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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

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In the Matters of	)	
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
Petition of Bell Atlantic Corporation	)	CC Docket No. 98-11
	)	
For Relief from Barrier to Deployment of Advanced Telecommunications Services	)	
	)	
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

JOINT COMMENTS OF ADVANCED TELCOM GROUP, ALLEGIANCE, e.spire, INTERMEDIA, NEXTLINK AND WINSTAR

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24 September 1999

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JOINT COMMENTS OF ADVANCED TELCOM GROUP, ALLEGIANCE, e.spire, INTERMEDIA, NEXTLINK AND WINSTAR

Advanced TelCom Group, Inc.; Allegiance Telecom, Inc.; e.spire Communications, Inc. ("e.spire); Intermedia Communications, Inc. ("Intermedia"); NEXTLINK, Communications, Inc.; and Winstar Communications, Inc. (collectively the "Joint CLEC Commenters") hereby respond to the FCC's request for comments in its Public Notice in the above-captioned proceedings (DA-1853, September 9, 1999). In the Public Notice, the FCC seeks comment regarding issues of statutory interpretation surrounding the applicability of Sections 251(b) and (c) (and related provisions) of the Communications Act of 1934, as amended (the "Act"), to incumbent local exchange carrier ("ILEC") provision of advanced telecommunications services. The FCC makes these queries in order to address more fully its conclusions in its *Section 706 Decision*[1] in which the FCC concluded that provisions apply to advanced telecommunications services, which *Decision* is on voluntary remand from the U.S. Court of Appeals for the D.C. Circuit.[2] U S WEST's position represents yet another attempt to avoid the pro-competitive requirements of Section 251 of the Act, which, if sanctioned, would place significant obstacles in the way of the nascent development of competitive markets for advanced services. As amplified herein, the FCC should reject U S WEST's argument and confirm that, depending on the circumstances, ILEC advanced services are either "telephone exchange service" or "exchange access."

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1 *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Dockets No. 98-147, *et al.*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 15,280 (1998) *appeal pending.*

2 *U S WEST Communications, Inc. v. Federal Communications Commission*, CC Docket No. 98-1410 (D.C. Cir. Aug. 25, 1999) (order granting motion for remand).

Introduction and Summary

The Telecommunications Act of 1996 (the "1996 Act") was designed to promote competition in all telecommunications markets, not just traditional, circuit-switched voice telephony. As such, the 1996 Act does not promote voice over data services, circuit-switched over packet-switched services, narrowband over broadband technologies, or wireless over wireline services. The decision to embrace all technologies is reflected in the definitions that underlie the obligations of incumbent local exchange carriers ("ILECs"). The definitions of pivotal terms such as "telecommunications service," "telephone exchange service," "exchange access," and "network element" They simply do not draw distinctions among markets and services based upon technological characteristics. Rather, they are technologically neutral.

Congress wisely refused to draw technology-specific lines. In the context of the 1996 Act as a whole, it is easy to see why. Congress understood the potential for advanced telecommunications services to revolutionize communications and information services and even supplant some telephony offerings. For this reason, in Section 706 of the 1996 Act, Congress also required the Commission (and state agencies) to take steps to encourage the provision of advanced telecommunications services to all Americans. In order to ensure that such services are made available by numerous competitive providers and that consumers and businesses thereby receive the benefits of competition, Congress refused to create blanket limits on the obligations of ILECs to provide interconnection, unbundled network elements, resale services, and collocation that could be used by emerging carriers to provide advanced services. Rather, Congress wanted to ensure that new entrants for both traditional and advanced services had access to those facilities and services of ILECs critical to competitive participation in all wireline markets, including advances services. Otherwise, ILECs – with their significant legacy advantage in loops, central office facilities, and interoffice transport networks – would enjoy a

significant advantage in the new advanced services markets, which could be used to prevent competitors from obtaining a foothold in the service environment of the future.

Further Commission action in this proceeding should continue to reflect the technological neutrality of the 1996 Act. The FCC should not limit its decision to whether packet-switched services accessed by DSL loops (or other means) are "telephone exchange service" or "exchange access." Rather, the FCC should address the status of all packet-switched, advanced services.

The Joint CLEC Commenters submit that whether advanced, packet-switched services meet the definition of 'telecommunications" are either "telephone exchange services" or "exchange access services" varies depending on the circumstances in which they are provided. There is no language in Section 3(47)(A) of the Act –one of two definitions for "telephone exchange service" – supporting the notion that circuit-switching or voice transmission is a prerequisite. Rather, the key elements of the definition are that service originates and terminates in a defined geographic service area (*i.e*, the equivalent of an "exchange area") for which customers pay a non-distance sensitive (*i.e.*, single zone) local service charge. Local packet-switched services meet these prerequisites. While "any-to-any communications" – the ability of every subscriber to intercommunicate with every other subscriber – is not a prerequisite of telephone exchange service, packet-switched services would nevertheless meet such a requirement as end users on a packet-switched network are technically capable of communicating with any other user on the network or on any connected network with compatible technology.

Even if there were doubts that advanced packet-switched services meet the requirements of Section 3(47)(A), the expansion of the definition of "telephone exchange service" in Section 3(47)(B) dispels any lingering concern. This definition, added by Congress

in the 1996 Act, does not even require switching. In fact, any service provided over a system of switches, transport facilities *or other equipment* that allows a subscriber to originate or terminate a telecommunications service satisfies the definition.

