ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Deployment of Wireline Services Offering Advanced Telecommunications Capability	))))	CC Docket Nos. 98-11, 98-26, 98-32, 98-78, 98-91, 98-147

COMMENTS OF U S WEST, INC.

RECEIVED
SEP 24 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

William T. Lake
John H. Harwood II
Samir C. Jain
Mary E. Kostel
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

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

Counsel for U S WEST Communications, Inc.

Of Counsel:
Dan L. Poole

September 24, 1999

No. of Copies rec'd 0+4
List ABCDE

TABLE OF CONTENTS

I. THE INAPPLICABILITY OF SECTIONS 251(b) AND (c) TO THE PROVISION OF ADVANCED SERVICES IS CONSISTENT WITH THE PROCOMPETITIVE PURPOSES OF THE ACT 4

II. SECTION 251(a) IMPOSES OBLIGATIONS ON ALL TELECOMMUNICATIONS CARRIERS AND ENCOMPASSES THEIR OFFERINGS OF ADVANCED SERVICES 5

III. A TELEPHONE COMPANY MUST COMPLY WITH THE REQUIREMENTS OF SECTION 251(b) WHEN IT ACTS AS A LOCAL EXCHANGE CARRIER, BUT NOT WHEN IT PROVIDES ADVANCED SERVICES BECAUSE SUCH SERVICES CONSTITUTE NEITHER TELEPHONE EXCHANGE SERVICE NOR EXCHANGE ACCESS 6

A. A Telephone Company Is not Subject to Obligations Imposed on LECs When It Provides Advanced Services, Because Such Services Are Not Telephone Exchange Service or Exchange Access 6

B. A Telephone Company That Provides Telephone Exchange and Exchange Access Services as Well as Advanced Services Is Subject to Section 251(b) Obligations, But Only With Respect to Its Telephone Exchange and Exchange Access Services 11

(1) Resale 12

(2) Number portability 12

(3) Dialing parity 13

(4) Access to rights-of-way 14

(5) Reciprocal compensation 14

IV. A TELEPHONE COMPANY MUST COMPLY WITH THE REQUIREMENTS OF SECTION 251(c) WHEN IT ACTS AS AN INCUMBENT LOCAL EXCHANGE CARRIER, BUT THOSE REQUIREMENTS ARE INAPPLICABLE TO THE PROVISION OF ADVANCED SERVICES 16

A. A Telephone Company Does Not Act As an ILEC Under Section 251(c) When It Provides Advanced Services 16

B. A Telephone Company That Provides Telephone Exchange or Exchange Access Services and Qualifies as an "Incumbent" Is Subject to Section 251(c) Obligations, But Only with Respect to Those Services and Not Any Advanced Services It May Provide 17

(1) Duty to negotiate 17

(2) Interconnection 18

(3) Unbundled access 18

(4) Discounted Rates for Resale 19

(5) Notice of changes 20

(6) Collocation 20

CONCLUSION 22

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

	)	
Deployment of Wireline Services Offering	)	CC Docket Nos. 98-11, 98-26,
Advanced Telecommunications Capability	)	98-32, 98-78, 98-91, 98-147
	)	

COMMENTS OF U S WEST, INC.

This proceeding presents the Commission with the opportunity to articulate a comprehensive framework for how section 251 applies to advanced services and, more particularly, to carriers that provide both advanced services and telephone exchange and exchange access services. The Commission previously has considered in several different proceedings the applicability of section 251 obligations to advanced services such as DSL. In its first order in the current proceeding, the Commission considered generally how and when to apply section 251 to advanced services.[1/] The Commission also considered in two orders whether and in what circumstances the reciprocal compensation obligation of section 251(b)(5) applies to services such as Internet access.[2/] Finally, the Commission — without expressly deciding whether the section 251(c) unbundling obligations apply to advanced services facilities

---

1/ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011 (1998) ("*Advanced Services Order*").

2/ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic,* Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, FCC 99-38 (rel. Feb. 26, 1999), *appeal pending, U S WEST Communications, Inc. V. FCC,* No. 98-1410 (D.C. Cir. filed Sept. 2, 1998) *("Reciprocal Compensation Order"); GTE Telephone Operating Cos., GTOC Tariff No. 1*, 13 FCC Rcd 22466 (1998) (*"GTE ADSL Order"*).

— recently determined that ILECs generally do not have to unbundle packet switches, DSLAMs, and other such facilities.[3] As the broad nature of the Commission's questions in the public notice for this proceeding suggests, the remand of the *Advanced Services Order* gives the Commission the chance to articulate a more comprehensive framework for how section 251 applies — and does not apply — to the provision of advanced services.

A key feature of this framework should be recognition of what Congress made clear in the statutory language: that the obligations of section 251(b) and (c) apply *only* to a telephone company's provision of telephone exchange service or exchange access, and *not* to its provision of advanced services such as DSL. As explained in U S WEST's appellate brief that caused the Commission to seek a remand of its *Advanced Services Order*, advanced services do not constitute either "telephone exchange service" or "exchange access." As a result, a telephone company is not acting as a local exchange carrier ("LEC") when it provides advanced services, and the obligations of sections 251(b) and (c) — which apply only to local exchange carriers — are inapplicable to the provision of those services.

