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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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 Services	)	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

COMMENTS OF CORECOMM LIMITED

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SUMMARY

CoreComm Limited ("CoreComm") submits that the Commission should stand by the decision it made in the Advanced Services Order concerning the classification of xDSL services as "exchange access" or "telephone exchange" offerings.

The duties outlined in Section 251 and 271 of the 1996 Act generally apply to entities, not to particular services as suggested by U S West. Congress imposed the obligations outlined in Section 251(c) on ILECs – and only on ILECs – because of the distinctive problems posed by their entrenched position and control of local telecommunications infrastructure. In assessing whether Section 251(c) applies, then, the inquiry must focus not on the services to be provided but on whether the carrier in question is an "incumbent local exchange carrier."

DSL services meet the definitions of telephone exchange service and of exchange access in Section 3 of the Communications Act as well as the commonly understood meanings of these terms. Congress did not mean to tie the scope of the terms in the 1996 Act to technologies or network architectures in use in 1996 but to evolve along with the innovation and technological change that was already apparent when the 1996 Act was passed and was expected to accelerate.

Even if the Commission were inclined to adopt a narrow, backward-looking definition of the terms "telephone exchange service" and "exchange access," it still would lack any basis to eviscerate Sections 251(c) and 271, because the key elements of these provisions are not linked to the terms at issue in U S West's challenge to the Advanced Services Order.

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1. *Do xDSL-based advanced services constitute either "telephone exchange service" or "exchange access" within the meaning of the Communications Act? U S WEST argues that DSL-based services do not constitute telephone exchange service because they do not begin and end within a telephone exchange or set of exchanges in the same local area; do not use or interconnect with the traditional circuit-switched public telephone network; do not permit "any-to-any" local intercommunications service; and are not covered by the exchange service charge. We seek comment on each of these contentions and the proper interpretation of these terms as they are used in the first half of the definition of "telephone exchange service," 47 U.S.C. § 153(47)(A)* 8

2. *What is the legal significance of the 1996 Act's addition to the definition of "telephone exchange service" of "comparable service provided through a system of switches, transmission equipment or other facilities . . . by which a subscriber can originate and terminate a telecommunications service"? U S WEST argues that Congress' use of the word "comparable" in its definition of telephone exchange service was meant to include those services that are functionally similar to and can substitute for switched local service. We seek comment as to the proper definition of this term and whether "comparable service provided through a system of switches, transmission equipment, or other facilities" is limited to a particular technology or technologies or has other defining characteristics.* 12

3. *Additionally, we seek comment on U S WEST's contention that advanced services are not "exchange access" because they are used to originate and terminate Internet traffic and not telephone toll service. In this regard, is "exchange access" a subset of "telephone exchange service" or a distinct category of service? Further, U S WEST argues that DSL-based services are "information access" services. We ask parties to address whether and in what way that category of service differs from "information services"? If DSL-based services are classified as "information access," can those services nonetheless be information services, telephone exchange services, or exchange access? In addition, we request comment regarding the extent to which these categories of service are mutually exclusive. We ask that parties address these issues in view of the relevant statutory language and Commission and judicial precedent.* 13

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4. *We also request comment as to the proper scope of the requirements of section 251(c) upon incumbent LECs generally and in their provision of advanced services specifically. Does that section, for instance, apply to all telecommunications services and facilities offered by an incumbent LEC regardless of whether the services or related facilities constitute telephone exchange service or exchange access? In this regard, how does the fact that section 251(c) sets forth obligations of incumbent local exchange carriers, and is not on its face limited to particular telecommunications services, affect the provision's applicability to incumbent LEC offerings other than telephone exchange service or exchange access?* 14

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COMMENTS OF CORECOMM LIMITED

CoreComm Limited ("CoreComm") hereby responds to the Common Carrier Bureau's Public Notice, DA 99-1853, released September 9, 1999 (the "Notice"), on the appropriate regulatory classification of certain advanced telecommunications services. The Notice poses four sets of questions bearing on the application of various statutory terms to "advanced services" offered by local exchange carriers, including particularly xDSL-based services. CoreComm welcomes the opportunity to assist the Commission in evaluating these issues.

