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FEDERAL COMMUNICATIONS COMMISSION
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September 24, 1999

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Deployment of Wireline Services Offering Advanced Telecommunications Capability CC Docket No. 98-147, 98-11, 98-26, 98-32, 98-78 and 98-91

Dear Ms. Salas:

Enclosed for filing in the above-referenced proceeding are an original and twelve copies of the Comments of NorthPoint Communications, Inc.

Please date stamp the additional copy provided herewith for that purpose and return the same to the bearer. Thank you for your assistance.

Sincerely,

Charles W. Logan

Enclosures

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

In the Matters of	)	
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
Petition of Bell Atlantic Corporation For Relief from Barriers to Deployment of Advanced Telecommunications Services	)	CC Docket No. 98-11
	)	
Petition of U S West Communications, Inc. For Relief from Barriers to Deployment of Advanced Telecommunications Services	)	CC Docket No. 98-26
	)	
Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Technology	)	CC Docket No. 98-32
	)	
Petition of the Association for Local Telecommunications Services (ALTS) For a Declaratory Ruling Establishing Conditions Necessary to Promote Deployment of Advanced Telecommunications Capability Under Section 706 of 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 NORTHPOINT COMMUNICATIONS, INC.

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September 24, 1999

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SUMMARY

The Commission significantly furthered the goals of promoting competition and the deployment of advanced services when it concluded in its August 1998 *Advanced Services Order* that incumbent LECs offering DSL services are subject to the market-opening provisions of Section 251 of the Communications Act of 1934, as amended. The Commission should reaffirm that, regardless of whether DSL is exchange access or exchange service, NorthPoint Communications, Inc. ("NorthPoint") and other competitive DSL providers are entitled to access to unbundled network elements under section 251(c)(3) of the Act, as well as to the resale and collocation rights set forth in sections 251(c)(4) and (6). Although U S West Communications, Inc. ("US West") has challenged the Commission's decision on appeal, it cannot dispute that it provides both exchange services and exchange access. Under a straightforward reading of the Act, it consequently is an incumbent local exchange carrier ("LEC"), whether or not its DSL service is considered exchange service or exchange access. As such, it is subject to all of section 251's obligations that apply to telecommunications services, including the DSL services provided by NorthPoint and other competitive LECs.

The Commission thus has a sound basis for reaffirming its *Advanced Services Order* without having to delve into the issue of whether DSL constitutes "exchange service" or "exchange access." Although US West made much of this issue on appeal, it is largely a red herring. To the extent the Commission determines that it is necessary to decide this issue, however, it may also reaffirm the *Advanced Services Order* by finding that DSL services are exchange access services, and, consequently, an incumbent local exchange carrier is subject to all of the market-opening obligations imposed by Section 251 in connection with its provision of those services. The text of the statute, Commission precedent, and the pro-competitive

objectives of the 1996 Act strongly support this conclusion. US West's argument that DSL is "information access" and not "exchange access" misinterprets the Act and would create artificial regulatory classifications based on particular technologies, a result clearly neither mandated by the statute nor intended by Congress.

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COMMENTS OF NORTHPOINT COMMUNICATIONS INC.

NorthPoint Communications, Inc. ("NorthPoint") submits these comments in response to the Public Notice released on September 9, 1999 (DA 99-1853) in the above-captioned

proceeding. The Public Notice invites interested parties to comment on issues raised by US West Communications, Inc. ("US West") in its petition for judicial review of the Commission's August 1998 order issued in these proceedings.[1] The central issue addressed in that petition is whether advanced services offered by an incumbent local exchange carrier ("LEC") that employs digital subscriber line ("DSL") and packet-switching technologies, are local exchange or exchange access services, as defined by the Communications Act of 1934, as amended. In addition, the Public Notice asks parties to address whether the pro-competition provisions of section 251(c) of the Act 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.