The Act's definition of "exchange access" is in counterpoint to "telephone exchange service." Specifically, where a communication is between end points in two different telephone exchange service areas such that something other than the local service charge is assessed, the local providers on whose facilities the communication originates or terminates provides "exchange access." Non-local advanced services meet this requirement. Thus, ILECs are required, under Section 251(c)(2), to make their networks available for interconnection with the advanced services networks of requesting carriers where such interconnection will be used to facilitate the transmission and routing of "telephone exchange service" and "exchange access service."

Moreover, there is no need or purpose to be served by creating a new category of service – "information access" – to address the means by which information service providers ("ISPs") access the network, as U S WEST suggests. As described in the decisions U S WEST cites, "information access" (which was created for a limited purpose in the context of the AT&T Consent Decree), is an exchange telecommunications service, and not a separate category of telecommunications service in its own right. Rather, information access merely reflects the use of exchange services and facilities by a particular class of users, ISPs. There is no difference between the ways in which ISPs and other business customers access the public telecommunication network. Both use dedicated and switched access services for this purpose. What data or voice content ISPs might put on this circuit is irrelevant into what regulatory category the service falls. Therefore, the current regulatory constructs – "telecommunications

service" and "information service" (or "basic" and "enhanced service")[3] – adequately address the means by which ISPs access the network and the service they provide their customers. While what U S WEST calls "information access" may be comprised of elements of "information service" or "telecommunications service," it is not a category unto itself to which ILECs may retreat to avoid their Section 251 obligations.

Finally, the ILEC obligations of Sections 251(c)(2)-(4) are stated broadly in the Act and should – indeed must – be construed equally broadly. These statutory provisions are technology neutral and not limited to traditional, voice, circuit-switched services. The unbundling and resale obligations of Sections 251(c)(3) and (4) are *not limited* to the services that define local exchange services, *i.e.*, telephone exchange service and exchange access. Such use restrictions simply are not supported by the language of the Act. Congress used terms to create such use restrictions when appropriate, but in these sections used the broader term "telecommunications services." Indeed, Congress expressly rejected the Senate version of these ILEC obligations which were to a degree limited to "telephone exchange" and "exchange access" services, using the more expansive term "telecommunications services." Whenever the ILEC has a network function or capability used to provide a telecommunications services, that network element is a potential candidate for unbundling under Sections 251(c)(3) and 251(d)(2). Similarly, whenever an ILEC offers any telecommunications service to end users, that service must be available to resellers at a wholesale discount per Section 251(c)(4).

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[3] 47 C.F.R. § 64.702

Statement of Interest

The Joint CLEC Commenters are certificated providers of local exchange services and exchange access, including packet-switched telecommunications services. At least two of the Joint CLEC Commenters, e.spire and Intermedia, have negotiated and when necessary arbitrated a number of interconnection agreements regarding advanced services – specifically frame relay interconnection – with a number of the ILECs. The FCC's Public Notice, like the *Section 706 Decision* before it, raises important issues regarding the competitive environment for the provision of advanced services. The Joint CLEC Commenters will be adversely affected if the Commission too narrowly interprets the statutory terms at issue in this matter, thereby hindering two of the principal objectives of Congress in passing the Telecommunications Act of 1996 ("the 1996 Act"): making advanced services available to all Americans and promoting competition in all telecommunications markets.

I. ADVANCED TELECOMMUNICATIONS SERVICES CONSTITUTE EITHER TELEPHONE EXCHANGE SERVICE OR EXCHANGE ACCESS, DEPENDING ON THE CIRCUMSTANCES. (Public Notice, p. 2, ¶¶ 1-3)

As amplified herein, advanced services constitute "telephone exchange service" when used to originate and terminate transmissions within the same local service area. One example, though by no means the only one, is packet-switched services using a frame relay, ATM, or other protocol, accessed by end users over a digital subscriber line ("DSL") to complete communications to and from other end users in the local service area of the public packet-switched network. Similarly, when advanced services transmissions do not both originate *and* terminate inside the local service area, then local advanced services facilities serve a role indistinguishable from "exchange access" in traditional, circuit-switched networks. The FCC's finding in the *Section 706 Decision* that advanced services are "telephone exchange services or exchange access" properly recognizes that, depending upon the circumstances of any end-to-end

transmission, advanced services *are* one or the other. This is no different than in the traditional, circuit-switched network where, depending upon the end points of the communication, the same local network facilities support either telephone exchange service or exchange access.

A. U S WEST's Efforts to Narrow the Scope of Advanced Services Are Unjustified.

As an initial matter, the Joint CLEC Commenters wish to emphasize that advanced services may be used far more broadly than outlined in the Public Notice. U S WEST, in its Court of Appeals brief on review of the *Section 706 Decision*, assumes that DSL service will be used exclusively to provide access to the Internet.[4] While this is certainly one use to which the service may be put, DSL loops may be used by end users for a host of different broadband (as well as voice) applications that do not involve Internet access, such as electronic commerce between a supplier and vendors or high speed data communications between different branches of financial or other institutions.

More importantly, as the FCC noted in its *Section 706 Decision*, every end user whose traffic is routed on to a packet-switched network may use its DSL (or other) connection to that network to establish a communications link – a permanent virtual connection ("PVC") – with any other end user on that network or any interconnected network.[5] Thus, a single DSL connection, or any loop connection for that matter, to a packet-switched network is not dedicated to communications between two definite end points, in the way that a private line is. U S

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4 Brief of Petitioner U S WEST Communications, Inc., Case No. 98-1410 (D.C. Cir., filed May 17, 1999) ("U S WEST Brief ") at 10-11.

5 *Section 706 Decision* ¶ 42 and n. 73. Significantly, regardless of the type of loop used to access the packet-switched network, DSL or otherwise, this holds true. In the *Section 706 Decision*, the FCC made clear that DSL packet-switched service was being used in a representative capacity. (¶ 3. n. 6). The FCC should do so here as well.