CoreComm is a growing, publicly-traded communications company that provides integrated local and long distance voice services as well as Internet access and high-speed data offerings to residential and business customers. CoreComm is exploiting the convergence of communications technologies to offer bundled packages of services designed to give consumers greater flexibility, choice, and value than the offerings of other telecommunications service providers. CoreComm believes its strategy of combining its own facilities with leased elements of the local and interexchange networks owned by other carriers will allow it to provide a wide range of advanced telecommunications services efficiently and expeditiously to markets throughout the United States, allowing it to become a leading facilities-based carrier.

INTRODUCTION

Before turning to the specific questions raised by the Notice, a few preliminary observations may serve to place the issues before the Commission in context.

First, no semantic slight of hand can be allowed to obscure the real issues at stake in the Commission's renewed inquiry into the statutory classification of digital subscriber line (DSL) services. The Notice seeks comment on arguments presented by U S West in a judicial challenge to the Commission's prior assessment of the proper regulatory treatment of digital subscriber line

("DSL" or "xDSL") services.[1] The issues framed in U S West's appellate briefs, however, bear only a tenuous relation to the questions raised before and considered by the Commission in the proceedings under review.

U S West's appellate briefs challenging the Advanced Services Order focused almost entirely on the meaning of two phrases set forth in Section 3 of the Communications Act: "telephone exchange service"[2] and "exchange access."[3] The Advanced Services Order, though, addressed two cornerstones of the Telecommunications Act of 1996. Specifically, the challenged order focused on the provisions of the 1996 Act that require all incumbent local exchange carriers ("LECs") to open their markets to competition[4] and the provisions establishing the conditions incumbent LECs that are also former Regional Bell Operating Companies, including U S West, must meet to win permission to offer interLATA telecommunications services.[5]

The Advanced Services Order ruled on a group of petitions filed by U S West and three other Regional Bell Operating Companies ("RBOCs") as well as some other petitions filed by other organizations in 1998. The questions raised in the RBOC petitions varied to some extent, but each presented the same core issue: whether the objectives set forth in Section 706 of the 1996 Act could and should be pursued by exempting "Information Age" services from the most important provisions of the Act. With rare firmness and unanimity, the Commission gave its unambiguous answer: no.

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[1] See U S West Communications, Inc. v. Federal Communications Commission, No. 98-1410 (D.C. Cir. Aug. 25, 1999) (order granting motion for voluntary remand).

[2] See 47 U.S.C. § 3(16).

[3] See 47 U.S.C. § 3(47).

[4] See 47 U.S.C. § 251(c).

[5] See 47 U.S.C. § 271.

The Commission found that the fundamental goal of Section 706 was to encourage the rapid deployment of advanced telecommunications capabilities to all Americans,[6] an objective that could best be achieved by applying the pro-competitive provisions of the 1996 Act -- including the market-opening requirements of Section 251 and the interLATA relief conditions of Section 271 -- to advanced services as well as to more conventional telecommunications offerings.[7] The Commission declined to "forbear" from applying Sections 251(c) and 271 to advanced services, concluding that it lacked authority to take such action even if it found that forbearance would be desirable.[8]

The forbearance sought in the RBOC petitions would have eviscerated the core provisions of the Telecommunications Act. Indeed, the attempt to win an exemption from Sections 251 and 271 for advanced services was at least as serious an assault on the framework adopted by Congress in the 1996 Act as the interLATA marketing arrangement U S West entered into with Qwest in order to circumvent the long distance entry restrictions in Sections 271 and 272[9], the RBOC attacks on the constitutionality of Section 271,[10] and the attempt by incumbent

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[6] See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 706.