NorthPoint has a vital interest in the issues presented in this proceeding. NorthPoint is a national, facilities-based competitive local exchange carrier dedicated to providing affordable, dedicated high-speed Internet access over existing telephone lines using digital subscriber line ("DSL") technology.[2] Promoting the deployment of such advanced services by competitive LECs such as NorthPoint furthers what the Commission has described as "fundamental goals" of

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

[2] NorthPoint currently operates DSL-based local networks in 24 major metropolitan areas and will expand its service to 28 metropolitan areas by the end of 1999. Upon completion of that expansion, NorthPoint's DSL network will pass 4 million businesses and 30 million homes. NorthPoint provides DSL-based Internet access service -- at speeds up to 1.5 Mbps, more than 25 times faster than common dial-up modems -- on a wholesale basis to national and regional Internet service providers, other competitive LECs, long distance carriers, value-added resellers, and other partners.

the Telecommunications Act of 1996 ("1996 Act"): fostering innovation and competition in the telecommunications marketplace.[3]

The Commission significantly furthered these goals when it concluded in the *Advanced Services Order* that incumbent LECs offering DSL services are subject to the pro-competition provisions of Section 251 of the Act. For the reasons discussed below, the Commission should reaffirm that, regardless of whether DSL is exchange access or exchange service, NorthPoint and other competitive DSL providers are entitled to access to unbundled network elements under section 251(c)(3) of the Act, as well as to the resale and collocation rights set forth in sections 251(c)(4) and (6). US West does not and cannot dispute that it provides both exchange services and exchange access, and that it, therefore, is an incumbent LEC. As such, it is subject to all of section 251's obligations that apply to telecommunications services, including the DSL services provided by NorthPoint and other competitive LECs.

The Commission thus has a sound basis for reaffirming its *Advanced Services Order* without having to delve into the issue of whether DSL constitutes "exchange service" or "exchange access." Although US West made much of this issue on appeal, it is largely a red herring. To the extent the Commission determines that it is necessary to decide this issue, however, it may also reaffirm the *Advanced Services Order* by finding that DSL services are exchange access services, and, consequently, an incumbent local exchange carrier is subject to all of the market-opening obligations imposed by Section 251 in connection with its provision of those services. The text of the statute, Commission precedent, and the pro-competitive objectives of the 1996 Act strongly support this conclusion. The position advanced by U S West

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[3] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24012, at ¶ 1 (1998).

on appeal, in contrast, would create artificial regulatory classifications based on particular technologies, a result clearly neither mandated by the statute nor intended by Congress.

I. REGARDLESS OF WHETHER DSL IS EXCHANGE SERVICE OR EXCHANGE ACCESS, DSL CARRIERS SUCH AS NORTHPOINT ARE ENTITLED TO NONDISCRIMINATORY ACCESS TO UNBUNDLED NETWORK ELEMENTS, RESALE, AND COLLOCATION BECAUSE THEY ARE PROVIDERS OF TELECOMMUNICATIONS SERVICES

US West does not and cannot dispute that it provides both exchange access and exchange services over its local telecommunications networks. US West and the other Bell Operating Companies ("BOCs") are therefore incumbent local exchange carriers under the plain meaning of the Act[4] and are subject to the obligations imposed by sections 251(b) and 251(c) of the Act.

US West appears to contend, however, that those obligations, especially the market-opening requirements of section 251(c), only apply to telecommunications services that it offers that are exchange or exchange access. As a result, it devoted most of its arguments on appeal to its claims that DSL services are not exchange or exchange access services. The premise of these arguments, however, finds no support in the statute.

The Act's definition of "local exchange carrier" is straightforward: it is "any person that is engaged in the provision of telephone exchange service or exchange access."[5] US West cannot be a LEC for one particular telecommunications service offering and not a LEC for another. If this were Congress's intent, it could easily have defined "local exchange carrier" as "any person

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[4] The Act defines incumbent local exchange carriers, to mean, with respect to an area, the local exchange carrier that "(A) on the date of enactment of the [1996 Act], provided telephone exchange service in such area; and (B) ... on such date of enactment, was deemed to be a member of the exchange carrier association, pursuant to section 69.601(b) of the Commission's rules." 47 U.S.C. § 251(h)(1). This definition includes an entity that becomes a successor or assign of a member of the exchange carrier association. *Id.* at § 251(h)((1)(B)(ii).