WEST's Brief repeatedly implies as much,[6] but the reality is that a single access link, be it DSL or otherwise, to a packet-switched network may be used to originate or terminate communications to a host of destinations.[7] Indeed, a public packet-switched network not only is less dedicated than a private line, but even the circuit-switched network. In the circuit-switched network, a temporary dedicated channel is created whenever a communication is set up by the end users. In contrast, in a packet-switched network, all facilities – including the access links or loops – may be shared simultaneously by multiple end users and their communications.[8] A single end user using DSL-based packet-switched services might be using his loop *simultaneously* for data communications with a number of locations as well as for voice services.

In sum, DSL-based services and other advanced services are not limited to use for access to the Internet or ISPs. Thus, the FCC's analysis of whether such services constitute "telephone exchange service" or "exchange access" should proceed unimpeded by the fact that limited applications of DSL-based services (such as "virtually" dedicated Internet access) are possible.

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6 U S WEST Brief at 11, 12 ("the end user's DSL pipe always remains pointed to a locally predesignated party"), 25.

7 The only limitations is that a PVC must be established in advance for each such end-to-end user connection, which is a simple process as the Commission noted in the *Section 706 Decision* (n. 73). In fact, setting up a PVC between two endpoints is a keyboard operation that takes seven minutes or less. *See ex parte* of e.spire and Intermedia, CC Docket No. 96-98 (August 9, 1999) at 10. Once established, the PVC allows communications between the affected end-points at any time.

8 See *Section 706 Decision*, ¶ 6. It is possible that an end-user's packet switched connection will be targeted on only one location, thus mimicking a private line or special access, as with GTE's DSL service. *See* GTE Telephone Operating Cos., FCC 98-292, CC Docket No. 98-79 at 15, ¶ 25 (Oct. 30, 1998) (subsequent history omitted) ("GTE DSL Order"). However, the dedicated nature of such a connection is virtual only, and obscures the reality that the connection is carried over a public switched network whose facilities are shared by multiple users and transmissions at any given time. Unlike a true private line, a user with a PVC targeted to one location may use its link to reach any other end user in that network.

B. Advanced Services Meet the Definition of "Telephone Exchange Service."

The Act provides two definitions for telephone exchange service:

> The term "telephone exchange service" means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

47 U.S.C. § 153 (47). In response to the set of questions in the first two numbered paragraphs in the Commission Public Notice, advanced packet-switched services meets each of these definitions and constitute "telephone exchange service."

Before looking at each definition in detail, the Joint CLEC Commenters emphasize that the definitions are, by their terms, technology neutral. The definitions do not support the inclusion or exclusion of a service based on whether circuit-switching or packet-switching is used. Indeed, subsection (B) makes clear that switching is not even required: "service provided through a system of switches, transmission equipment *or other facilities* (or combination thereof)."[9]

Moreover, the definitions do not draw any distinction between voice and data services, nor should they, given that even the traditional circuit-switched network is used extensively for data transmissions. Finally, the definitions do not make any reference to whether digital or analog transmissions are used. Again, even the traditional circuit-switched network extensively incorporates digital transmission technology today. As the FCC properly observed

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[9] 47 U.S.C. § 153(47)(B)(emphasis added).

in its *Section 706 Decision*, the definition for telephone exchange service and the Act as a whole is technology neutral.[10]

Any effort to tie the definitions to a particular technology – which is not supported by the words Congress used – would render the 1996 Act obsolete and impotent in the starting block. As the FCC noted in the *Section 706 Decision*, all electronic communications "are becoming digital," and packet switching promises "a variety of new services and *vast improvements to existing service.*[11] Given that advanced services are supplementing and even supplanting traditional circuit-switched services, it only stands to reason that Congress would define the terms underpinning the carrier and ILEC obligations under the 1996 Act broadly, lest the legislation instantly be trivialized.

1. Section 3(47)(A). (Public Notice, p. 2, ¶ 1)

The first component of the definition is subsection (A) is "service within a telephone exchange, or within a connected system of telephone exchanges operated to furnish subscribers with intercommunicating service of the character ordinarily furnished to a single exchange" within the same exchange area.[12] Any telecommunications service that is offered to connect points, whether using packet-switched or circuit-switched technology, within a geographic service area defined by the serving area of a switch, provides service within an exchange area. Packet-switches, and systems of connected packet-switches, serve a defined geographic area and a defined set of potential subscribers within that area. As such, packet-switched services like circuit-switched services are provided within an exchange or system of connected exchanges.

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10 *Section 706 Decision* ¶ 11.

11 *Section 706 Decision*, ¶¶ 6-7 (emphasis added).

12 47 U.S.C. § 153(47)(A).

The fact that the "exchange area" for an advanced service might exceed the size of the exchange area in the traditional circuit-switched voice network is no impediment to finding such advanced service to be a "telephone exchange service." Much as the FCC found in its *Local Competition* proceeding that the determination of "what geographic areas should be considered 'local areas'" for reciprocal compensation purposes might vary depending on the service involved,[13] so too should the regulators interpret "exchange" and "exchange area" in light of the services and rate structures under evaluation. Nothing in subsection (A) supports the exclusion of a packet-switched service because its exchanges are not coterminous with those of traditional circuit-switched services.

The second interrelated part of the subsection (A) definition is that service within an exchange or system of connected exchanges must be "covered by the exchange service charge." This component is closely tied to the defined geographic service area that makes up the exchange area. Specifically, if there is a single zone (or non-distance sensitive) rate that covers communications anywhere within that geographic area, whether defined by a single exchange or a system of connected exchanges, then there is an "exchange service charge" for such area. Consequently, service that originates and terminates with that area is "telephone exchange service."