[7] See Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147 et al., Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24011, 24044-48 at ¶¶ 69-79 (1998) ("Advanced Services Order"). 1999 FCC LEXIS 1327 (released March 31, 1999).

[8] The Commission found that Section 10(d) expressly prohibits forbearance and that Section 706 is not an independent grant of authority to forbear. See Advanced Services Order, 13 FCC Rcd at 24047-48, ¶ 76-79.

[9] See AT&T Corp. v. Ameritech Corp., Memorandum Opinion & Order, 13 FCC Rcd 21438 (1988) ("Qwest Order"), affirmed sub nom. U S West Communications, Inc. v. FCC, 177 F.3d 1057) (D.C. Cir 1999).

[10] See SBC Communications, Inc. v. Federal Communications Commission, 154 F.3d 226 (5th Cir 1998); BellSouth Corp. v. Federal Communications Commission, 162 F.3d 678 (D.C. Cir. 1998) ("BellSouth").

LECs to prevent the Commission from writing federal rules to implement Section 251.[11/] Each of these efforts, like U S West's attempt to exempt advanced services from Sections 251 and 272, represents a fundamental breach of the bargain that led to adoption of the 1996 Act.

The Commission has resisted these efforts, and in each case it ultimately has been vindicated by the courts. This steadfast resistance to the legal assaults led by the RBOCs is beginning to bear fruit, and at least one RBOC appears to have taken important steps toward meeting a number of its market-opening responsibilities and may be prepared to present the first credible application for authority to offer interLATA services pursuant to the Section 271 process.[12/] Now is not the time for the Commission to retreat from its commitment to breaking monopoly control over local telecommunications facilities and services.

Second, the duties imposed by Section 251 and 271 of the Telecommunications Act of 1996 generally apply to *entities,* not to particular services. The responsibilities in Section 251(c) apply to incumbent local exchange carriers ("ILECs") without regard to the types of telecommunications services these carriers or their competitors choose to provide.[13/] Congress imposed the obligations outlined in Section 251(c) on ILECs – and only on ILECs – because of the distinctive problems posed by their entrenched position, with established customer

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[11/] See Iowa Utilities Board v. FCC, 120 F.3d 753, 818 (8th Cir. 1997) (challenging Local Competition Order, infra note 38), affirmed in part and reversed in part sub nom. AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999) ("Iowa Utilities Board").

[12/] While CoreComm is encouraged by the steps Bell Atlantic has taken to open local exchange markets in New York to competition, CoreComm takes no position concerning whether Bell Atlantic has satisfied the "competitive checklist" for interLATA entry contained in Section 271.

[13/] See 47 U.S.C. § 251(c) (imposing additional obligations on "each incumbent local exchange carrier").

relationships and control of local telecommunications infrastructure.[14] As the courts have recognized, Congress made a reasoned judgment that incumbent LECs must be subject to unique constraints because they occupy a unique position by virtue of their ownership of this "last-mile" infrastructure, which is both essential to the provision of service and difficult to replicate.[15] In assessing whether Section 251(c) applies, then, the inquiry must focus not on the services to be provided but on whether the carrier in question is an "incumbent local exchange carrier,"[16] and US West unquestionably is such a carrier.

Section 251(c) includes one provision that refers to "the transmission and routing of telephone exchange service and exchange access" in describing the duty of an incumbent LEC to interconnect its facilities with the equipment of competitors,[17] but this provision must not be read in isolation from the subsections that accompany it. For example, the next paragraph of Section 251(c) expressly requires incumbent LECs to make elements of their networks available on an unbundled basis in order to allow competitors to provide any telecommunications service.[18] Likewise, Section 251(c) establishes a resale obligation for "any telecommunications service that

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[14] See, e.g., 141 Cong. Rec. S7906 (daily ed. June 7, 1995) (statement of Sen. Lott) ("It is critical to recognize the reason why all of these barriers, regulations, and restrictions exist in the first place – the so-called bottleneck. Opening the local network removes the bottleneck and ensures that all competitors will have equal and universal access to all consumers."); see also BellSouth, 162 F.3d at 689 ("Congress required the BOCs to open their local markets to competition before allowing them to enter the long distance services market in-region, because, due to the unique infrastructure controlled by the BOCs, they could exercise monopoly power.").