[5] 47 U.S.C. § 153(26).

to the extent he is engaged in the provision of telephone exchange service or exchange access." Similarly, Congress could have simply qualified the first sentence of section 251(c) to state that "each incumbent local exchange carrier has the following duties *in offering telephone exchange service or exchange access*." But Congress chose neither of these options. Rather, it imposed on US West and other incumbent LECs the obligation to offer access to unbundled network elements, pursuant to section 251(c)(3), without regard to whether the element is used to provide exchange or exchange access service.[6] Further, under section 251(c)(4), Congress required incumbent LECs to make available at wholesale rates any retail "telecommunications service," without regard to whether the service is an exchange or exchange access service.

Moreover, the debate over whether DSL service is an exchange or exchange access service is irrelevant to the right of NorthPoint and other DSL providers to obtain access to the unbundled network elements, primarily, loops and transport, that they need to provide their DSL services. Section 251(c)(3) requires incumbent LECs to provide access to such network elements to "any requesting telecommunications carrier for the provision of a telecommunications service."[7] US West does not appear to dispute its obligation to provide access to loops and transport, since even under US West's statutory interpretation those elements are used to provide exchange and exchange access services. Further, there does not appear to be any serious debate that NorthPoint is a telecommunications carrier and DSL is a

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[6] Thus, contrary to US West's arguments in this proceeding, the Commission properly concluded in CC Docket No. 96-98 that it has authority to require incumbent LECs to offer access to DSLAMs as unbundled network elements in "limited circumstances," pursuant to section 251(c)(3). *See FCC Promotes Local Telecommunications Competition – Adopts Rules on Unbundling of Network Elements*, Report No. CC 99-41 (released Sept. 15, 1999).

[7] 47 U.S.C. § 251(c)(3).

telecommunications service, whether or not it is an exchange or exchange access service.[8] The Commission made this clear in its *Advanced Services Order*, concluding that

> "advanced services are telecommunications services. The Commission has repeatedly held that specific packet-switched services are 'basic services,' that is to say, pure transmission services. xDSL and packet switching are simply transmission technologies. To the extent that an advanced service does no more than transport information of the user's choosing between or among user-specified points, without change in the form or content of the information as sent and received, it is 'telecommunications,' as defined by the Act. Moreover, to the extent that such a service is offered for a fee directly to the public, it is a 'telecommunications service.'"[9]

US West does not dispute this conclusion, nor can it.

In sum, even under US West's reading of the statute, NorthPoint and other competitive DSL providers are entitled under section 251(c)(3) to access to unbundled network elements that are unquestionably used by an incumbent LEC to provide exchange and exchange access service, as well as to the resale rights under section 251(c)(4). In addition, US West and other incumbent LECs are required under section 251(c)(6) to provide DSL carriers the opportunity to collocate equipment, including digital subscriber line access multiplexers ("DSLAMs") needed to obtain access to the unbundled network elements.

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[8] The Act defines "telecommunications service" as the "offering of telecommunications for a free directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). "Telecommunications" is defined as the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form of content of the information as sent and received." *Id.* at § 153(43). "Telecommunications carrier" is defined as "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services ...." *Id.* at § 153(44).

[9] *Advanced Services Order*, 13 FCC Rcd 24011, at ¶ 35 (footnotes omitted). *See also GTE DSL Order*, 13 FCC Rcd 22466, at ¶ 20 (1998) ("Under the definition of information service added by the 1996 Act, an information service, while not a telecommunications service itself, is provided *via telecommunications*. . . . [B]ecause information services are offered via telecommunications, they necessarily require a transmission component in order for users to access information.").

II. TO THE EXTENT THE COMMISSION DETERMINES THAT IT IS NECESSARY TO ADDRESS THE ISSUE, DSL SERVICE IS AN "EXCHANGE ACCESS" SERVICE UNDER THE COMMUNICATIONS ACT

A. THE WORDING OF THE ACT AND FCC PRECEDENT SUPPORT A FINDING THAT DSL IS EXCHANGE ACCESS

As discussed above, the Commission has a strong basis for reaffirming the *Advanced Services Order* without having to reach the issue of whether DSL is "exchange service" or "exchange access." To the extent it deems it necessary to reach this issue, however, the Commission also has a sound basis for finding that an incumbent LEC is engaged in the provision of exchange access service when it provides DSL and other advanced services to the public and, consequently, is subject to the obligations set forth in sections 251(b) and (c) of the Act with respect to the facilities used to provide those services as well as retail advanced services.