As an example, U S WEST's frame relay services generally are offered at a single rate LATA-wide, depending solely upon the number of PVCs loaded on to a user-to-network interface ("UNI"), regardless of the distance covered by the PVCs, provided only that each such PVC is defined by two end points within the LATA. Accordingly, the entire LATA serves as the

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13 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15,499, 16013-14 (1996) (subsequent history omitted) ("Local Competition Order") (local service area for reciprocal compensation purposes where a CMRS provider interconnects with a LEC is the Major Trading Area).

exchange area for that service. As such, state commissions addressing the issue have found the LATA boundaries defines the local exchange area for frame relay reciprocal compensation purposes.[14]

2. Section 3(47)(B) (Public Notice, p. 2, ¶ 2)

The definition in subsection (A) pre-dates the 1996 Act. In 1996, Congress added subsection (B) as an alternative definition, which defines "telephone exchange service" as including "comparable services provided through a system of switches, transmission equipment, *or* other facilities (or combination thereof) by which a subscriber can originate and terminate *a telecommunications service.*"[15] U S WEST focuses on the term "comparable service" to argue that subsection (B) describes only close substitutes for voice telephony.[16]

The language of subsection (B) does not support this constricted reading of "comparable service." As an initial matter, if that is what "comparable service" meant, there would have been no need to add the subsection. The existing language in subsection (A) would have been sufficient. Moreover, the language of (B), like (A), supports no limitation to voice telephony or a close substitute. In fact, (B) makes clear that "comparable service" may consist of

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14 *E.g., In the Matter of e.spire Communications, Inc., American Communications Services of Pima County, Inc., and ACSI Local Switched Services, Inc., for Arbitration with U S WEST Communications, Inc., of Interconnection Rates, Terms, and Conditions pursuant to 47 U.S.C. Section 252(b) of the Telecommunications Act of 1996*, Docket No. T-01051B-98-0406 *et al.*, Decision No. 61527 (Arizona Corporation Commission, February 19, 1999) at 7, 9-11 (intraLATA and interLATA traffic treated as equivalent to local and toll traffic, respectively) ("Arizona e.spire-U S WEST Decision"); *In the Matter of the Petition by e.spire Communications, Inc., and ACSI Local Switched Services, Inc.*, d/b/a *e.spire Communications for Arbitration of an Amendment to an Interconnection Agreement with WEST Communications, Inc., pursuant to Section 252(b) of the Telecommunications Act of 1996*, Findings of Fact, Conclusions of Law, and Order, Docket No. 98-382-TC (New Mexico State Corporation Commission, December 31, 1999) at 16-20, 29-30 (same) ("New Mexico e.spire-U S WEST Decision").

15 47 U.S.C. §153(47)(B) (emphasis added).

16 U S WEST Brief at 25.

a system without a switch altogether.[17] Thus, advanced services that exclude circuit-switching – assuming *arguendo* that subsection (A) applied only to circuit-switched services, *which it does not* – could still fall within the scope of "comparable service" and subsection (B). Furthermore, the fact that subsection (B) requires only that the service support the origination and termination of a "telecommunications service," strongly refutes any argument that "telephone exchange service" must be a voice service or a close substitute.

At bottom, the *sine qua non* of "comparable service" is that there is a service provided within a local exchange or its equivalent subject to a local exchange service charge. As noted above, this is the charge that permits communications within a defined service area, such service area to depend upon the technology and network architecture at issue. That these are the critical elements of telephone exchange service – defined geographic service area covered by a local service charge – is reinforced by the mutually exclusive definition of telephone toll service:

> Telephone toll service.--The term "telephone toll service" means 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.*

47 U.S.C. ¶ 153(48) (emphasis added).

This definition, along with the definition of "telephone exchange service" creates a dichotomy based solely on those two factors. It is these factors, given Congress's addition of subsection (B) in the 1996 Act, that form the real prerequisites for telecommunications services falling within the "telephone exchange service" definition.

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[17] For this reasons private line or special access services that originate and terminate in the same exchange area should be treated as "telephone exchange service."

3. U S WEST's rationale for restricting the scope of the "telephone exchange service" definitions to traditional services are unjustified. (Public Notice, p. 2, ¶ 1)

As noted above, U S WEST attempts to restrict "telephone exchange service" to two-way, circuit-switched voice communications. Certainly, it is true that prior to the advent of advanced services, and passage of the 1996 Act, decisions existed applying the pre-existing language now found in Section 3(47)(A) to voice services.[18]

However, none of those cases stated that voice telephony and only voice telephony meets the definition of "telephone exchange service" set forth in subsection (A). As the FCC stated in the *Section 706 Decision*, a finding that local, two-way switched voice service qualifies as a "telephone exchange service" is a far cry from holding that *only* local, two-way, switched voice offerings constitute"telephone exchange services."[19] By way of analogy, asserting that all dogs are mammals is not to say that all mammals are dogs.

Similarly, U S WEST's attempt to require "any-to-any communications" – the ability of every subscriber to intercommunicate with every other subscriber – as a necessary component of "telephone exchange service" also must fail.[20] The language of the statute does not support this limitation or the requirement that telephone exchange service be supported by a switch. Moreover, even if some basis for such qualification could be found in earlier FCC cases,[21] Congress's addition of subsection (B) eliminates such a requirement by mandating that a

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18 *E.g.*, *Southwestern Bell Telephone Company v. United States*, 45 F. Supp. 403 (W.D. Mo. 1942); *Northwestern Bell Telephone Company v. Consolidated Telephone Company*, 142 N.W.2d 324 (Neb. 1966).