[15] See BellSouth, 162 F.3d at 691 ("Congress clearly had a rational basis for singling out the BOCs, i.e., the unique nature of their control over their local exchange areas.").

[16] As Section 251(h) makes clear, any entity that provided telephone exchange service and was a member of the exchange carrier association on the date the 1996 Act was enacted is an "incumbent local exchange carrier." 47 U.S.C. § 251(h).

[17] 47 U.S.C. § 251(c)(2)(A).

[18] See 47 U.S.C. § 251(c)(3).

the [incumbent local exchange] carrier provides at retail to subscribers who are not telecommunications carriers," and it guarantees competitors the right to collocate their equipment with the incumbent's facilities, without regard to the type of service being provided.

Section 271 also focuses on entities. It prohibits RBOCs, such as U S West, from providing "interLATA services" whether they are circuit-switched, packet-switched, or unswitched and whether the information transmitted is voice, data, video, or any other form of communication. It contains no reference whatsoever to exchange access or telephone exchange service. U S West's efforts to import a limitation on Section 251(c) and Section 271 based on the types of telecommunications service an incumbent LEC chooses to provide have no basis in the statute and are flatly at odds with its purpose.

Third, to the extent the Commission must focus on the terms in Section 3, it should interpret them with due regard to context so as to give effect to the goals of Congress. A searching examination of the language, context, history, and purpose of the relevant statutory provisions is required, with a good measure of common sense as well.[19/] As Justice Holmes observed, "A word is not a crystal, transparent and unchanged; it is the skin of a living thought, and may vary greatly in color and content according to the circumstances and the time in which it is used."[20/] Congress undoubtedly intended its words to be read in a forward-looking way, with an understanding that telephone technologies and services are constantly evolving.[21/] Moreover,

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[19/] See Bell Atlantic Telephone Companies v. Federal Communications Commission, 131 F.3d 1044, 1047 (D.C. Cir. 1997) ("The literal language of a provision taken out of context cannot provide conclusive proof of congressional intent, any more than a word can have meaning without context to illuminate its use.").

[20/] Towne v. Eisner, 245 U.S. 418, 425 (1918).

the Commission should keep in mind that Section 3, by its terms, specifies that its definitions apply "unless the context otherwise requires . . . ."[22]

CoreComm now turns to the Bureau's four sets of questions:

1. *Do xDSL-based advanced services constitute either "telephone exchange service" or "exchange access" within the meaning of the Communications Act? U S WEST argues that DSL-based services do not constitute telephone exchange service because they do not begin and end within a telephone exchange or set of exchanges in the same local area; do not use or interconnect with the traditional circuit-switched public telephone network; do not permit "any-to-any" local intercommunications service; and are not covered by the exchange service charge. We seek comment on each of these contentions and the proper interpretation of these terms as they are used in the first half of the definition of "telephone exchange service," 47 U.S.C. § 153(47)(A).*

DSL services meet the definitions of telephone exchange service and of exchange access in Section 3 of the Communications Act. The Commission implicitly recognized as much in the GTE DSL Order.[23] U S West is a quarter century too late in advancing the contention that "telephone" service encompasses only rudimentary "plain old telephone service" (or "POTS"). For at least three decades, POTS services have been used for data as well as voice. Data modems were among the first products included within the Part 68 equipment registration program.[24]

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[21] See, e.g., 141 Cong. Rec. S8468 (daily ed. June 15, 1995) (statement of Sen. Pressler) (describing competitive checklist in Section 271(c)(2)(B) as "a snapshot of what is required for these competitive [local] services now and in the reasonably foreseeable future . . . Section 251's 'minimum standards' permit regulatory flexibility and are not limited to a 'snapshot' of today's technology or requirements").