This exclusion is not an accident or the result of some glitch in the statutory definitions. Rather, it represents a purposeful choice by Congress to keep Internet and other advanced services free from regulation, including forced sharing with competitors at regulated prices. In effect, Congress implicitly performed the same "necessary and impair" analysis for advanced services that it required the Commission to undertake in section 251(d)(2) for network elements associated with telephone exchange and exchange access services. As the statutory text reflects, Congress concluded that, because the advanced services market is already competitive,

---

[3] FCC News Release: "FCC Promotes Local Telecommunications Competition," rel. Sept. 15, 1999 ("Sept. 15 News Release").

the regulatory obligations of sections 251(b) and (c) are inappropriate for such services. Indeed, such regulatory requirements -- including unbundling and resale -- would operate to discourage all carriers from investing in and deploying new communications technologies.

Contrary to the predictions of doom that some CLECs undoubtedly will sound in this proceeding, implementing the plain language of the statute will not unravel the Act and deprive CLECs of facilities they truly need to provide service. A telephone company that provides advanced services still must comply with section 251(b) when it acts as a LEC and with section 251(c) when it acts as an incumbent LEC. In particular, a telephone company must still, in accordance with the terms of section 251(c), unbundle elements it uses in the provision of telephone exchange or exchange access services, offer those services at a discount for resale, and provide collocation when necessary for interconnection or for access to unbundled network elements. But, as required by the plain language of the statute and in keeping with Chairman Kennard's recently expressed desire to create an advanced services "oasis" free from regulation,[4/] the Commission should recognize that the requirements of sections 251(b) and (c) do not apply to a telephone company's provision of advanced services, even if that company also acts as a local exchange carrier in other contexts.

In these comments, U S WEST sets forth how the obligations of section 251 apply to telephone companies that provide both telephone exchange and exchange access services and advanced services. As explained below, section 251(a) applies to a company's provision of all telecommunications services, including DSL and other advanced services. Sections 251(b) and

---

4/ William E. Kennard, Remarks at the National Association of Telecommunications Officers and Advisors, 19th Annual Conference, Atlanta, GA: "Consumer Choice Through Competition" (Sept. 17, 1999).

(c), on the other hand, do not reach a telephone company's provision of advanced services, but still require the company to comply with the requirements of each section with respect to all telephone exchange and exchange access services and the facilities used to provide such services.

I. THE INAPPLICABILITY OF SECTIONS 251(b) AND (c) TO THE PROVISION OF ADVANCED SERVICES IS CONSISTENT WITH THE PROCOMPETITIVE PURPOSES OF THE ACT.

As summarized below and detailed more fully in U S WEST's appellate brief in the D.C. Circuit, advanced services are neither telephone exchange service nor exchange access. Therefore, a telephone company providing advanced services is not acting as a LEC (or an incumbent LEC) and the obligations of section 251(b) and (c) do not apply to the company's provision of those services. This result is consistent with the design and purposes of the Act and section 251.

Congress was careful and deliberate in how and when it imposed regulatory obligations under section 251. This congressional caution reflects a recognition that regulation -- while useful in promoting competition in some circumstances -- will often stifle competition and investment and therefore needs to be targeted and minimized. This understanding is evident in the necessary and impair standards of section 251(d)(2). While section 251(c)(3) imposes a duty on ILECs to unbundle network elements, Congress wanted to ensure that such unbundling was limited to those circumstances where competitors truly had a need for those elements. Congress sought to promote competition by regulating only where necessary to foster competition and otherwise letting market-driven investment and innovation create competition.

The overall structure of section 251 also reflects this congressional determination. That section does not simply impose all the listed obligations on all telecommunications carriers.

Rather, it parcels out obligations depending on what role a carrier plays. The statute is as much a decision *not* to impose obligations on carriers acting in certain capacities as it is a decision to impose obligations. Thus, a telecommunications carrier that is not acting as a LEC is not subject to the requirements of sections 251(b) or (c). Similarly, a LEC that does not qualify as an incumbent is not bound by section 251(c).

The Commission should respect the boundaries Congress drew -- not only because it is bound by the plain language of the statute, but also because this language implements Congress's procompetitive policy. Congress decided that sections 251(b) and (c) should apply only to the provision of telephone exchange service and exchange access because it recognized that competition is developing rapidly in the advanced service market and that regulation would stifle that development by discouraging investment and innovation.

II. SECTION 251(a) IMPOSES OBLIGATIONS ON ALL TELECOMMUNICATIONS CARRIERS AND ENCOMPASSES THEIR OFFERINGS OF ADVANCED SERVICES.

Section 251(a) imposes duties on each "telecommunications carrier." A "telecommunications carrier" in turn is "any provider of telecommunications services," except aggregators.[5/] Because DSL and other advanced services constitute telecommunications services, section 251(a) applies to the provision of advanced services. Thus, when a carrier provides advanced services, it must, as section 251(a) requires, interconnect with other

---

5/ 47 U.S.C. § 153(44).

telecommunications carriers and comply with the guidelines and standards established under sections 255 and 256.[6]

III. A TELEPHONE COMPANY MUST COMPLY WITH THE REQUIREMENTS OF SECTION 251(b) WHEN IT ACTS AS A LOCAL EXCHANGE CARRIER, BUT NOT WHEN IT PROVIDES ADVANCED SERVICES BECAUSE SUCH SERVICES CONSTITUTE NEITHER TELEPHONE EXCHANGE SERVICE NOR EXCHANGE ACCESS.