19 *See Section 706 Decision*, ¶ 43.

20 *See* U S WEST Brief at 21.

21 *Offshore Tel. Co.*, 3 FCC Rcd 4137, 4142 (1988) (suggesting that under the pre-existing definition, telephone exchange service requires the ability to originate and terminate calls between two subscribers served by the exchange). The FCC's decision in this case cites (continued...)

"telephone exchange service" merely support the "origination and termination of *a telecommunications service*." 47 U.S.C. § 153(47)(B) (emphasis added).

Assuming *arguendo* that "any-to-any communications" were an absolute prerequisite, packet-switched advanced services would satisfy this condition. As the FCC noted in its *Section 706 Decision*:

> Every end-user's traffic is routed onto the same packet-switched network and there is no technical barrier to any end-user establishing a connection with any customer located on that network (or, indeed, on any network connected to that network).[22]

U S WEST, in its arbitrations with e.spire concerning frame relay interconnection readily acknowledged this capability of packet-switched services.[23] The number of PVCs a user sets up

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(...continued)

so many different factors that are not present when talking about advanced services (for example, service to only a particular group of industrial customers, no state certification, no local service revenues, and a tariff authorizing service only to a rig outside the state's territorial waters), that it is difficult to assess what was decisional in that case.

22 *Section 706 Decision* ¶ 42. The FCC also noted that establishment of such connection between end users are simple and straightforward. *Id.* n. 73.

23 For example, in the cross-examination of U S WEST's technical subject matter expert, Mark Schmidt, in e.spire's frame relay arbitration in Arizona, U S WEST acknowledged that any two customers on a frame relay network could set up a PVC between them and that multiple PVCs could be set up over the same link.

> Q. So if any two customers in one frame relay cloud wanted to intercommunicate with each other, they can inform the carrier of that, and a PVC could be set up over the shared network; is that correct?
>
> A. That is correct.
>
> Q. ... You say that "if a voice customer told U S WEST that PVC connection was required from their telephone to 'Aunt Sally's' telephone set, then every time the customer lifted the receiver off the telephone, a connection would be set up to 'Aunt Sally's' telephone- but to no other location." Mr. Schmidt, in the case where this customer has established multiple PVCs but only one of them is to Aunt Sally, that's not really true, is it?
>
> A. In your example, where a customer had multiple PVCs, then when they "picked up" their telephone set, they could select which other end of that PVC connection they chose to use.

Transcript of proceeding, Arizona Corporation Commission, Docket No. T-03596A-98-0406 *et al.*, Nov. 5, 1998, at p. 201, ll. 17-21 and p. 202 l. 22 to p. 203 l. 10.

(continued...)

on its access link is the subscriber's decision, not a defining characteristic of the system, as a PVC theoretically could be set up with every other subscriber. The fact that a traditional telephone subscriber uses her phone in a limited fashion over many years only to call Mom, for example, does not mean she is not receiving "telephone exchange service." Nor should the fact that most packet switched network end users choose to set up PVCs with a limited number of other end users disqualify advanced packet-switched services from the definition of "telephone exchange service."

Finally, a service need not be interconnected with the circuit-switched network in order to qualify as a "telephone exchange service."[24] There is no basis for this proposed limitation in the Act's definitions whatsoever. Such a requirement would be tantamount to mandating that the service under scrutiny itself be a circuit-switched service. This cannot be the case for the reasons cited above. Any doubt in this regard is removed by the fact that subsection (B) expressly eliminates any requirement that a qualifying service even be switched.

4. At least four States have concluded that frame relay packet-switched services meet the definitions of "telephone exchange service."

The FCC is not alone in finding that advanced, packet-switched services are "telephone exchange services" as that term is use in Section 251(c)(2) of the Act. At least four State Commissions have faced the same issue, Illinois, New Mexico, Colorado, and Arizona. In each case, the state arbitrator concluded that packet-switched services constitute "telephone exchange service." For example, in Intermedia's arbitration with Ameritech in Illinois, the ALJ concluded that:

(...continued)

[24] *See* U S WEST Brief at 19. *See* Public Notice at 2, ¶ 2.

> contrary to Ameritech's assertions, Frame Relay services fall under the broad definition of Section 3(a)(47). [sic] Frame relay services can be provided within a telephone exchange and there is "intercommunicating" between the subscribers for which there can be an exchange service charge. We are also of the opinion that Section 3(a)(47) [sic] includes frame relay, particularly as applied to offering within exchange boundaries. Thus, we believe that Ameritech's definition of telephone exchange service is too restrictive. A telephone in these times carries more than voice messages. A Frame Relay data service also has the ability to provide voice service and has evolved from "POTS" service.[25]

The Illinois proposed decision predated the *Section 706 Decision.* Since the FCC's order, three U S WEST states have looked at the same issue in the context of whether U S WEST must provide frame relay interconnection under Section 251(c)(2) for the purposes of transmitting and routing telephone exchange service and exchange access. In each case, after conducting its own analysis of the nature of frame relay packet-switched services. the state Commission found that U S WEST must do so. The New Mexico Commission, while acknowledging the existence of the *Section 706 Decision*, made its own independent decision that Section 251(c)(2) applies to frame relay interconnection:

> The [New Mexico] Commission's analysis of the FCC's language in its *Section 706 Order,* the context in which the FCC drew attention to its *Frame Relay Order*, and the logic and arguments put forth by e.spire have persuaded us that the provision of frame relay services is subject to the standards of Section 251(c)(2) of the Telecommunications Act of 1996.[26]

Similarly, in Colorado, the PUC concluded as follows:

> The FRN [Frame Relay Network] of U S WEST is a publicly offered network of advanced telecommunications services. Interconnection of the FRNs of e.spire and U S WEST should be accomplished in accordance with § 251(c)(2) of the Act. To

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25 *Intermedia Communications, Inc., and Illinois Bell Telephone Company (Ameritech Illinois)*, Docket No. 97 AB-002, Hearing Examiner's Proposed Arbitration Decision (Illinois Commerce Commission, June 16, 1997). This arbitration settled before the Illinois Commission was able to issue a final decision.