[22] 47 U.S.C. § 153.

[23] See GTE Tel. Operating Cos. GTOC Transmittal No. 1148, CC Docket No. 98-79, FCC 98-292, Memorandum Opinion and Order at ¶¶ 25, 27 (rel. Oct. 30, 1998) ("GTE DSL Order") (finding DSL service is either interstate special access or intrastate service, depending on usage).

[24] See Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices, CS Docket No. 97-80, Notice of Proposed Rulemaking, 12 FCC Rcd 5639, 5644 at n.19 (Feb. 20, 1997) (noting that data modems were among first devices registered under Part 68 rules).

Digital services long have been offered alongside analog service,[25] and packet-switching has coexisted alongside circuit-switching for many years.[26] U S West's briefs and comments assume that "telephone" service is synonymous with "voice telephone" service, but this assumption is simply incorrect.[27]

In the early 1980s, the Commission had no difficulty recognizing that the rules governing traditional telephone services should also apply to "data-over-voice" offerings that were the direct antecedent to xDSL.[28] These forerunners of today's "advanced" services used – and continue to use -- the same loops, conduits, telephone poles, central offices, and other bottleneck local facilities that Congress intended to open to competition by passing the 1996 Act.

The local telephone "exchange" generally has referred to a local switching center and whatever wires lead from that switching center to an individual customer premises. Services within the exchange are considered "exchange services." Services that use exchange facilities to originate or terminate traffic leaving or entering the local exchange area are "exchange access" services. In either case, the primary focus of the term – and of statutory and regulatory requirements – is on "last mile" facilities that form a bottleneck to competition.

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[25] AT&T's Dataphone Digital Service, with offerings at DSO and DS1 speeds, was introduced more than 25 years ago.

[26] See American Telephone and Telegraph Company, For Authority under Section 214 of the Communications Act, as amended, to Install and Operate Packet Switches at Specified Telephone Company Locations in the United States, Memorandum Opinion, Order, and Authorization, 94 FCC 2d 48, 57 (1983) ("BPSS") (classifying packet switching as basic service).

[27] See Harry Newton, Newton's Telecom Dictionary 716 (Fourteen ed. 1998) (defining "telephony" as the science of transmitting voice, data, video or image signals over a distance greater than what you can transmit by shouting" and noting that "telecommunications" is simply a "more pompous sounding term" for telephony, which has "generic" meaning).

The terms "exchange service" and "exchange access" have been widely used and are commonly understood to encompass a wide range of services provided by local exchange carriers. Indeed, virtually every telecommunications service offered by U S West and the other RBOCs has been characterized as either "exchange service" or "exchange access," to the exclusion of other categories. The local exchange carriers themselves have used these categories in their tariffs filed with the FCC and with the state utility regulators, and this usage is fully consistent with the practice of government regulators and end users.[29/]

When xDSL technologies are used to provide telecommunications services that cross exchange boundaries, they reasonably can be classified as "exchange access" services under the terms of the statutory definition. As U S West acknowledges, "exchange access" is the offering of services or facilities "for the purpose of the origination or termination of telephone toll services." The statute provides that "telephone toll service" is "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service."[30/] Where xDSL is used by Internet service providers ("ISPs") to obtain high-speed connectivity to their customers, the rates charged by ISPs are not typically usage-sensitive in the same way that long distance voice services traditionally

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[28/] See International Business Machines Corp., ENF File No. 83-34, Memorandum Opinion and Order, 58 RR 2d 374 (1985) ("Local Data Transport Order").