A telephone company does not act as a LEC when it provides advanced services: such services do not fall within the definition of telephone exchange service or exchange access. As a result, the requirements of section 251(b) are inapplicable to a telephone company's provision of advanced services.

A. A Telephone Company Is Not Subject to Obligations Imposed on LECs When It Provides Advanced Services, Because Such Services Are Not Telephone Exchange Service or Exchange Access.

Section 251(b) imposes particular duties on every "local exchange carrier." The Act defines a "local exchange carrier" as

> any person that is engaged in the provision of *telephone exchange service* or *exchange access*. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term.[7]

---

[6] Section 201 of the Act similarly would require reasonable interconnection of telecommunications networks that are not covered under sections 251(b) or (c). *See* 47 U.S.C. § 201.

[7] 47 U.S.C. § 153(26) (emphasis added).

As set forth more fully in U S WEST's appellate brief before the D.C. Circuit,[8] which the Commission has made a part of the record in this proceeding and U S WEST incorporates herein by reference, advanced services constitute neither "telephone exchange service" nor "exchange access."

The Act defines "telephone exchange service" as either service *within* a local exchange that permits all subscribers to call each other for the exchange service charge, or "comparable" service.[9] Advanced services do not meet either half of the definition. The Commission has long interpreted the first half of this definition to mean "the provision of individual two-way voice communication by means of a central switching complex to interconnect all subscribers within a geographic area."[10] The overwhelming majority of advanced service communications, such as Internet-bound DSL communications, do not stay within a local exchange. Nor do such communications transit or interconnect with the local exchange network or PSTN. Moreover, DSL and other advanced services do not provide universal local connectivity and are not included in a subscriber's exchange service charge.

DSL and other advanced services also are not "comparable" to the local calling services described in the first half of the definition: They are a supplement to, and not a substitute for, basic local service. As U S WEST explained in its previous comments to the

---

[8] *See* Brief of Petitioner, *U S WEST Communications, Inc. v. FCC* (D.C. Cir. filed May 17, 1999) (No. 98-1410) (*remanded* Aug. 25, 1999).

[9] 47 U.S.C. § 153(47).

[10] *Application of Midwest Corp.*, 53 F.C.C.2d 294, 300 (1975). *See also Offshore Tel. Co. v. South Cent. Bell Tel. Co.*, 6 FCC Rcd 2286, 2287 (1991) (telephone exchange service is "a local calling capability that permits a community of interconnected customers to make calls to one another over a switched network"); *Domestic Public Radio Svc.*, 76 F.C.C.2d 273, 281 (1980) (same formulation as *Midwest Corp.*).

Commission, "comparable" in this context refers to those services that are functionally equivalent to and substitutable for two-way switched local calling.[11] DSL and other advanced services fail to meet this test. Indeed, the Commission itself has consistently held that services bearing the characteristics of DSL and other advanced services — such as dial-up Internet access and special access — do not meet the definition of "telephone exchange service," even when that definition is expanded to include comparable services.[12]

Finally, advanced services also are not "exchange access." The statutory *sine qua non* of "exchange access" is that it is used for "telephone toll services" — defined in the Act as telephone-to-telephone long-distance calling.[13] But DSL and other advanced services do not connect one telephone user to another for the purpose of making a long-distance telephone toll call. Instead, as Commission decisions themselves make clear, these services connect subscribers to Internet and other information service providers and thus constitute "*information* access," not "exchange access."[14]

---

[11] *Petition of U S WEST Communications, Inc. for Relief from Barriers to Deployment of Advanced Telecommunications Services*, CC Dkt. No. 98-26 at 45-46 n.24 (filed Feb. 25, 1998); *Reply Comments of U S WEST Communications, Inc.*, CC Dkt. No. 98-26 at 19-20 (filed May 6, 1998); *Comments of U S WEST, Inc.*, CC Dkt. No. 98-78 at 15-17 (filed June 18, 1998).

[12] *See* Declaratory Ruling, *Inter-Carrier Compensation for ISP Bound Traffic*, CC Dkt. No. 96-98, FCC 99-38, ¶¶ 12, 16-17 (rel. Feb. 25, 1999); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, 14 FCC Rcd 3160, 3224 & n.384 (1999) (citing *GTE ADSL Order*, 13 FCC Rcd at 22480).

[13] 47 U.S.C. §§ 153(16), (48).

[14] *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, 22023-24 & n. 621 (1996) (*Non-Accounting Safeguards Order"*). Moreover, because telephone toll services -- a type of (continued...)

Thus, advanced services are not telephone exchange or exchange access service, and a telephone company such as U S WEST is not acting as a local exchange carrier when it provides advanced services. And because the obligations of sections 251(b) apply only to local exchange carriers, section 251(b) does not apply to a telephone company when it provides advanced services.

The application of particular regulatory obligations to a telephone company when it provides one type of service but not when it provides other types of services is consistent with longstanding practice. In fact, the Commission has already taken this approach with respect to section 251. As noted above, section 251(a) applies to all "telecommunications carriers." In the *Local Competition Order*, the Commission concluded that an entity that provides both telecommunications and information services "is subject to the obligations under section 251(a), *to the extent that it is acting as a telecommunications carrier*" by providing telecommunications services, but not when it is providing information services.[15/] That is, when a phone company wears its "telecommunications carrier" hat, it is subject to the requirements of section 251(a). But when a phone company wears its information service provider hat, those requirements do not

---

[14/] (...continued)
telecommunications service -- and information services are mutually exclusive categories, *see* Federal-State Joint Board on Universal Service, 13 FCC Rcd 11501, 07-08 ¶ 13 (1998), exchange access and information access are entirely distinct. And whether (as the Commission asks) exchange access is a subset of telephone exchange service is irrelevant: advanced services are neither exchange access nor telephone exchange service.