26 *New Mexico e.spire-U S WEST Decision* at 16.

> simply require e.spire to purchase retail NNI [network-to-network] interface services out of U S WEST's tariff would completely ignore e.spire's status as a CLEC. It would preclude carrier-to-carrier interconnection as envisioned by the 1996 Act.[27]

Similarly, the FCC should confirm that advanced, packet-switched services are "telephone exchange service" and that interconnection with such ILEC networks is governed by Section 251(c)(2).

C. Advanced Services Satisfy the Definition of "Exchange Access Service." (Public Notice, p. 2, ¶ 1)

As explained above, where advanced packet-switched services originate and terminate in the same exchange area – as defined by the serving area of the packet switch or system of switches and covered by a non-distance sensitive local charge – the service provided by the carrier (or interconnected carriers) involved qualifies as "telephone exchange service." Where packet-switched communications originate and terminate in two different exchange areas, the carrier(s) at the originating and terminating ends each provide the equivalent of exchange access service.

This interpretation falls squarely within the definitions of "exchange access." The Act defines "exchange access" to mean:

> the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.

47 U.S.C. § 153(16). In turn, "telephone toll services" is:

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[27] *In the Matter of the Petition by e.spire Communications, Inc., and ACSI Local Switched Services for Arbitration of an Amendment of an Interconnection Agreement with WEST Communications, Inc., pursuant to Section 252(b) of the Telecommunications Act of 1996*, Initial Commission Decision, Docket No. 98A-319T, Decision No. C98-1057 (Colorado PUC, October 29, 1998) (subsequent history omitted). *See also Arizona e.spire-U S WEST Decision at* 5-6 (finding Section 251(c)(2) applies to frame relay interconnection, relying principally on the FCC's *Section 706 Decision*).

> 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.

47 U.S.C. § 153(48).[28] In other words, "telephone toll" service is telecommunications between end users located in two different geographic areas, each area defined as an "exchange area" by the ability of end users within each area to intercommunicate per the equivalent of the local exchange service charge.

In such a situation, local packet-switched networks provide the same access function as do the LECs for traditional, circuit-switched calls. Namely, LECs operating local packet-switched networks offer interexchange carriers, either singly or in conjunction with another LEC, the equivalent of exchange access. Indeed, U S WEST, in its arbitrations with e.spire acknowledged that, for interLATA frame relay communications, it offered the equivalent of exchange access.[29] Furthermore, on the interstate level, U S WEST offers its frame relay services as exchange access services.[30]

In short, by virtue of the fact that advanced packet-switched services constitute "telephone exchange service" when each end points of a transmission is within a different geographic service area defined by the application of a non-distance sensitive service charge–

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28 U S WEST's contentions that "stations" means traditional telephones is unwarranted. The statute does not define station *per se*, but in the context of the definition of "station license," referring to radio stations, the Act refers broadly to "apparatus for transmission of energy, or communications, or signals. 47 U.S.C. §153(42). *GF.* 47 U.S.C. § 153(14) ("customer premises equipment" means "equipment employed on the premises of a person ... to originate, route, or terminate telecommunications").

29 *See, e.g.*, U S Communications, Inc.'s Reply Memorandum in Support of its Proposed Amendment Language, Arizona Corporation Commission Docket No. T-03021A-98-0406 (filed May 6, 1999) at 3 (arguing that, if the *Arizona e.spire-U S WEST Decision* applied to the interstate aspects of *frame relay interconnection*, "U S WEST will lose the ability to charge e.spire for the [frame relay] *exchange access service,* U S WEST provides to e.spire." (emphasis added)). The Arizona Commission held that its decisions applied to both interstate as well as intrastate aspects of frame relay interconnection.

30 *See generally* U S WEST Communications, Tariff FCC No. 5, § 8.

i.e., an "exchange" – the equivalent of "telephone toll" service is being provided. Where "telephone toll" service is provided, any carrier that provides origination or termination of such traffic is providing "exchange access." Thus, the FCC should confirm that advanced packet-switched service provided by a LEC for the origination or termination of an interexchange packet-switched communication is providing "exchange access."[31]

D. There is No Basis for Creating a New Category of "Information Access" Service. (Public Notice, p. 2, ¶ 3)

Advanced services are not, in and of themselves, "information services" or "information access," although they may be used to support the provision of either. U S WEST offers no precedential support for a category of "information access" service that is mutually exclusive of "telephone exchange service" or "exchange access." Nor does U S WEST offer any public policy basis for such a result. The only reason for the U S WEST attempt to create this category of service is to narrow its Section 251(c) obligations and strengthen, free from regulatory constraints, its grip on high speed access to the Internet, which the FCC should not countenance.

