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	)	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 REPLY COMMENTS OF ADVANCED TELCOM, ALLEGIANCE, e.spire, INTERMEDIA, NEXTLINK AND WINSTAR

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October 1, 1999

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Advanced TelCom, 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") by their attorneys, hereby reply to the initial comments filed in response to the Commission's Public Notice (DA-1853, released Sept. 9, 1999) ("Public Notice"). The Commission should reject the contentions of U S WEST and other ILECs (GTE and SBC) (collectively, the "three ILECs") that the definitions of "telephone exchange service" and "exchange access" are limited to "plain old telephone service" or the "equivalent." Moreover, the Commission should give short shrift to the ILECs' arguments that the use of telephone exchange service or exchange access for connection to the Internet somehow transforms that service into a new category of service, i.e., "information access," that they assert should be free from regulation under Sections 251(b) and (c) of the Communications Act of 1934, as amended (the "Act").

As demonstrated in the record developed in response to the Public Notice, the definitions of "telephone exchange access" and "exchange access" cannot be confined to POTS-like services. To the contrary, the definitions encompass not only traditional, circuit-switched voice service but advanced telecommunications services as well. Moreover, despite their best efforts, the three ILECs have advanced one thin rationale for limiting all Section 251(c) ILEC obligations. They argue that when an ILEC uses its local network to provide a

telecommunications service other than telephone exchange service or exchange access, it is no longer acting as an ILEC. The Joint CLEC Commenters, as well as most of the parties filing initial comments, adequately explain why this argument is directly at odds with the plain language of Section 251(c).

In these Joint Reply Comments, the Joint CLEC Commenters reply to those arguments made by the three ILECs that are not already fully addressed in their initial Comments. Moreover, the Joint CLEC Commenters also respond to the Comments of COVAD, the sole competitive provider to suggest that "information access" should be recognized as a category of ILEC service distinct from "telephone exchange service" and "exchange access."

I. THE RECORD DEMONSTRATES THAT ADVANCED SERVICES MEET THE ACT'S DEFINITION OF TELEPHONE EXCHANGE SERVICE AND EXCHANGE ACCESS.

As the vast majority of commenters recognize, advanced services meet the Act's definition of "telephone exchange service" and "exchange access."[1] Those few Commenters that contend otherwise, including the three ILECs, merely recycle the arguments made by U S WEST in its Court of Appeals Brief. The Joint CLEC Commenters addressed these contentions in their initial Comments, and incorporate those herein by reference in response to the arguments of the three ILECs.

It is noteworthy, however, that U S WEST concedes that once a requesting carrier is interconnected with an ILEC under Section 251(c)(2) it may use that interconnection to provide all telecommunications services, including advanced services:

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[1] E.g., MGC Comments at 5-6; Northpoint Communications Comments at 7-10; AT&T Comments at 3; MCI WorldCom Comments at 12-16; CDS Networks Comments at 3-4; CoreComm Comments at 8-11; Prism Comments at 9-13.

> Of course, a carrier that properly obtains interconnection because it provides telephone exchange service or exchange access is not limited to using its interconnection arrangement to provide just those services. Such a carrier could, in compliance with Act, use the interconnection to provide advanced services as well.[2]

The Joint CLEC Commenters agree. By comparison, a carrier that is collocating equipment in an ILEC central office for purposes of interconnection or access to unbundled network elements may use that equipment for other purposes as well.[3] A requesting carrier should likewise be allowed to use a Section 251(c)(2) interconnection arrangement for broader purposes. The Joint CLEC Commenters have shown that an ILEC's advanced packet-switched services are telephone exchange services when used to originate and terminate communications among subscribers located within a local area. On this basis, a requesting carrier would be entitled to obtain interconnection under Section 251(c)(2) to exchange its packet-switched traffic with the ILEC in that area. Once interconnected, however, as U S WEST notes, the requesting carrier is entitled to use that Section 251(c)(2) interconnection for other purposes, such as originating or terminating traffic where the other end of the packet-switched communication is outside the "local" service, *i.e.*, exchange, areas. While the Joint CLEC Commenters submit, as do AT&T, MCI, and others,[4] that this particular situation qualifies as "exchange access," U S WEST concedes, quite correctly, in the scenario just described, any distinction between "telephone exchange service" and "exchange access" is irrelevant, provided the carrier is entitled to obtain interconnection under Section 251(c)(2).

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2 U S WEST Comments at 18.

3 *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report and Order and Further Notice of Proposed Rulemaking, 1999 FCC LEXIS 1327 (FCC 99-48, Mar. 31, 1999) ("*Collocation Decision*") at ¶¶27-29.

