59 (1998) ("*Universal Service Report*").

carriers, they are not eligible to obtain exchange access[.]"[8] The same reasoning is applicable to DSL services. Thus DSL services cannot be exchange access when used to connect to an ISP because ISPs do not provide telecommunications service.

Nor does it matter that the ISP subscriber, and not the ISP, may be the one obtaining the DSL service. Because ISPs do not provide telecommunications, DSL service is not being used in connection with "telephone toll services" even if an end user is the subscriber. Moreover, the Commission has stated, "by definition, an entity that uses 'exchange access' is a telecommunications carrier."[9]

DSL Service Is Telephone Exchange Service

Level 3 submits that DSL services, as described above, satisfy either of the definitions of "telephone exchange service" in Section 3(47) of the Act. The first definition is "service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge."[10] There are three operational clauses in the definition to be considered. First, "service within a telephone exchange," suggests only that a service is provided and that the calling party and the called party must be within the same local exchange area. The second clause, "within a connected system of

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[8] *Non-Accounting Safeguards Order*, at ¶ 248.

[9] *Id.*

[10] 47 U.S.C. § 153(47)(A).

telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange," suggests the situation in which traffic within two exchanges is treated as if it were traffic within a single exchange. Extended area service would be an example of telephone exchange service under this second clause. The third clause, "and which is covered by the exchange service charge," suggests only that one obtains local communication functionality as a result of entering into a service and payment arrangement with the provider of a telephone exchange service. The third clause cannot be limited only to circuit-switched traffic, or voice traffic, or service provided by the dominant carrier– in a competitive environment, there can be no single service for which "the" exchange service charge is imposed. US WEST suggests that any service for which a subscriber pays anything other than the charge for basic local calling does not satisfy the definition. US WEST Brief at 22. By that logic, any enhancements to basic local calling could not be characterized as "telephone exchange service." Moreover, even if US WEST does not bundle DSL service with other basic local calling options, if another carrier provided both and charged one price, that arrangement obviously would satisfy the definition.

DSL services certainly satisfy the part (A) definition. DSL services provide communication links between end users and ISPs. As long as both the end user and the ISP are located in the same exchange, the first clause is satisfied. As long as both the end user and the ISP are located in separate exchanges and traffic between those exchanges is treated the same as traffic within a single exchange, the second clause is satisfied. As long as the functionality of communicating between the subscriber and the ISP is what a subscriber receives for paying a subscription charge to the DSL service provider, the third clause is satisfied.

In addition, jurisdiction is not relevant to regulatory classification. It is not relevant whether the communications to the Internet that the ISP receives, processes, and may forward, terminate, for jurisdictional purposes, outside the exchange service area. The definition speaks only in terms of *service* within the local exchange. The service in question is only the connection between the end user and the ISP. The only inquiry, then, is the geographical location of the subscriber and the ISP.

DSL services also satisfy the alternative definition of "telephone exchange service" under Section 3(47)(B). The second definition is "comparable service through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service."[11] This second definition, added by the 1996 Act, expands the scope of telephone exchange service. The inquiry really is whether the service in question in any way replaces, or could be replaced by, traditional local exchange service.

In particular, the term "comparable" suggests a process of comparing non-identical services, which necessarily confers considerable discretion on the Commission. Within this grant of discretion, the Commission may consider whether a service should be subject to the requirements imposed on other "telephone exchange services" in order to accomplish the objectives of the Act. If a particular telecommunications service does not meet the definition provided in (A), the Commission may nevertheless deem it a "telephone exchange service" under (B) if it is a facilities-based service reasonably similar to facilities-based services the Commission has previously classified as telephone exchange service. DSL service may be considered "telephone exchange

[11] 47 U.S.C. §153(47)(B).

service" under (B) of the definition for no other reason than it is an enhancement to local loop transmission technologies to enable communications between end users.

In addition, DSL service is certainly comparable to local exchange service because it replaces local dial-up traffic to ISPs. Although US WEST appears to agree in principle with this interpretation, its view is too narrow and ignores the fact that the second definition was added by the 1996 Act, which specifically intended to open local markets to competition and expand competitive choices. US WEST suggests that telephone exchange service in the second definition must be the functional equivalent of switched local service. In other words, in US WEST's view, all functionality of traditional local exchange service must be available in the "comparable" service. US WEST ignores the fact that competitive carriers should not be obligated simply to duplicate each other's services.