In addition, as the Commission has recognized, "information access" is distinct from "information services": typically, telephone companies provide the former to providers of the latter. *See Non-Accounting Safeguards Order* n.621 ("BOCs provide ISPs with "information access.").

[15/] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15990 (1996) (emphasis added) (hereinafter "*Local Competition Order*").

apply. More generally, of course, information services are not subject to common carrier regulation under Title II even if they are offered by an entity that is otherwise a common carrier — a distinction that again reflects a recognition that the regulatory treatment of a service provider varies with the type of service it is offering.[16]

The Act's definition of "local exchange carrier" reflects this same conception of multiple roles. That definition provides that a person generally is not a LEC "insofar as such person is engaged in the provision of a commercial mobile service."[17] Thus, even if a company is a LEC for some purposes, it is *not* a LEC when providing commercial mobile service, and section 251(b)'s requirements do not apply to the company when it provides those services.

The application of section 251(b) obligations to a company only when it is acting as a LEC ultimately is a matter of common sense. For example, when AT&T enters a local market and provides "telephone exchange service" in competition with an incumbent LEC, AT&T is acting as a LEC and must provide that service subject to section 251(b). But no one suggests that AT&T is subject to that section when it sells long-distance services in the same market, since it does not provide those services in its capacity as a LEC. Thus, a competitor cannot demand the right to resell AT&T's long-distance voice and Internet backbone services

---

[16] *See* 47 C.F.R. § 64.702. This same variation is present in a number of other contexts. For example, the Commission has found that section 254(d)'s requirement that "every telecommunications carrier that provides interstate telecommunications service" contribute to universal service applies to satellite and video service providers "only to the extent that they are providing interstate telecommunications services." *In the Matter of Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9176 (1997). Similarly, although the Commission has classified domestic satellite operators as common carriers, it allows them to provide a limited number of transponders on a noncommon carrier basis. *See Domestic Fixed-Satellite Transponder Sales*, 90 F.C.C.2d 1238 (1982), *aff'd*, *Wold Communications Inc. v. FCC*, 735 F.2d 1465 (D.C. Cir. 1984).

[17] 47 U.S.C. § 153(26).

under the requirements of section 251(b)(1) or demand access to the rights-of-way containing AT&T's interexchange fibers under section 251(b)(4).[18]

In sum, the definitions of "telephone exchange service" and "exchange access" are the key to determining whether the provision of a particular service is subject to the Act's rules for the local exchange marketplace. If a carrier is providing a service that qualifies as either "telephone exchange service" or "exchange access," the carrier is acting as a "local exchange carrier" and must provide the service subject to the obligations in section 251(b) of the Act. Conversely, if a carrier is providing something that is neither "telephone exchange service" nor "exchange access," it is not acting in the capacity of a LEC, and it may provide the service free from LEC regulation. Because advanced services are neither telephone exchange service nor exchange access, the section 251(b) LEC obligations do not apply to the provision of those services.

B. A Telephone Company That Provides Telephone Exchange and Exchange Access Services as Well as Advanced Services Is Subject to Section 251(b) Obligations, But Only With Respect to Its Telephone Exchange and Exchange Access Services.

The inapplicability of section 251(b)'s requirements to advanced services does not exempt a telephone company from those requirements to the extent it provides telephone exchange and/or exchange access services. To the contrary, each of those requirements

---

[18] In fact, AT&T's equivalent to DSL service -- its cable modem service offered via its cable television plant -- may be governed by an entirely different regulatory scheme. AT&T argues that its cable modem service is not telecommunications service at all, but instead cable service. Whatever the merits of this view, if AT&T were to offer DSL service, it would not be be subject to any of the obligations of section 251(b) or (c) with respect to that service -- because DSL service is neither telephone exchange service nor exchange access.

continues to apply to the company when it acts as a local exchange carrier, and the inapplicability to advanced services often has limited practical effect.

(1) *Resale.* When a local telephone company provides telephone exchange service or exchange access, it must not "prohibit, and not . . . impose unreasonable or discriminatory conditions or limitations on" the resale of those services.[19] This obligation remains in effect whether or not the telephone company also provides advanced services. If the company does provide advanced services, however, it need not comply with this obligation with respect to the resale of those services.

(2) *Number portability.* Under this provision, when a local telephone company is engaged in providing telephone exchange service or exchange access, it must ensure that, if any customer wishes to switch to another provider, the customer will be able to retain, at the same location, his telecommunications numbers "without impairment of quality, reliability, or convenience."[20] If the telephone company also provides advanced services, this obligation remains unchanged, but it does not attach to the entity's provision of advanced services.