[29/] See Newton's Telecom Dictionary 277, 278 (defining "exchange access" as "the provision of exchange services for the purpose of originating or terminating interexchange communications" and noting that BellSouth calls its local phone services "exchange service" but uses the term interchangeably with "POTS."

[30/] 47 U.S.C. § 153(48).

have been priced, but they include fees separate from the charges for exchange access.[31] In the same vein, a separate charge is levied for the interstate circuits used in conjunction with special access circuits and obtained from LECs, so the statute need not be read to contradict the long-standing industry usage, under which switched access and special access are both "exchange access" services.

U S West has not explained why Congress would have departed from the commonly understood meanings of "telephone exchange service" and "exchange access," and CoreComm can imagine no justification for making such a departure. CoreComm respectfully suggests that the Commission should avoid a literal or hyper-technical interpretation of the words used in Section 3 where such an interpretation would thwart the market-opening objectives that are so plainly evident from the legislative history and context of the 1996 Act.

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[31] Needless to say, the classification of an offering as an "exchange service" or as an "exchange access service" for one purpose is not necessarily controlling for other purposes. See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98 and 99-68, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 99-38 (released February 26, 1999) (rejecting argument that classification of dial-up ISP calls as access service controls regulatory treatment of same calls for purposes of interstate access charges or reciprocal compensation).

2. *What is the legal significance of the 1996 Act's addition to the definition of "telephone exchange service" of "comparable service provided through a system of switches, transmission equipment or other facilities . . . by which a subscriber can originate and terminate a telecommunications service"? U S WEST argues that Congress' use of the word "comparable" in its definition of telephone exchange service was meant to include those services that are functionally similar to and can substitute for switched local service. We seek comment as to the proper definition of this term and whether "comparable service provided through a system of switches, transmission equipment, or other facilities" is limited to a particular technology or technologies or has other defining characteristics.*

Any doubt concerning the intended scope of the obligations imposed on incumbent LECs by the 1996 Act was eliminated by the expansion of the definition of "telephone exchange service" to encompass a "comparable service provided through a system of switches, transmission equipment or other facilities . . . by which a subscriber can originate and terminate a telecommunications service."[32/] This amendment conclusively demonstrates that Congress did not mean to tie the scope of the term "telephone exchange service" to technologies or network architectures in use in 1996 but to evolve along with the innovation and technological change that was already apparent when the 1996 Act was passed and was expected to accelerate.

Even if the word "comparable" could be read to limit the range of covered services to those that are functionally similar to and can substitute for switched local service, xDSL services clearly qualify. Surely U S West would not assert that switched local telephone services are only capable of accommodating voice communications, because the use of local switched networks for dial-up access to data transmission services has been commonplace for years. xDSL obviously is functionally similar to and can substitute for both the voice and data-carrying

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[32/] 47 U.S.C. 153(47)(B).

capabilities of POTS.[33/] Most current DSL offerings are optimized for data, but voice applications for xDSL technology are not only feasible, but continue to grow.

3. *Additionally, we seek comment on U S WEST's contention that advanced services are not "exchange access" because they are used to originate and terminate Internet traffic and not telephone toll service. In this regard, is "exchange access" a subset of "telephone exchange service" or a distinct category of service? Further, U S WEST argues that DSL-based services are "information access" services. We ask parties to address whether and in what way that category of service differs from "information services"? If DSL-based services are classified as "information access," can those services nonetheless be information services, telephone exchange services, or exchange access? In addition, we request comment regarding the extent to which these categories of service are mutually exclusive. We ask that parties address these issues in view of the relevant statutory language and Commission and judicial precedent.*

The Commission should reject U S West's attempt to establish "information access" as a distinct regulatory category mutually exclusive of "exchange access." The term "information access" was created at the time the Modification of Final Judgment ("MFJ") was initially negotiated, and at that time it was defined as "the provision of specialized exchange telecommunications services by a BOC in an exchange area in connection with the . . . transmission . . . of telecommunications traffic to or from the facilities of a provider of information services."[34/] To the best of CoreComm's knowledge, "information access" has never been considered a category of service independent of exchange access in any FCC proceeding,[35/]

[33/] DSL is marketed partly on the basis that it obviates the subscriber's need to procure an additional telephone line.