When local carrier facilities are used for purposes of accessing ISPs or the Internet, the local component of such services still falls within the category of "telephone

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[31] The FCC should also take the opportunity to confirm that, consistent with paragraph 191 of its *Local Competition Order* and Section 51.515(a) of its Rules, 47 C.F.R. § 51.515(a), applies equally to advanced services. In particular, where a carrier provides exchange access to other carriers, it is entitled to Section 251(c)(2) interconnection for such purposes, even where it is also providing exchange access to itself. *See Local Competition Order*, 115 FCC Rcd at 15,598-99. The need for this clarification is particularly urgent given the fact that the Colorado Commission, in the e.spire-U S WEST frame relay interconnection arbitration cited this part of the FCC's order to reach the exact opposite conclusion. *See In the Matter of the Petition by e.spire Communications, Inc., and ACSI Local Switched Services for Arbitration of an Amendment of an Interconnection Agreement with WEST Communications, Inc., pursuant to Section 252(b) of the Telecommunications Act of 1996*, Ruling on Application for Rehearing Reargument, or Reconsideration, Decision No. C99-748, Docket No. 98A-319T at 3-4. (Colorado PUC, July 8, 1999).

exchange service" or "exchange access." U S WEST contends otherwise, arguing that such advanced services fall within a wholly separate category of telecommunications called "information access."[32]

The lack of merit in U S WEST's assertions lies within the very decisions it cites to support its arguments. U S WEST cites the AT&T Consent Decree approved in *United States v. American Tel. & Tel. Co.* as the original source of the category of service called "information access."[33] Admittedly, the Consent Decree used the term, referring to the means by which information service providers accessed the local public network. However, the definition, which U S WEST cited selectively in its Brief, underscores the fact that "information access" was merely a subset of exchange telecommunications services:

> Specialized *exchange telecommunications services* by a BOC *in an exchange area* in connection with the origination, termination, transmission forwarding or routing *of telecommunications traffic* to or from the facilities of a provider of information service.[34]

The fact that "information access" is merely a form of telephone exchange service is underscored by another reference in the Consent Decree. Specifically, in Section II.A, the Consent Decree provided that BOCs must provide interexchange carriers and information service providers with non-discriminatory "exchange access, information access, *and exchange services for such access"* on a tariffed and nondiscriminatory basis.[35] The Decree did not create a new type of service category, "information access," distinct from "telephone exchange service" or "exchange access." Rather, the Consent Decree coined the term to facilitate implementation of the equal access and non-discrimination requirements being placed on BOCs under the Consent

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32 U S WEST Brief at 27.

33 *Id.* (quoting *United States v. American Tel. & Tel. Co*, 552 F.2d 131, 229 (D.D.C. 1982)).

34 *Id.* at 229 (emphases added).

35 *Id.* at 227 (emphasis added). *Accord* 47 U.S.C. § 251(g).

Decree. These obligations were intended to be coextensive with the prohibitions regarding BOC entry into the interexchange and information services markets explaining the use of the term "information access" by the Consent Decree. Accordingly, the reference to "information access" in Section 251(g) of the Act is not, as U S WEST contends, a preservation of a separate category of telecommunications service, but merely a continuation of the equal access provisions of the Consent Decree until superseded by subsequent FCC regulation.

The fact that "information access" is not a separate category of service is underscored by the fact that for many years ISPs have purchased network access out of state tariffs used by other end users. In its First Report and Order in the *Access Charge Reform* docket, the FCC maintained its access charge exemption for information service providers. The FCC stated that these providers should continue to be treated as end users, [36] recognizing that information service providers purchase intrastate services to enable their customers to access them from the same tariffs as other end users.[37] Thus, rather than supporting a separate category of service – the reason U S WEST cites this decision – the *Access Charge Reform* decision confirms that so-called "information access" is not anything other than telephone exchange service or exchange access. Indeed, reviewing an application very similar to the limited one described by U S WEST in its Brief, the FCC recently found DSL-based, dedicated Internet access to be tariffed a special access service.[38]

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36 *Access Charge Reform*, 12 FCC Rcd 15982, 16133-35 (1997) (subsequent history omitted).

37 *Id.* at 16134-35.

38 *GTE DSL Order*, *supra*, at 15, ¶25.

Similarly, in its *Non-Accounting Safeguards Order,*[39] the FCC did not acknowledge that "information access" is a distinct category of service. To the contrary, the FCC simply noted that information service providers do not themselves offer basic telecommunications to *their* customers.[40] However, in this situation, the issue is *not* what service ISPs provide to their customers, but what service ILECs provide to ISPs. In the *Non-Accounting Safeguards* decision, the FCC noted that there is an underlying telecommunications service component to any information services. Traditionally, the FCC has permitted information service providers to purchase access links to allow their subscribers to reach them from local telephone exchange service tariffs. This is appropriate as there is no difference between the ways in which ISPs and other business customers access the public communications network. ISPs use dedicated and switched access services, just like other business end user customers. What data or voice content ISPs might put on those circuits is totally irrelevant to the analysis of what type of underlying telecommunications service they use from a regulatory standpoint. All digital services put combinations of binary information on the network – the configuration, content and source of that information is irrelevant to the nature of the telecommunications service that provides them access to the network and their customers.

For these reasons, the FCC should not recognize "information access" service as a category separate from "telephone exchange service" or "exchange access" Indeed, to do so would allow ILECs to evade their Section 251(c) obligations in large part.

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39 *Implementation of the New-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 11 FCC Rcd 21905 (1996).

40 *Id.* at 22023-24.

II. SECTION 251(c) OBLIGATIONS APPLY TO ILECS GENERALLY IN THEIR PROVISION OF TELECOMMUNICATIONS SERVICES. (Public Notice, p. 2, ¶ 4)

The Public Notice seeks comment as to 'the proper scope of the requirements of Section 251(c) upon incumbent LECs generally and in their provision of advanced services specifically." *Public Notice*, p. 2. ¶ 4. As explained below, Section 251(c), by its plain terms, applies to all telecommunications services and facilities offered by an ILEC.