The inapplicability of number portability obligations to a carrier's provision of advanced services has little practical effect. The concern underlying section 251(b)(2) — that one LEC's customer will be discouraged from switching to another LEC if in doing so he cannot retain his original telephone number — typically does not arise in the advanced services context. Telephone numbers are the "addresses" used to place circuit-switched telephone calls. Advanced services, however, are not used to place such calls; rather, they enable users to transmit and

---

[19] 47 U.S.C. § 251(b)(1).

[20] 47 U.S.C. § 153(30); 47 U.S.C. § 251(b)(2).

receive packets of data to and from "addresses" other than traditional telephone numbers. For example, DSL services are often used in connecting to the Internet. The equivalent of a telephone number on the Internet is a user's e-mail address or, if he has a website, his website address: both are expressed in a string of numbers called an Internet protocol ("IP") address. IP addresses are assigned not by the telephone company providing advanced services but, typically, by the user's Internet service provider ("ISP"). No issue concerning the "portability" of such an address thus arises when a customer changes its advanced service provider.[21/]

(3) *Dialing parity.* Under this section, a local telephone company that provides telephone exchange service or exchange access must provide dialing parity to its competitors: it cannot require its customers to dial longer, more cumbersome numbers in order to connect to another carrier's network.[22/] This provision is tailored to the unique context of traditional telephone service, in which a customer uses a telephone key pad to dial numbers each time he places a call, and therefore might be discouraged from placing calls with longer numbers. This obligation too is inapplicable to a telephone company's provision of advanced services.

As with number portability, the inapplicability of dialing parity obligations to advanced services has little practical effect because users of advanced services generally do not dial numbers on a telephone keypad for each call. For example, in the context of advanced

---

21/ Of course, if the telephone company also acts as the ISP, it may in that capacity assign the customer his IP address. Nevertheless, its action in that regard would not be subject to the obligations of section 251(B)(2), because in providing services as an ISP it would not be providing either telephone exchange service or exchange access — and therefore would not qualify as a LEC. In any event, a customer generally cannot keep his or her e-mail address when switching from one ISP to another.

22/ 47 U.S.C. § 251(b)(3).

services such as DSL, which establish a dedicated, always-on connection to the customer's predesignated Internet service provider, the customer does not have to dial any numbers at all.

(4) *Access to rights-of-way.* In its capacity as a LEC, a telephone company must allow other providers — of telephone exchange service, exchange access, or any other telecommunications service, including advanced services — access to rights-of-way.[23/] The obligations imposed by section 251(b)(4) remain the same whether or not a local telephone company that provides telephone exchange service or exchange access also provides advanced services. As a theoretical matter, if there were rights-of-way that a local telephone company used only for its provision of advanced services, this section would not require the company to allow access to those rights-of-way to any other entity. But, in fact, by their very nature most advanced services are provided using the same rights-of-way as those used in the provision of telephone exchange service and exchange access. For example, DSL services use the same loop — and therefore the same right of way — as the telephone company's telephone exchange and exchange access services. Accordingly, the telephone company must provide access to the right-of-way in its capacity as a local exchange carrier even though the obligation does not apply to its provision of advanced services.

(5) *Reciprocal compensation.* When a local telephone company is engaged in the provision of telephone exchange service or exchange access, it must establish "reciprocal compensation" arrangements with other providers for the "the transport and termination of telecommunications" carried over those services.[24/] This obligation remains applicable to the

---

23/ 47 U.S.C. § 251(b)(4).

24/ 47 U.S.C. § 251(b)(5).

telephone company's LEC activities even if the company also provides advanced services. However, the telephone company need not pay reciprocal compensation to other carriers for the transport and termination of telecommunications that it originates by way of its advanced services. For example, reciprocal compensation need not be paid when two Asynchronous Transfer Mode ("ATM") networks interconnect.

As the Commission's recent decisions make clear, most communications transmitted over advanced services are not subject to reciprocal compensation requirements for other reasons as well. Most of these communications are Internet-bound, and, as the Commission recently held, Internet-bound traffic is "largely interstate."[25] The Commission has recognized that Internet-bound traffic "do[es] not terminate at the ISP's local server, . . . but continue[s] to the ultimate destination or destinations, very often at a distant Internet website."[26] And, as the Commission has correctly determined, reciprocal compensation obligations apply only to the transport and termination of *local* traffic.[27] Thus, even if the provision of advanced services qualified a carrier as a LEC, the majority of communications transmitted over those services would not be subject to reciprocal compensation in any event because they do not terminate locally.

---

[25] *Reciprocal Compensation Order* ¶ 1. In their appeal of that order, LEC petitioners challenge the Commission's statement that state commissions may impose reciprocal compensation obligations with respect to the carriage of ISP-bound traffic despite holding in the same order that ISP-bound traffic is "largely interstate," *id.*, and holding in a previous order that reciprocal compensation obligations attach only to local traffic. *Local Competition Order* at 16013.

[26] *GTE ADSL Order* at 22476.

[27] *Local Competition Order* at 16013.

IV. A TELEPHONE COMPANY MUST COMPLY WITH THE REQUIREMENTS OF SECTION 251(c) WHEN IT ACTS AS AN INCUMBENT LOCAL EXCHANGE CARRIER, BUT THOSE REQUIREMENTS ARE INAPPLICABLE TO THE PROVISION OF ADVANCED SERVICES.

Because a telephone company does not act as an ILEC when providing advanced services, the obligations in section 251(c) do not apply to provision of such services. The telephone company still must comply with section 251(c) with respect to its telephone exchange and exchange access services.