Section 153(26) of the Act defines "local exchange carrier" as "any person engaged in the provision of telephone exchange service or exchange access."[10] Section 3(16) of the Act defines "exchange access" as "the offering of access to telephone services or facilities for the purpose of the origination or termination of telephone toll services."[11] Section 3(48), in turn, defines "telephone toll service" as "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."[12]

Incumbent LEC DSL services satisfy the definitions of "exchange access" and "telephone toll service." DSL services offer access to telephone services or facilities (*i.e.*, the local loop and

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[10] 47 U.S.C. § 153(26).

[11] 47 U.S.C. § 153(16).

[12] *Id.* at § 153(48).

other components of the incumbent LEC's local exchange network) that originate and terminate traffic from the subscriber to points in different exchange areas, typically to information services located on the Internet via an Internet Service Provider ("ISP"). Moreover, the subscriber pays a separate charge for DSL services, in addition to the rate paid for local exchange service.

In its brief on appeal, U S West strained to avoid this reasonable reading of the statute by arguing that DSL service is not exchange access, because it does not involve "the origination or termination of telephone toll services." Specifically, U S West contended that "telephone toll service" refers only to "ordinary telephone-to-telephone long-distance calling."[13] The statute, however, defines "telephone toll service" as "telephone service between stations in different exchange areas." To be sure, in the past, including at the time this definition was enacted in 1934, telephone service between different exchanges was limited to long distance voice calls between telephone handsets. But, this historical fact does not mean that the Commission is required to define the phrase "telephone service between stations" on the basis of technologies that existed in 1934. That approach would lead to the absurd result that "telephone toll service" means operator-directed communications between two end users who employ hand-cranked phones.

Rather, the Commission has the discretion and duty to interpret that phrase in light of current telecommunications technology.[14] In today's telecommunications world, "telephone service between stations in different exchange areas" encompasses not only traditional long-

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[13] U S West Brief at 28.

[14] *See Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1475 (D.C. Cir. 1984) ("The drafters of the Communications Act ... designed the statute to 'avoid the necessity of repetitive legislation,' by arming the Commission 'with sufficiently elastic power such that it could readily accommodate dynamic new developments in the field of communications.'") *quoting Computer and Communications Industry Association v. FCC*, 693 F.2d 198, 213 (D.C. Cir. 1982) and *General Telephone Co. v. United States*, 449 F.2d 846, 853 (5th Cir. 1971)).

distance voice service, but also data traffic between more advanced "stations," such as fax machines and computers. Moreover, as we discuss below, in addition to carrying data traffic, DSL is capable of transmitting voice communications between ordinary telephone handsets. U S West's effort to distinguish DSL service from "ordinary telephone-to-telephone long-distance calling" consequently collapses under its own weight. The Commission should reject its transparent attempt to escape its obligations under section 251 through artificial distinctions based on technology.

Categorizing DSL as exchange access for purposes of Section 251 is also consistent with the Commission's October 1998 finding that GTE's DSL service is a special access service that is properly tariffed at the federal level.[15] Section 69.2 of the Commission's rules defines "access service" as including "services and facilities provided for the origination or termination of any interstate or foreign telecommunications."[16] As explained by the Commission in its *GTE DSL Order*, there are two categories of access service: switched access services, which use local switches to route originating and terminating interstate toll calls; and special access services, which generally provide a dedicated path between an end user and a termination point within the local exchange carrier's service territory to form part of an interstate private line service. The Commission concluded that GTE's DSL service is a special access service, like the point-to-point private line service high volume telephony customers purchase for direct access to an interexchange carrier's network, because it provides end users with direct, dedicated access to their selected ISPs. Hence, the Commission may reasonably conclude that DSL is "exchange access" for purposes of sections 251(b) and (c) for the same reason that it found that DSL

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[15] *GTE DSL Order*, 13 FCC Rcd 22466 (1998).