In a competitive environment, subscribers should be able to choose services that suit their needs. If certain subscribers do not need "any-to-any" communications capability, competitive providers should be able to provide only as much service as subscribers request. Therefore, if a subscriber wants only a limited geographic range to its local service, or limited hours of availability, that should not defeat a claim that the limited service is comparable to the traditional local exchange service. Requiring functional equivalence to satisfy the "comparable" definition will stymie the development of competition.

DSL services easily satisfy the remainder of the definition. They employ transmission facilities and switches (albeit packet-switches rather than circuit-switches) that enable subscribers to originate and terminate telecommunications to ISPs. Accordingly, under either definition, DSL services constitute "telephone exchange service" under the Act.

Whether DSL Service is Information Access is not Relevant

US West claims that DSL service is neither exchange access nor telephone exchange service, but "information access." US WEST Brief at 28. Information access is not a term defined in the Act, but instead it is a holdover term from the Modification of Final Judgment ("MFJ") that arose from the proceeding that led to the breakup of AT&T. Whether DSL service is information access is not relevant because the Act did not establish this third category. The Act contemplates the provision of exchange access and telephone exchange service. There is no statutory basis for concluding that "information access" is a separate category of LEC service independent of either exchange access or telephone exchange service. The Act expanded the definition of telephone exchange service by adding definition (B), and it restricted the definition of exchange access by limiting it only to the provision of telephone toll service. To the extent that a particular telecommunications service does not appear to satisfy either the original definition of telephone exchange service or the new definition of exchange access, definition (B) of telephone exchange service permits the Commission to exercise considerable discretion to classify a service as telephone exchange service.

Moreover, Section 251(g) of the Act is consistent with this approach. While Section 251(g) requires incumbent carriers to continue to provide information access under the obligations existing at the time of the 1996 Act, it does not contemplate expansion of the application of that term. Instead, Section 251(g) provides that an incumbent carrier's obligation to provide information access is subject to reassessment by the Commission. Therefore, the Commission should not expand the terms of the MFJ that continue to apply; it should recast a carrier's obligations under the MFJ as appropriate obligations under the Act. Rather than subvert the statutory framework of the Act by

using a regulatory classification that has no statutory basis, the Commission should exercise the discretion that Congress provided to classify DSL services as telephone exchange service.

As demonstrated above, and as the FCC has already determined, traffic to ISPs is not exchange access; therefore, it must be telephone exchange service. Whether DSL traffic to ISPs may also satisfy a definition of information access derived from the MFJ is not relevant to whether DSL traffic to ISPs is either exchange access or telephone exchange service under the Act.

Conclusion

The definition of "telephone exchange service" focuses on the particular service being offered. In that context, a jurisdictionally interstate communication may involve the use of telephone exchange service. DSL service satisfies the first definition of "telephone exchange service" as long as the ISP and the ISP subscriber are located within the same local calling area, and the DSL service provider imposes a charge on the DSL service subscriber. DSL service satisfies the second definition of "telephone exchange service" because DSL service is comparable to conventional local exchange service because it replaces dial-up traffic to ISPs. A "comparable" service does not necessarily have to duplicate all aspects of conventional local exchange service; otherwise, competitive choices and the provision of alternative services could be thwarted. In addition, the use of the term "comparable" in the definition of telephone exchange service confers considerable discretion on the Commission. DSL service is not exchange access because, as the Commission has already ruled, ISPs do not obtain exchange access. Finally, whether DSL service is information access is not relevant because the statutory framework contemplates the provision of exchange access and telephone exchange service, not a third category of information access. Because DSL

service is telephone exchange service, it is subject to all obligations of incumbent local exchange carriers that attach to telephone exchange service under Section 251 of the Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael W. Fleming, hereby certify that the foregoing COMMENTS OF LEVEL 3 COMMUNICATIONS, L.L.C. was served on this 24th day of September, 1999 upon the following persons by hand delivery:

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