A. A Telephone Company Does Not Act As an ILEC Under Section 251(c) When It Provides Advanced Services.

Section 251(c) imposes particular duties on every "incumbent local exchange carrier." The statute defines an "incumbent local exchange carrier" as the "local exchange carrier" in an area that "provided telephone exchange service in such area" when the Act was enacted and that was a member of the exchange carrier association (or is a successor or assign of such a local exchange carrier).[28] Thus, an entity qualifies as an ILEC under this definition only to the extent that it acted as a LEC as of February 1996 and provided "telephone exchange service" in the area in question.

An entity is not an ILEC when it provides advanced services. As explained in Part II.A above, because advanced services are neither telephone exchange nor exchange access service, an entity providing advanced services is not acting as a LEC when it provides those services. And by definition, an entity cannot be acting in the capacity of an ILEC if it is not acting as a LEC. Likewise, the mere fact that a carrier provides local exchange service as an

---

[28] 47 U.S.C. § 251(h)(1). The statute further provides that the Commission may provide for the treatment of another LEC as an ILEC under certain conditions. *Id.* § 251(h)(2).

incumbent LEC does not mean that *all* of its telecommunications services are subject to incumbent LEC regulation. For example, even though GTE and Sprint are the incumbent LECs in some service areas (such as some of the Virginia suburbs of Washington, D.C.), competitors cannot obtain unbundled access to the elements of Sprint's long-distance and international networks under section 251(c)(3), or resale discounts on GTE's nationwide Internet backbone under section 251(c)(4), because these are not services provided by Sprint or GTE in their capacities as "incumbent local exchange carriers." By the same token, services provided by U S WEST when it is not acting in its capacity as an incumbent LEC do not give rise to section 251(c) obligations.

B. A Telephone Company That Provides Telephone Exchange or Exchange Access Services and Qualifies as an "Incumbent" Is Subject to Section 251(c) Obligations, But Only with Respect to Those Services and Not Any Advanced Services It May Provide.

Section 251(c) obligations apply to a telephone company to the extent that it acts as an ILEC, but no more. Thus, a company that provides telephone exchange and exchange access services, qualifies as an "incumbent," and also provides advanced services is subject to 251(c) in its capacity as an ILEC (*i.e.*, with respect to its telephone exchange and exchange access services), but not in connection with its provision of advanced services.

(1) *Duty to negotiate.* A telephone company that provides telephone exchange service or exchange access, and also qualifies as an "incumbent" under section 251(h), is required to negotiate in good faith with regard to all of the obligations it incurs under sections 251(b) and (c), regardless of whether it also provides advanced services.[29]

---

[29] 47 U.S.C. § 251(c)(1).

(2) *Interconnection.* Under section 251(c)(2), a telephone company that is engaged in providing telephone exchange service or exchange access, and also qualifies as an "incumbent," must provide interconnection with its network insofar as it uses the network in the provision of those services to any telecommunications carrier that will use such interconnection for the provision of telephone exchange service or exchange access.[30] Because section 251(c)(2) requires telephone companies to interconnect only "for the transmission . . . of telephone exchange service and exchange access," it does not require a telephone company to interconnect with another carrier that will use such interconnection solely for the purpose of providing advanced services. Thus, for example, an ILEC need not interconnect under section 251(c)(2) with another carrier's packet-switched network or other network used solely for the provision of advanced services (and not telephone exchange service or exchange access). The company's interconnection obligations under section 251(a), however, apply to all of these telecommunications services. *See supra* Part II.

Of course, a carrier that properly obtains interconnection because it provides telephone exchange service or exchange access is not limited to using its interconnection arrangement to provide just those services. Such a carrier could, in compliance with the Act, use the interconnection to provide advanced services as well.

(3) *Unbundled access.* A telephone company that is engaged in providing telephone exchange service or exchange access, and is an incumbent, must provide unbundled access to certain network elements to any telecommunications carrier, including providers of

---

[30] 47 U.S.C. § 251(c)(2).

telephone exchange service, exchange access, and advanced services.[31] This obligation applies to network elements the telephone company uses to provide telephone exchange service or exchange access and remains in place regardless of whether the telephone company also provides advanced services. Moreover, unlike the obligation to provide interconnection under section 251(c)(2), a telephone company's obligation to provide access to unbundled elements is not dependent on the requester's provision of telephone exchange service or exchange access; rather, unbundled elements must be made available to providers of any telecommunications service, including advanced services. Whether a network element must be unbundled therefore turns on how its owner, the telephone company, uses it: the obligation does not apply to elements that the company uses solely in the provision of advanced services, such as a DSLAM used for DSL services.

As with section 251(b)(5), recent Commission precedent already reaches substantially the same result, albeit by different means. In its order adopted on September 15, 1999, the Commission generally declined to require local telephone companies to unbundle facilities — such as packet switches and DSLAMs — used to provide high-speed data services, including Internet access.[32]

(4) *Discounted rates for resale.* A telephone company that provides telephone exchange service or exchange access at retail and is an incumbent must offer those retail services for resale at wholesale rates and must comply with the nondiscrimination and other conditions in

---

[31] 47 U.S.C. § 251(c)(3).