[34/] See United States v. American Tel. And Tel. Co., 552 F.Supp. 131, 227 (1982) (emphasis added).

[35/] The Commission alluded to the MFJ's classification of certain services as "information access" offerings in the Non-Accounting Safeguards Order. See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 22024 at n. 621 (1996). As explained previously, the MFJ did not establish "information access" as a category of service independent of "exchange access," so the footnote in the Non-Accounting Safeguards Order is based on a misreading of the consent

and its appearance in a single line of the Telecommunications Act does not reflect any intention by Congress to distinguish certain services as "information access" in opposition to "exchange access." The 1996 Act uses the term "information access" only as part of a "catch-all" provision that simply preserves pre-existing access obligations pending the FCC's adoption of new rules.

4. *We also request comment as to the proper scope of the requirements of section 251(c) upon incumbent LECs generally and in their provision of advanced services specifically. Does that section, for instance, apply to all telecommunications services and facilities offered by an incumbent LEC regardless of whether the services or related facilities constitute telephone exchange service or exchange access? In this regard, how does the fact that section 251(c) sets forth obligations of incumbent local exchange carriers, and is not on its face limited to particular telecommunications services, affect the provision's applicability to incumbent LEC offerings other than telephone exchange service or exchange access?*

As this question indicates, even if the Commission were inclined to adopt a narrow, backward-looking definition of the terms "telephone exchange service" and "exchange access," it still would lack any basis to eviscerate Sections 251(c) and 271. Many of the key provisions of Section 251(c) – including the ones addressing unbundled network elements, resale, and collocation – are not linked to the terms at issue in U S West's challenge to the Advanced Services Order. Likewise, a narrow definition of these terms will be of no assistance to U S West in its efforts to evade the constraints of Section 271.

U S West appears to be trying to conflate the term "information access" with the concept of "information services," a phrase that has a well-developed meaning. These terms, though, are

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decree. The result reached in the Non-Accounting Safeguards Order did not rely or depend on the purported "information access" distinction, so this passage should be considered dicta. Moreover, the idea that "information access" and "exchange access" are mutually exclusive categories of service assumes that the transmission services used to deliver information services are not telecommunications services. This theory has been conclusively discredited by at least two recent decisions. See GTE DSL Order at ¶ 20 ("an information service, while not a telecommunications service itself, is provided via telecommunications"); Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11529 (1998).

completely different, and there is no basis for using them interchangably. The use of the term "information access" in the MFJ was not intended to suggest that the transmission service used to obtain "access" to an information service would not itself be regulated as a transmission service. The drafters of the MFJ consent decree – and the Commission, which had confronted the same issues in its seminal Computer II decision a few years earlier[36/] – understood that opening local telecommunications bottlenecks was essential to unleash information service providers (or, in the Commission's parlance, "enhanced service providers") to develop and offer innovative Information Age services.[37/] The Commission followed the same approach in its Computer III and Open Network Architecture proceedings, because it recognized that the use of a telecommunications service as an input to, or means of accessing, an information service should not exempt an ILEC's offering from regulation.[38/] To the contrary, the underlying telecommunications services were subject to close regulation as a means of fostering competition in enhanced services.

36/ See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384, 464 (May 2, 1980) ("Computer II Final Decision") ("[A]n active and healthy enhanced services market should stimulate demand . . . . [and] serve to lower the unit costs of transmitting information. This will only be true, however, to the extent that the market structure prevents such anticompetitive practices as . . . denial of access from diminishing utilization of the network.").

37/ See American Tel. And Tel. Co., 552 F.Supp. at 189-90.