[16] 47 C.F.R. § 69.2.

qualifies as an access service under Section 69.2 of the its rules -- DSL is used to originate and terminate traffic in different exchange areas.

There consequently is strong support for classifying DSL as an exchange access service. The Commission was thus correct in imposing the obligations set forth in Sections 251(b) and (c) of the Act on incumbent LECs that offer DSL services, and ruling that competitive LECs are entitled to interconnection to these services under Section 251(c)(2).

B. US WEST'S CLAIM THAT DSL IS "INFORMATION ACCESS" IS MERITLESS

In its brief on appeal, U S West attempted to draw a distinction between "ordinary telephone-to-telephone long-distance calling" and the data traffic transmitted by DSL to ISPs and internet sites. According to U S West, the former constitutes "exchange access" subject to section 251's obligations on incumbent LECs, while the latter constitutes "information access" falling outside of these obligations.[17] This claim, however, is contrary to a reasonable reading of the statute and would undermine its pro-competitive purposes.

Section 3 of the Act defines its key terms. That section contains the operative definitions of "local exchange carrier," "exchange access," and "telephone toll services," which in turn define the fundamental scope of the obligations of section 251(b) and (c). Significantly, section 3 does not contain a definition of the term "information access." Nor does this term appear in sections 251(b) or (c). It would be peculiar for Congress to omit any mention of "information access" in these provisions if, as U S West claims, Congress intended for this term to play such a central role in defining the applicability of the fundamental obligations established by the 1996 Act to open local telecommunications networks to competition.

[17] U S West Brief at 27-29.

Congress was aware of the distinction between different services that employ telecommunications and telecommunications services. Indeed, section 3 of the Act defines both "telecommunications services" and "information services" as mutually exclusive categories.[18] But, Congress chose *not* to draw such distinctions for purposes of *access* services. Section 3 sets forth one general category of these services: exchange access. It is consequently reasonable for the Commission to interpret this term as encompassing the transmission of traditional long-distance voice traffic as well as the transmission of voice and data traffic via DSL.

In its effort to avoid section 251's obligations, U S West makes much out of section 251(g) of the Act, which states that

> "each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment."[19]

U S West seizes on this language to argue that Congress drew a distinction between "exchange access" and "information access" for purposes of defining the scope of the obligations set forth in section 251(b) and (c). But, section 251(g) simply preserves the pre-1996 Act status quo, pending any changes to that regime the Commission might adopt in implementing the new pro-competition measures established by the 1996 Act. That section certainly should not be read in a manner that undercuts the market-opening requirements of the Act.

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[18] 47 U.S.C. §§ 153(20) & (46).

[19] *Id.* at § 251(g).

Section 251(g)'s reference to both "information access" and "exchange access" is a vestige of the 1982 Modification of Final Judgment ("MFJ"), which, unlike section 3 of the Act, set forth definitions of both "information access" and "exchange access."[20] The MFJ required the BOCs to provide access to information service providers ("information access") and to interexchange service providers ("exchange access") that was equal in price, quality and type as that provided to AT&T.[21] US West claims that these judicially created concepts were incorporated into the 1996 Act to limit the scope of the obligations imposed in incumbent LECs by section 251(c).

As discussed above, the new 1996 Act's framework does *not* carry forward the MFJ's distinction between information access and exchange access in either section 3 or in sections 251(b) and (c). In fact, while the Act is replete with references to "exchange access,"[22] it uses the term "information access" only twice. The first such reference is in section 251(g), which, as discussed above, only serves to preserve the pre-1996 Act status quo pending the FCC's implementation of the Act. The only other reference in the Act to "information access" appears in section 274(h)(2)(A) and is similarly a remnant of the MFJ.[23] Section 274 sets forth the 1996 Act's framework for permitting BOCs to engage in electronic publishing, and its reference to "information access" simply makes clear that "electronic publishing" does not include "information access" as that term was defined in the MFJ. The Act's sparse references to

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[20] *United States v. American Telephone and Telegraph Co.*, 552 F. Supp. 131, 228-29 (D. D.C. 1982).