[32] *See* Sept. 15 News Release. In U S WEST's view, whether to require the unbundling of elements used in the provision of advanced services is not a question left to the Commission's discretion; as a statutory matter, unbundling requirements simply do not apply to these elements.

section 251(c)(4) concerning the resale of those services.[33] These obligations are unchanged if a carrier also offers advanced services. However, a carrier need not offer its advanced services for resale at wholesale rates or satisfy the other conditions listed in section 251(c)(4) as to its advanced services because it is not acting as an ILEC in providing those services. For example, in the same way that Sprint -- which acts as an ILEC and as an IXC in different circumstances -- is not required under section 251(c)(4) to resell its long distance services, U S WEST is not obligated to resell its DSL services.[34]

(5) *Notice of changes.* A telephone company that provides telephone exchange service or exchange access and is an incumbent must comply with the notice requirements in section 251(c)(5) with regard to those services, but need not provide such notice in connection with its provision of advanced services.[35] However, section 251(a) gives the Commission authority to devise proper network disclosure rules. Moreover, the fact that a telephone company utilizes a given network interface to provide both telephone exchange service and advanced services would not exempt it from providing proper disclosure about the interface.

(6) *Collocation.* A telephone company that provides telephone exchange service or exchange access must provide for collocation necessary to satisfy its interconnection obligations under section 251(c)(2)[36] as well as its obligations to provide access to unbundled

---

33/ *See* 47 U.S.C. § 251(c)(4).

34/ Despite the clear parallel between Sprint and U S WEST in this instance, some state regulators nevertheless have reached the incongruous conclusion that U S WEST must comply with this section in the provision of its non-LEC services.

35/ *See* 47 U.S.C. § 251(c)(5).

36/ As the Commission made clear in its *Local Competition Order,* section 251(c)(6) (continued...)

network elements under section 251(c)(3).[37] This collocation requirement is unchanged by the company's provision of advanced services. For example, whether or not the company also provides advanced services, a telephone company that provides telephone exchange service or exchange access must allow collocation of another carrier's DSLAM to the extent that such collocation is "necessary for interconnection or access to unbundled network elements" such as a local loop owned by the telephone company.[38]

---

[36] (...continued)
requires collocation only in aid of the interconnection obligation imposed by section 251(c)(2), not the interconnection obligation of section 251(a). *Local Competition Order* at 15795. And as explained *supra,* interconnection under section 251(c)(2) is required only for the provision of telephone exchange service or exchange access; it is not required for the provision of advanced services. Thus, a telephone company that provides telephone exchange service or exchange access is under no obligation to collocate with a carrier where the collocation is solely for the purpose of interconnection to provide advanced services. However, if the carrier is providing telephone exchange service or exchange access and is lawfully collocating equipment on an ILEC's property, that equipment can also be used for the provision of the carrier's advanced services.

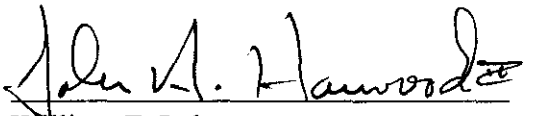
[37] *See* 47 U.S.C. § 251(c)(6).

[38] *Id.*

CONCLUSION

The Commission should take the opportunity of the remand of the *Advanced Services Order* to establish clearly the extent and limits of the applicability of section 251 to telephone companies that offer both telephone exchange and exchange access services and advanced services. A key determinant of those limits is Congress's decision, as made clear in the Act's language, not to impose the obligations of sections 251(b) and (c) on a telephone company's provision of advanced services such as DSL.

Respectfully submitted,



William T. Lake
John H. Harwood II
Samir C. Jain
Mary E. Kostel
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

Of Counsel:
Dan L. Poole

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

DATE: September 24, 1999

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of September, 1999 I caused true and correct copies of the foregoing Comments of U S WEST Communications, Inc. to be served either by hand* or by first-class mail, postage pre-paid, upon the following:

Mary Kostel

Mary Kostel

Chairman William E. Kennard*
Federal Communications Commission
445 Twelfth Street, SW
Room 8-B201
Washington, DC 20554

Commissioner Harold Furchtgott-Roth*
Federal Communications Commission
445 Twelfth Street, SW
Room 8-A302
Washington, DC 20554

Commissioner Gloria Tristani*
Federal Communications Commission
445 Twelfth Street, SW
Room 8-C302
Washington, DC 20554

Commissioner Susan Ness*
Federal Communications Commission
445 Twelfth Street, SW
Room 8-B115
Washington, DC 20554

Commissioner Michael Powell*
Federal Communications Commission
445 Twelfth Street, SW
Room 8-A204
Washington, DC 20554

International Transcription Service, Inc.*
1231 20th Street, NW
Washington, DC 20036

* Denotes hand delivery via messenger

Janice M. Myles*
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, SW
Room 5-C327
Washington, DC 20554

Christopher J. Wright
John Edward Ingle
Laurence N. Bourne
Federal Communications Commission
445 Twelfth Street, SW, Room 8-A741

Nancy Caroline Garrison
Catherine G. O'Sullivan
Robert Nicholson
U.S. Dept of Justice
Antitrust Division, Appellate
601 D Street, NW, Patrick Henry Building
Washington, DC 20530

Charles C. Hunter
Catherine M. Hannan
Hunter Communications Law Group
1620 I Street, NW, Suite 701
Washington, DC 20006

Brad E. Mutschelknaus
Robert Jeffery Aamoth
Steven A. Augustino
Kelley, Drye & Warren
1200 19th Street, NW, Suite 500
Washington, DC 20036-2423

