Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

COMMENTS OF DSLnet COMMUNICATIONS, LLC

Pursuant to the Public Notice released September 9, 1999 in this proceeding,[1] DSLnet Communications, LLC ("DSLnet"), by its undersigned counsel, hereby submits these comments regarding the remand of the Commission's August 1998 *Advanced Services Order*[2] from the United States Court of Appeals for the District of Columbia.

I. The Availability of the Market-Opening Provisions of Section 251 to DSL Providers is Critical to the Proliferation of Broadband Access in the United States.

DSLnet was founded in March 1998 to capitalize on the opportunity created in large measure by the Telecommunications Act of 1996 for delivering competitive, high-bandwidth, cost-effective data connections using Digital Subscriber Line ("DSL") technology. DSL technology offers the most significant opportunity over the next few years to make available broadband access to new segments of the American public. Unlike other broadband alternatives, DSL utilizes the copper telephone wires that already connect nearly all telecommunications users, including schools, libraries, hospitals and government agencies, to the nation's telecommunications infrastructure.

DSLnet has attracted considerable investment for its aggressive strategy to deploy its broadband services in selected markets across the nation by the end of this year. DSLnet is certified to provide telecommunications services in forty states and in the District of Columbia, and expects to receive certification in the remaining ten states by the end of 1999. DSLnet currently provides high-speed Internet access to customers, but the company is evaluating the development of

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[1] *See Public Notice*, Comments Requested in Connection With Court Remand of August 1998 Advanced Services Order, CC Docket Nos. 98-11, 98-26, 98-32, 98-78, 98-91, 98-147, DA 99-1853, DA 99-1853, released September 9, 1999.

[2] *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 Service Order*").

integrated telecommunications service offerings that could respond to the changing and growing needs of customers.

The success of the nascent DSL market depends upon the continued eligibility of DSL carriers to invoke the market-opening provisions of Section 251 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996. DSLnet and many other emerging competitive DSL providers rely upon the use of unbundled network elements and collocation that have been obtained from incumbent carriers pursuant to Section 251. Therefore, the issues raised in this proceeding are of special interest not only for DSLnet, but all Americans interested in competitive, innovative and affordable options for broadband access.

II. Section 251(c) Applies to Incumbent Local Exchange *Carriers*, and is Not Limited to Telephone Exchange and Exchange Access Services.

In its Public Notice, the Commission asks whether the obligations imposed on incumbent local exchange carriers ("ILECs") apply to all ILEC services, regardless of whether the services or related facilities constitute telephone exchange or exchange access services. The plain terms of Section 251(c) indicate that its provisions apply to *carriers*, not to services. None of the ILECs dispute that they provide telephone exchange and exchange access services; therefore, they are incumbent carriers subject to Section 251(c). Section 251 offers no indication that Congress intended for the Commission to determine, on a case-by-case basis, whether each service offered by ILECs is subject to § 251.

The Commission's interpretation of the ILECs' unbundling obligations provide an illustration of the principle that § 251 applies to incumbent carriers, and not only to particular ILEC services. Many of the network elements that the Commission has required ILECs to unbundle are

not themselves telephone exchange or exchange access services. ILECs are required, for example, to unbundle loops, not because a loop itself is a telephone exchange or exchange access service, but because the requesting carrier intends to use the loop for its provision of telecommunications services. Once a carrier is deemed to be an incumbent carrier, *all* of its services are subject to Section 251 and must be provided to any requesting carrier that is eligible to invoke its provisions.

III. DSL Providers are Eligible to Invoke Most of Section 251's Market-Opening Provisions Even if DSL is not a Telephone Exchange or Exchange Access Service.

Except as specifically noted in Section 251(c), a requesting carrier's intended use of ILEC facilities is not relevant to an ILEC's duties under this section. The intended use of a facility by the requesting carrier is addressed in the separate subdivisions of subsection (c). For example, subsection § 251(c)(2), interconnection, applies only to carriers that will use the ILEC network to transmit or route telephone exchange service or exchange access, while subsection § 251(c)(3), unbundled access, applies to any carrier that will use the ILEC facilities to provide telecommunications services.

DSL carriers are eligible to request pursuant to § 251 all services and facilities that may be used to provide telecommunications services. It is beyond dispute that the services offered by DSL carriers qualify as telecommunications services. Federal law defines "telecommunications" as the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[3] "Telecommunications service" is thereafter defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public,

[3] 47 U.S.C. § 153(43).

regardless of the facilities used."[4] This definition clearly includes the provision by DSL carriers of facilities that enable end-users to transmit packetized voice and data information.

Section 251(c) is intended to stimulate competition by opening access to the "last mile" connections to consumers controlled by the ILECs that are necessary for the provision of all wireline telecommunications services. The unbundled loops and central office facilities used by DSL providers are foremost among the bottleneck resources that Congress had in mind when it drafted Section 251(c). Therefore, wholly apart from U S West's argument with respect to whether DSL services are telephone exchange or exchange access services subject to the provisions of Section 251(c)(2), ILECs are required, under the other subdivisions of Section 251(c), to fulfill DSL carriers' requests for negotiation for interconnection, access to unbundled elements, and collocation.

IV. The Commission Should Regulate ILEC DSL Pricing.

Even if the Commission were to determine that some or all advanced services are not subject to § 251, the Commission should nonetheless exercise its authority under the Act to closely supervise ILEC pricing of DSL services. If the provision of competitive DSL service is to be viable, it is essential that ILECs incorporate an appropriate allocation of loop costs, and reasonable and nondiscriminatory prices for conditioned loops into their own DSL prices. Unfortunately, the Commission has to date declined to examine DSL pricing issues. Therefore, ILECs have been able to take advantage of disparate and inadequate state regulation to maintain unreasonable pricing practices. The Commission should promptly initiate an investigation of DSL pricing issues and

[4] 47 U.S.C. § 153(46). See also *Advanced Services Order* at ¶ 35.

establish pricing guidelines that will assure reasonable and nondiscriminatory pricing for DSL and underlying services.

V. Conclusion

For the foregoing reasons, the Commission should reaffirm that Section 251 applies to all ILEC facilities and services, and that the incumbent carriers must therefore provide the market-opening provisions of Section 251(c) to DSL carriers subject only to the limitations set forth therein. DSL service offers the most promising opportunity today for the deployment of affordable broadband services to many consumers who cannot afford or do not have access to existing high-speed broadband services. If incumbent carriers are permitted to exclude all broadband competitors from the use of the "last mile" copper wire connection to consumers, the ILECs will be able to suppress nearly all competition for DSL services, resulting in slower deployment, higher prices and fewer services for American broadband consumers. The Commission should also ensure meaningful access to consumers by investigating the unreasonable DSL pricing practices of the incumbent carriers.

Respectfully submitted,

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Dated: September 24, 1999

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was hand delivered this 24th day of September, 1999, to the persons listed below.

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