[21] *Id.* at 227.

[22] *See* 47 U.S.C. §§ 153(37), 251(c)(2), 251(g), 253(f), 259(d)(2), 260(a)(1), 261(c), 271(c)(1)(A), 271(g)(5) & (6), 272(e)(1)-(3), 276(a)(1), 276(b)(1)(B), 332(c)(7)(C)(i).

[23] 47 U.S.C. § 274(h)(2)(A).

"information access" show that Congress did not intend carry forward the distinction the MFJ drew between "information access" and "exchange access."

Moreover, the MFJ, issued in August 1982, preceded the adoption of the FCC's original access charge rules in 1983. In adopting these rules the Commission sought to distribute the costs of "exchange access in a fair and reasonable manner among all users of access service."[24] Further, the FCC recognized that enhanced service providers, a category that is made up almost entirely by providers of information services, are "among a variety of users of access service" in that they obtain "local exchange services or facilities which are used, in part or in whole, for the purpose of completing interstate calls which transit its location and, commonly, another location in the exchange area."[25] Against this background, it is reasonable to interpret the 1996 Act as similarly subsuming "information access" within the more general category of "exchange access" for purposes of implementing sections 251(b) and (c) such that an incumbent LEC's DSL service falls within their scope.

In its brief on appeal, U S West cited the Commission's *Non-Accounting Safeguards Order* in support of its contrived reading of section 251.[26] In that decision, the Commission concluded that section 272(e)(2) of the Act does not require a BOC to provide exchange access facilities or services to ISPs.[27] The Commission also noted the MFJ distinction between "exchange access" and "information access," and stated that ISPs "do not provide telephone toll

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[24] *MTS/WATS Market Structure, Memorandum Opinion and Order*, 97 FCC 2d 682, 711 (1983).

[25] *Id.*

[26] US West Brief at 29.

[27] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC 21905, 22023-24 (1996) ("*Non-Accounting Safeguards Order*").

services" and "do not use exchange access as it is defined by the Act."[28] U S West claims that this passage in the *Non-Accounting Safeguards Order* shows that an incumbent LEC's DSL service constitutes information access and is not subject to section 251's obligations.

As an initial matter, the discussion cited by U S West appears to be inapposite to an incumbent LEC's provision of DSL. In providing DSL, the incumbent LECs are not acting as ISPs or offering information services; rather, they are providing the "transmission component" over which the ISPs' information services are offered.[29] As such, they are engaged in the provision of a telecommunications service that can be reasonably be categorized as exchange access.

In any event, to the extent the *Non-Accounting Safeguards Order* suggests that exchange access can be used only by interexchange carriers and not by ISPs, that view is inconsistent with the Commission's historical approach to access and should be revised. As an historical matter, the Commission has not permitted use restrictions on incumbent LEC access services. Such access is offered on a switched or special basis to ISPs and interexchange carriers alike. When an ISP orders service to be used for the origination and termination of a switched interstate call, it may take advantage of a special exemption that permits it to pay business line rates rather than interstate access rates.[30] In contrast, when an ISP order special access, it orders out of the same tariffs, and pays the same rates, as an interexchange carrier. NorthPoint also notes that the *Non-*

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[28] *Id.* at 22024 & n.621.

[29] *See GTE DSL Order*, 13 FCC Rcd 22466, at ¶ 20 ("Under the definition of information service added by the 1996 Act, an information service, while not a telecommunications service itself, is provided *via telecommunications*. . . . [B]ecause information services are offered via telecommunications, they necessarily require a transmission component in order for users to access information.").

[30] *See Access Charge Reform,* 12 FCC Rcd 15982, at ¶¶ 341-48 (1997) (preserving exemption).