Anthony C. Epstein
Jenner & Block
601 13th Street, NW, 12th Floor
Washington, DC 20005

Peter Douglas Keisler
Sidley & Austin
1722 Eye Street, NW, Suite 600
Washington, DC 20006-3795

Mark Lewis Evans
Kellogg, Huber, Hansen, Todd & Evans
1301 K Street, NW, Suite 1000 West
Washington, DC 20005

Linda Lee Oliver
Hogan & Hartson
555 13th Street, NW
Columbia Square
Washington, DC 20004-1109

Gail Laurie Polivy
GTE Service Corporation
1850 M Street, NW, Suite 1200
Washington, DC 20036-5801

David King
Adtran, Inc.
901 Explorer Blvd.
Huntsville, AL 35806

Stephen C. Garavito
Mark C. Rosenblum
AT&T Corp.
295 North Maple Avenue
Room 3252G1
Basking Ridge, NJ 07920

* Denotes hand delivery via messenger

John T. Lenahan
Frank Michael Panek
Ameritech
2000 W. Ameritech Center Dr.
Room 4H84
Hoffman Estates, IL 60195

Glenn B. Manishin
Christy C. Kunin
Stephanie A. Joyce
Blumenfeld & Cohen-Technology Law Group
1615 M Street, NW, Suite 700
Washington, DC 20036

Stephen R. Bell
Thomas Jones
Sophie J. Keefer
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, NW

Donna M. Epps
1320 North Court House Road
8th Floor
Arlington, VA 22201

Stephen L. Earnest
M. Robert Sutherland
BellSouth Corporation
1155 Peachtree Street, NE, Suite 1700
Atlanta, GA 30306-3610

Gretchen T. Dumas
Peter Arth, Jr.
Lionel B. Wilson
Public Utilities Commission, State of California
505 Van Ness Ave.
San Francisco, CA 94102

Ronald L. Plesser
Stuart P. Ingis
Tashir J. Lee
Randall Brian Lowe
Julie A. Kaminski
Piper & Marbury L.L.P.
1200 19th Street, NW, Seventh Floor
Washington, DC 20036

Colleen Boothby
Levine, Blaszak, Block & Boothby
2001 L Street, NW, Suite 900
Washington, DC 20036

Jonathan Jacob Nadler
Squire, Sanders & Dempsey
1201 Pennsylvania Avenue NW
Washington, DC 20044

Russell M. Blau
Dana Frix
Richard Martin Rindler
Swidler Berlin Shereff Friedman
3000 K Street, NW, Suite 300
Washington, DC 20007-5116

* Denotes hand delivery via messenger

Thomas M. Koutsky
Covad Communications Company
700 13th Street, NW, Suite 950
Washington, DC 20005

Dave Burstein
DSL Prime
420 West 119th St. # 51
New York, NY 10027

Michael J. Ettner
George N. Barclay
General Services Administration
1800 F Street, NW, Room 4002
Washington, DC 20405

Jeffrey S. Linder
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20006

Terry G. Mahn
Fish & Richardson
601 13th Street, NW
Washington, DC 20005

Matthew Bennett Pachman
MCI Telecommunications Corp.
1133 19th Street, NW
Washington, DC 20036

Dr. H. Gilbert Miller
Mitretek Systems, Inc.
7525 Colshire Drive
McLean, VA 22102

Rodney L. Joyce
J. Thomas Nolan
Shook, Hardy & Bacon
600 14th Street, NW, Suite 800
Washington, DC 20005-2004

R. Gerald Salemme
Cathleen Massey
Nextlink Communications, Inc.
1730 Rhode Island Avenue, NW, Suite 1000
Washington, DC 20036

Stephen L. Goodman
Halprin, Temple, Goodman & Maher
555 12th Street, NW
Suite 950, North Tower
Washington, DC 20004

Ruth Milkman*
Buck Logan*
Lawler, Metzger & Milkman, LLC
1909 K Street, NW, Suite 820
Washington, DC 20006

Ernest G. Johnson
Oklahoma Corporation Commission
P.O. Box 52000-2000
Oklahoma City, OK 73152-2000

Colleen M. Dale
Primary Network Communications
11756 Borman Drive, Suite 101
St. Louis, MO 63146

* Denotes hand delivery via messenger

Leon M. Kestenbaum
Jay C. Keithley
H. Richard Juhnke
Sprint Corporation
1850 M Street, NW, 11th Floor
Washington, DC 20036

Pat Wood, III
Judy Walsh
Brett A. Perlman
Public Utility Commission of Texas
1701 N. Congress Ave
P.O. Box 13326
Austin, TX 78711-3326

Lawrence E. Sarjeant
Linda Kent
Keith Townsend
John W. Hunter
Julie E. Rones
United States Telephone Association
1401 H Street, NW, Suite 600
Washington, DC 20005

Margot Smiley Humphrey
Koteen & Naftalin, LLP
1150 Connecticutt Ave., NW
Washington, DC 20036

Susan M. Miller
The Alliance for Telecommunications
Industry Solutions, Inc.
1200 G Street, NW, Suite 500
Washington, DC 20005

Genevieve Morelli
Qwest Communications
4250 North Fairfax Drive
Arlington, VA 22203

* Denotes hand delivery via messenger