38/ See Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), CC Docket No.85-229, Report & Order, 104 FCC 2d 958, 1019-20 at ¶113 (1986) ("Computer III Phase I Order"); Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 at ¶ 258 (1996) ("Local Competition Order") (subsequent history omitted); Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2 Phase I, Memorandum Opinion and Order, 4 FCC Rcd 1, 41 at ¶ 69 (1988) ("BOC ONA Order").

If the Commission is reluctant to impose each and every obligation mentioned in Section 251(c) on all of an incumbent LEC's services and facilities under all circumstances, the statute gives the Commission the power to adopt fine-tuned regulatory relief rather than the ham-fisted approach advocated by U S West. For example, Section 251(f) provides escape values for rural and "two percent" carriers, and Section 10 provides a mechanism by which other carrier burdens can be removed,[39] and Section 251(d)(2) is, of course, a limitation on the unbundling requirements of Section 251(c)(3).

By the same token, if the Commission is uncomfortable relying on the specific provisions of Section 251(c) in applying interconnection rules to incumbent LECs, it has numerous alternative sources of authority to adopt such requirements. For example, Section 201(a) expressly authorizes the Commission to order carriers "to establish physical connections with other carriers" and to adopt other rules governing interconnection.[40] Section 201(b) gives the Commission the power to ensure that rates are just and reasonable, as well as rulemaking authority to implement any other provision of the Communications Act,[41] and Section 202(a) establishes a sweeping prohibition against unjust and unreasonable discrimination.[42]

In the past, the Commission has used these broad statutory provisions to require RBOCs to offer interconnection with competitors on just and reasonable terms in order to provide

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[39] This authority is, of course, subject to the constraint that Sections 251 and 271 must be "fully implemented" prior to forbearance.

[40] 47 U.S.C. § 201(a).

[41] 47 U.S.C. § 201(b).

[42] 47 U.S.C. § 202(a).

advanced data services.[43/] The 1996 Act did nothing to limit the reach of the Commission's preexisting statutory powers, and the Supreme Court has upheld the use of these powers, as well as the "ancillary" authority granted by Section 4(i), to regulate services that are not even mentioned in any part of the Communications Act, much less expressly singled out for regulation.[44/] Of course, the Commission has a responsibility to exercise great care when it invokes its general authority to regulate in the absence of a specific statutory mandate. If the Commission believes, however, that technological advances have created an unintended loophole that threatens to undercut the unambiguous intent of Congress, the Commission has the duty as well as the power to act. Therefore, although CoreComm believes that xDSL offerings are squarely within the scope of Sections 251(c) and 271, the Commission clearly would be justified in using its broad authority under other parts of the Communications Act in the event it concludes that these more specific provisions do not apply.

CONCLUSION

The investment, competition, and innovation that the Congress sought to stimulate when it adopted the 1996 Act is just beginning to emerge. This is due in large measure to the Commission's insistence that the incumbent LECs – and especially the RBOCs – fulfill their market-opening responsibilities.

U S West has not made any compelling showing that the Commission erred in its determinations that Sections 251(c) applies to the xDSL services offered by incumbent local

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43/ See Computer III Phase I Order, 104 FCC 2d at 1019 at ¶ 113; Local Competition Order, 11 FCC Rcd at 15631, ¶ 258; BOC ONA Order, 4 FCC Rcd at 41, ¶ 69.

44/ See United States v. Southwestern Cable, 392 U.S. 157, 178 (1968); Iowa Utilities Board, 525 U.S. at 371.

exchange carriers and that Section 271 applies to the xDSL services offered by the RBOCs. The Commission made precisely the right decisions and should stand by them.

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September 24, 1999

CERTIFICATE OF SERVICE

I, Jette Ward, hereby certify that on this 24th day of September, 1999, I caused copies of the foregoing "**COMMENTS OF CORECOMM LIMITED**" to be served by U.S. mail, first class, postage prepaid, or by hand delivery (*) on the following:

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