4 E.g., AT&T Comments at 3; MCI WorldCom Comments at 12-16.; Comments of Rhythms NetConnections at 19-21.

II. THE FCC HAS NEVER ESTABLISHED "INFORMATION ACCESS" AS A TYPE OF ACCESS SEPARATE FROM "EXCHANGE ACCESS."

SBC and GTE join U S WEST in contending that, where a DSL loop is used to provide dedicated access to an ISP, that connection is a species of access service called "information access" that is separate and distinct from exchange access.[5] However, the FCC stated clearly in its GTE DSL Order that such dedicated access[6] is *exchange access* – special access – and did not categorize such an arrangement as "information access."

If, as the three ILECs contend, the FCC had confirmed in earlier decisions such as the *Non-Accounting Safeguards Order* that dedicated ISP access is "information access" distinct from "exchange access," one would have expected the Commission to categorize GTE's DSL service in that manner. The fact that the FCC did not do so merely underscores that the references to "information access" service in the AT&T Consent Decree, in Section 251(g), and even in the Commission decisions cited by the three ILECs are merely residual language from the Consent Decree and nothing more. As MCI WorldCom notes, Judge Greene referred to information access in a classic "belts-and-suspenders" maneuver to prevent the RBOCs from arguing that data services were outside the scope of the decree.[7] Furthermore, assuming *arguendo* that GTE's DSL service and other similar services used to access ISPs are special access as the FCC found,[8] GTE itself acknowledges that special access is "exchange access."[9]

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5 E.g., SBC Comments at 8; GTE Comments at 8-11.

6 As the Joint Commenters explained in their comments, the dedicated nature of the GTE ADSL connection is "virtual" and not inherent in the packet-switching network used to create the circuit. *See* Joint CLEC Comments at 19-21. Several of the other parties confirm this. *E.g.*, AT&T Comments at 10-11.

7 *See* MCI WorldCom Comments at 15.

8 GTE Telephone Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148, 14 CR 279, 1998 FCC LEXIS 5594 (Oct. 30, 1998) at ¶25. The Joint CLEC Commenters do not agree with the finding in the GTE DSL Order that the service is jurisdictionally interstate, but will not argue that matter here.

Further, the three ILECs' arguments in favor of "information access" merely underscore their attempt to divert the FCC's attention away from the broad array of potential applications utilizing advanced packet-switched services. GTE, SBC, and U S WEST focus on "virtual" dedicated access to the Internet as the overwhelmingly predominant use for advanced services.[10] But in fact carriers are using advanced services to support voice communications in addition to a variety of non-dedicated data applications. Therefore, like subscribers to circuit-switched network services, subscribers of packet-switched services have the potential to reach any other subscriber on that network or any connected network, as the FCC has recognized.[11]

The Joint CLEC Commenters reiterate that the FCC should not limit its analysis to a narrow, "virtual" dedicated DSL application but must look more broadly at packet-switched services. As explained in the comments, e•spire and Intermedia have already conducted

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(…continued)

[9] GTE Comments, Attachment 1.

[10] SBC Comments at 4-5; GTE Comments at 7; U S West Comments at 7-8.

[11] Deployment of Wireline Services Offering Advanced Telecommunications Capability, First Report and Order and Further Notice of Proposed Rulemaking, 1999 FCC LEXIS 1327 (1999) ("*Collocation Order*") at ¶10. Covad contends that the services supported by packet-switched access do not include "telephone toll service," that such access, therefore, does not fall within the Act's definition of "exchange access," and that packet-switched access is not subject to the requirements applicable to exchange access under Section 252(c)(2)(A). As discussed above, however, the Act's definition of "telephone toll service" clearly includes packet switched services. Section 3(48) of the Act, 47 U.S.C. §153(48) ("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.") *See* Covad Comments at 4-5. Moreover, even if "telephone toll service" were interpreted as applying only to voice telephony, the requirement would still apply. The Commission's April 10, 1998, *Report to Congress on Universal Service* is replete with references to various forms of Internet telephony, all of which involve a subscriber fee or fees over and above the monthly fee for local telephone service. Federal-State Joint Board on Universal Service, 11 CR 1312, 1998 FCC LEXIS 1741 (1998) at ¶¶83-93. This reinforces the conclusion that the form of access involved fits squarely within the Act's definition of "exchange access": "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). As discussed above, the fact that the same access service can be used for more than one purpose does not remove it from the definition of exchange access.

arbitrations regarding frame relay interconnection in several states. Clear guidance from the FCC would assist the states in addressing the threshold questions of the applicability of Section 251(c)(2) to interconnection between advanced networks of various kinds.

III. THE PLAIN LANGUAGE OF THE ACT CONFIRMS THAT SECTION 251(C) OBLIGATIONS APPLY GENERALLY TO ANY ILEC TELECOMMUNICATIONS SERVICE.