Accounting Safeguards Order was adopted prior to the explosive growth of DSL that has taken place in the past several years. As a consequence, certain aspects of that decision do not appear to reflect a full understanding of the nature of this service and the extent to which incumbent and competitive LECs would offer it as an exchange access service. Moreover, to the extent that the *Non-Accounting Safeguards Order* is interpreted to mean that ISP's utilize "information access," but not "exchange access," that reading appears to be inconsistent with the Commission's more recent conclusion that GTE's DSL service is an interstate special access service that must be tariffed by incumbent LECs at the federal level.[31]

To the extent it addresses the issue of whether DSL is exchange service or exchange access, the Commission should take this opportunity to eliminate any ambiguity created by the cited portion of the *Non-Accounting Safeguards Order*. The FCC should confirm that DSL services offered by incumbent LECs are exchange access services subject to the obligations set forth in sections 251(b) and (c) of the Act.

C. US WEST'S ATTEMPT TO DISTINGUISH "INFORMATION ACCESS" FROM "EXCHANGE ACCESS" WOULD LEAD TO RESULTS THAT ARE UNWORKABLE AND INCONSISTENT WITH THE 1996 ACT'S GOALS

Adopting U S West's argument that DSL constitutes "information access" separate and apart from "exchange access" for purposes of applying sections 251(b) and (c) would to lead to anomalous results. For instance, the distinction U S West seeks to impose on the statute will make less and less sense as carriers begin offering voice services as well as data services over DSL. The Commission has recognized that "'IP telephony' services enable real-time voice

[31] *GTE DSL Order*, 13 FCC Rcd 22466.

transmission using Internet protocols."[32] These services include "phone-to-phone" IP telephony that permit a customer to use the same telephone handset used to place an "ordinary" touch-tone call over the public switched telephone network. As such, the Commission has observed that this form of IP telephony bears the characteristics of "telecommunications services."[33] Imposing an artificial regulatory distinction between voice and data traffic and between "information access" and "exchange access" ignores these developments and would logically, but nonsensically mean that DSL is *both* exchange access and information access. The far more sensible interpretation of the Act is to treat DSL as exchange access for purposes of sections 251(b) and (c).

Another anomaly of U S West's interpretation of the Act is that it would mean that competitive DSL providers such as NorthPoint would no longer be classified as local exchange carriers because they would neither be providing telephone exchange services or exchange access. This, of course, is wholly inconsistent with the longstanding treatment of these entities as LECs.[34]

Still another problem with U S West's argument is that it erroneously asserts that DSL uses a wholly separate network than circuit-switched voice traffic. This certainly is not the case, as discussed above. To be sure, the two use different technologies. But they still share the same local network facilities, most importantly the local loop. The Commission most recently

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[32] *Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd 11830, at ¶ 84 (1998).

[33] *Id.* at ¶ 88-89.

[34] *See, e.g., Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 4761, at ¶ 53 n. 129 (1999) (reference to NorthPoint as a CLEC); *Bell Atlantic Telephone Cos. Tariff No. 1, Transmittal No. 1076*, 13 FCC Rcd 17883, at ¶ 6 (1998) (same).

recognized this fact in a proceeding that, among other issues, examines issues raised by line sharing. In that proceeding, the Commission stated that "ADSL-technology allows a high-speed data channel to run on higher frequencies above the frequency used for delivery of analog voice signals. By separating the line into a voice channel and an advanced services channel, such a line can carry both voice and advanced services traffic simultaneously . . . ."[35]

U S West cannot avoid the fact that incumbent LECs continue to have bottleneck control over these local telecommunications networks that are used for both advanced and traditional services. Without full implementation of section 251's market-opening measures, this control threatens to stifle competition and innovation in the deployment of DSL just as in the provision of "plain old telephone service." This is the overriding fact the Commission must keep in mind in interpreting the term "exchange access," not the fact that DSL uses a different technology than traditional services.

[35] *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* 14 FCC Rcd 4761, at ¶ 92 (1999) (footnote omitted).

III. CONCLUSION

For the reasons set forth above, the Commission should reaffirm that incumbent LECs offering advanced services are subject to the obligations set forth in section 251(b) and (c) of the Act.

RESPECTFULLY SUBMITTED,

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September 24, 1999

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I, Charles W. Logan, do hereby certify that on this day of September 24, 1999, I caused a copy of the foregoing Comments of NorthPoint Communications, Inc. to be served upon each of the parties listed on the attached Service List.

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