Section 251(c)(2), which sets forth an ILEC's interconnection obligations, applies specifically to use of that interconnection for purposes related to transmitting and routing "telephone exchange service" and "exchange access." However, the obligation goes to the interconnection with the ILEC's "network." While the term "network' is not defined by the Act, the derivative term "network element" is. *See* 47 U.S.C. § 153(29). "Network element" refers broadly to a facility or functionality used to provide a telecommunications service. As such, it is important to note that the only places in the Act where the term "network element" is used make reference to incumbent ILEC facilities. Accordingly, it is fair to assume that Section 251(c)(2) of the Act permits interconnection with any network facilities of an ILEC that are used to provide any telecommunications service, provided only that such interconnection is for the purpose of transmitting or routing telephone exchange service or exchange access.

A similar analysis applies to the Section 251(c)(3) obligations to unbundle network elements. As explained above, any facility or functionality of a telecommunications service that an ILEC provides is a network element, as defined in the Act, potentially subject to unbundling. The FCC recognized as much in the *Section 706 Decision.*[41] U S WEST does not

[41] *Section 706 Decision at* ¶ 11.

contest that advanced services are telecommunications services.[42] Thus, provided that a facility or functionality used to provide *any ILEC telecommunications service*, including advanced services, meets the condition of feasibility and the necessary and impair tests of Section 251(d)(2) – a matter not at issue in this proceeding – such facility or functionality must be unbundled.

The analysis of Section 251(c)(4) is even more straightforward. This provision makes clear that if an ILEC makes "*any* telecommunications service" available at retail to subscribers that are not telecommunications carriers, that service must be made available to resellers at a wholesale discount under Section 252(d)(3). Congress did not say "telephone exchange service." Certainly, Congress was specific when it intended a narrower meaning, as in Section 251(c)(2).[43] Thus, for example, when an ILEC tariffs DSL service at the federal level, that service must be made available for resale at wholesale discount rates, the fact that such service may not be considered "telephone exchange service" notwithstanding.[44]

U S WEST argues that when an ILEC provides services other than "telephone exchange service" or "exchange access," the ILEC is *not* acting as an ILEC and the service it provides is free from Section 251(c) regulation.[45] However, if Congress intended to limit the scope of the Section 251(c) obligations to something less expansive than "telecommunications

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42 Even the U S WEST suggestion that advanced services fall into an "information access" service comes with the acknowledgement that the service is telecommunications. *See* U S WEST Brief at 27 (citing *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 229 (D.D.C. 1982) (information access is "specialized exchange telecommunications" in connection with the transmission of "telecommunications traffic").

43 Requesting carriers are entitled to Section 251(c)(2) when interconnection to be used for purposes of transmitting and routing "telephone exchange service" or "exchange access."

44 As the FCC made clear in its *Section 706 Decision*, many advanced services, even when provided in a manner that fits the definition of "exchange access" service, will be offered to end users. (¶ 61). The FCC should confirm its tentative conclusion that even exchange access services, when offered primarily to end users, are subject to Section 241(c)(4).

service," it would have used the more narrow terms in the Act. In fact, the Senate version of what ultimately became the 1996 Act – S.652 – did attempt to limit part of the ultimate Section 251(c)(3) obligations in exactly this manner, but the Joint Conference Committee rejected this restriction when adopting the final statutory provisions, making clear that the scope of Section 251(c) is broader where the term telecommunications service is employed.[46]

Not only does the plain language of Section 251(c) support its broad application to ILEC-provided telecommunications services, but public policy dictates this result. All ILECs, most particularly the RBOCs and GTE, retain an overwhelming legacy advantage in their network in terms of loops, central office facilities, and interoffice transmission channels. These advantages give *any* telecommunications service that ILEC provides an inherent competitive edge. Section 251(c) was structured to neutralize that advantage in all telecommunications markets. Broad application of the Section 251(c) obligations to telecommunications services prevents the ILECs from leveraging that advantage when providing services other than those traditionally provided by LECs.[47] Accordingly, the Commission is fully justified, in addition to being obligated by the plain language of the statute, to apply the Section 251(c) obligations to all ILEC telecommunications services.

(...continued)

45 U S WEST Brief at 6. *See* 47 U.S.C. § 153(26) (definition of "local exchange carrier").

46 Under S.652, Section 251(b)(2) would have provided for "non-discriminatory access on an unbundled basis to any of the local exchange carrier's telecommunications facilities and information . . . necessary to the transmission and routing of *any telephone exchange service or exchange access*. S. 652, § 101 (104th Cong. 2nd Sess.)

47 Should the FCC conclude that an ILEC may provide advanced services through a properly structured affiliate such that the affiliate is not subject to Section 251(c) obligations, the FCC should also make clear that similar affiliates may be structured to provide other telecommunications services free from these obligations, with the exceptions of penalties-based "telephone exchange service" and "exchange access" service.

Conclusion

For the foregoing reasons, the FCC should affirm its conclusion in the *Section 706 Decision* that advanced packet-switched services – not just advanced services using DSL technology – provided by ILECs are either "telephone exchange service" or "exchange access" depending upon the circumstances. As such, ILECs are obligated to interconnect their advanced services networks with other local carriers under Section 251(c)(2). The Commission also should reject U S WEST's call to exempt itself from Section 251(c) obligations by creating a category of "information access" separate from "telephone exchange service" and "exchange access." This requested category of service is nothing more than the use of "telephone exchange service" or "exchange access" for purposes of Internet access and is not deserving of separate regulatory treatment. Finally, the Commission should find that the Section 251(b) and 251(c) obligations of the Act apply to all "telecommunications services" provided by an ILEC, as the plain language of the statute requires.

Respectfully submitted,

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