The Public Notice makes clear that the FCC will address the broader issue of whether the ILECs' Section 251(c) obligations extend to advanced services.[12] Sprint agrees with the Joint CLEC comments that the plain language of Section 251(c) makes clear that these obligations generally do apply to advanced services.[13] The Joint CLEC Commenters agree, of course, that the applicability of the unbundling obligation of Section 251(c)(3), for example, is subject to the "necessary" and "impair" tests of Section 251(d)(2). Moreover, for an advanced service to be subject to the resale obligations of Section 251(c)(4), it must be a service offered at "retail to subscribers who are not telecommunications carriers."

The UNE remand order does not implicate the applicability of Section 251(c) to advanced services. The text of the UNE remand order is not yet released, but it is clear from the public meeting that the FCC did not say Section 251(c)(3) does not apply, but simply that the Commission did not feel compelled to order unbundling of packet switches and DSLAMS "at this time." Such language in no way precludes the Commission from ordering such unbundling later if conditions require. Thus, for example, the Commission initially refrained from requiring ILECs to permit the collocation of hybrid CLEC equipment that included switching or enhanced

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12 Public Notice at 2, ¶4.

13 Sprint Comments at 2; Joint CLEC Comments at 5-6.

service capabilities, but it later adopted such requirements.[14] Further, statements at the public meeting imply that the Commission will require that DSLAMs, an advanced services network element, be unbundled in situations where central office collocation space is exhausted. Furthermore, the Commission is requiring that loops capable of supporting advanced services be unbundled. Clearly, therefore, the FCC has already confirmed its conclusion in the *Section 706 Decision* that Section 251(c)(3) applies to advanced telecommunications features and facilities in the ILECs' networks.[15]

Similarly, the plain language of Section 251(c)(4) of the Act supports an affirmation of the *Section 706 Decision* that this provision applies to an ILEC's advanced telecommunications services. Specifically, an ILEC must offer at a wholesale discount any telecommunications service they offer on a "retail" basis to "subscribers that are not telecommunications carriers." 47 U.S.C. § 251(c)(4). GTE would like the FCC to read the qualification "*principally offers*" into this section, but that qualification simply does not exist.[16] If the service is offered at retail to non-telecommunications carriers, Section 251(c)(4) applies. Moreover, if the service is made available in a retail tariff, it must be made available to requesting resellers at a discount off that rate. Some carriers, such as Pacific Bell, offer frame relay service at a zero percent discount off the retail tariff rate to the resellers on the theory that the retail rate reflects the wholesale rate, because it is equal to the rate in Pacific Bell's tariff. The Joint CLEC Commenters submit that the ILECs should not be allowed to hide behind such sophistry. Rather, retail tariff rates that

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14 *Section 706 Order* at ¶¶26 and 28.

15 *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*, at ¶52 .

16 GTE Comments at 12.

match a purported "wholesale rate" are still subjected to an avoided cost analysis and cannot be hidden from scrutiny.

Furthermore, the fact that an ISP might integrate a telecommunications service – such as the means by which it accesses a public packet- or circuit-switched network – into its enhanced or information service, does not, as GTE suggests, pull that underlying service outside of the scope of "telecommunications service."[17] The fact that an ISP or other end user customer might incorporate the ILEC's retail offering into its own non-telecom service does not obviate the requirements that the underlying ILEC service is subject to Section 251(c)(4). The service remains a "retail" offering to non-telecom subscribers.

U S WEST uses the vast majority of its comments to explain that if one interpreted references in Sections 251(b) and (c) of the Act to LEC and ILEC "telecommunications services" to apply only to "telephone exchange service" and "exchange access," those sections would still make sense.[18] This is probative of one thing, namely, that the obligations of Section 251(b) and (c) *do* apply to "telephone exchange service" and "exchange access." U S WEST's verbose soliloquy cannot change the fact that these sections refer more broadly to "telecommunications service" (with the exception of Section 251(c)(2)) and the FCC must defer to the plain language.

Finally, GTE asks the FCC, if it finds the Section 251(c)(4) obligations extend to all ILEC telecommunications services, to forbear from enforcing these sections.[19] The FCC considered and rejected such requests in the *Advanced Services Decision*. In the coming century,

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17 GTE Comments at 12. GTE's contention that most subscribers to its ADSL service are ISPs is not creditable, *see id.* at 7, as GTE has described the service as a means for ISP *customers* to access their Internet providers.

18 U S WEST Comments at 6-21.

19 GTE Comments at 13-14.

high-speed data communications services will be more important than voice-only services, not less so.

IV. CONCLUSION.

The Commission should rule that the Act's definitions of "telephone exchange access" and "exchange access" apply to advanced telecommunications services, and that such services are subject to the requirements of Section 251(c) of the Act when provided by ILECs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Joint Reply Comments of Advanced Telcom, Allegiance, E.spire, Intermedia, Nextlink and Winstar were served via first-class mail, postage prepaid, this 1st day of October, 1999, on the following.

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