

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

RECEIVED

OCT - 1 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matters of)	
)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability)	
)	
Petition of Bell Atlantic Corporation	)	CC Docket No. 98-11
)	
For Relief from Barriers to Deployment of)	
Advanced Telecommunications Services)	
)	
Petition of U S WEST Communications, Inc.	)	CC Docket No. 98-26
For Relief from Barriers to Deployment of)	
Advanced Telecommunications Services)	
)	
Petition of Ameritech Corporation to	)	CC Docket No. 98-32
Remove Barriers to Investment in)	
Advanced Telecommunications Technology)	
)	
Petition of the Alliance for Public	)	CCB/CPD No. 98-15
Technology Requesting Issuance of Notice	)	RM 9244
of Inquiry and Notice of Proposed)	
Rulemaking to Implement Section 706 of)	
the 1996 Telecommunications Act)	
)	
Petition of the Association for Local)	
Telecommunications Services (ALTS) for a	)	CC Docket No. 98-78
Declaratory Ruling Establishing Conditions)	
Necessary to Promote Deployment of)	
Advanced Telecommunications Capability)	
Under Section 706 of the Telecommunications)	
Act of 1996)	
)	
Southwestern Bell Telephone Company,	)	CC Docket No. 98-91
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)	

**COMMENTS OF
FOCAL COMMUNICATIONS CORPORATION,
HYPERION TELECOMMUNICATIONS, INC., D/B/A
ADELPHIA BUSINESS SOLUTIONS
AND
KMC TELECOM INC.**

Patrick J. Donovan
Michael W. Fleming
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007
(202) 424-7500

Dated: October 1, 1999

Counsel for Focal Communications
Hyperion Telecommunications, Inc.
d/b/a Adelfhia Business Solutions
Corporation and KMC Telecom, Inc.

TABLE OF CONTENTS

SUMMARY i

A "BROADBAND OASIS" SHOULD NOT BE CREATED BY REGULATORY
RECLASSIFICATION 2

CONGRESS DID NOT ESTABLISH "INFORMATION ACCESS" AS A DEFAULT
CATEGORY 4

ADVANCED SERVICES ARE "TELEPHONE EXCHANGE SERVICE" 5

CONCLUSION 9

SUMMARY

Focal, KMC, and Hyperion agree with all the commenters that xDSL services are indeed "telecommunications services" under section 251. Furthermore, Focal, KMC, and Hyperion agree with the Commission's conclusion in the *Advanced Services Order* and elsewhere that all incumbent LEC telecommunications services constitute either "exchange" or "exchange access." The efforts of US WEST and other ILECs to transform references to "information access" in two portions of the 1996 Act which transition certain *Modification of Final Judgment* obligations to the Commission are utterly unfounded.

Focal, KMC, and Hyperion also firmly agree with NorthPoint, AT&T and other commenters that the Commission need not resolve whether xDSL falls into the exchange or exchange access category in order to carry out the Court's remand. Incumbents are fully obligated to discharge their section 251 obligations in respect to xDSL and other services regardless of which category applies to xDSL, and the Commission should so rule.

If the Commission does proceed to analyze which category is applicable to xDSL, then Focal, KMC, and Hyperion readily acknowledge that xDSL services constitute exchange access when they are used to carry interexchange traffic to an IXC point of presence (as occurs today when ILECs use HDSL to carry IXC traffic to POPs). In those cases, the xDSL would be used in connection with telephone toll services and meet the statutory definition of "exchange access." In all other cases, xDSL is necessarily part of an exchange service -- not exchange access -- because the underlying service does not meet the statutory definition of exchange access: "... the

offering of access to telephone exchange services or facilities for the purpose of the origination of telephone toll services."¹

Some commenters try to escape this conclusion by arguing the Commission has the authority to alter the definition of "telephone toll service" in section 153(48) by removing the phrase "telephone service between stations in different exchange areas" from the statutory definition, and thereby sweeping in all calls to ISPs utilizing xDSL.² Putting aside the conundrum of how the ISPs providing such "telephone toll service" could avoid being treated as carriers if such an action were taken, it is manifest the Commission cannot jettison plain statutory language in so sweeping a fashion. If the Commission does have any flexibility in construing section 153(48)'s definition of toll service, it at most could extend it to the use of xDSL for voice-over-IP interexchange traffic (or its equivalent) to and from an ISP. Defining all xDSL traffic to ISPs as "telephone toll service" -- including, for example, calls to ISPs over xDSL when only nearby cached information is queried -- would render the statutory definition meaningless.

As Focal, KMC, and Hyperion pointed out in their initial comments, ISDN, which provides "advanced data services" of 128 kps, squarely fits with the first prong of the statutory definition of exchange services. Accordingly, other comparable services, whether they are "dial-up" calls using modems (which independently qualify as exchange service under the first prong), or any of the various flavors of xDSL (which includes IDSL, which runs at the same speed as

¹ 47 U.S.C. sec. 153(40). *See also Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, 22024 (1996): " ... ISPs do not provide telephone toll services ..."

² Rhythms NetConnections at 17-18.

ISDN), clearly qualify as exchange services under the second prong of the statutory definition. Thus, except where xDSL is used to carry interexchange traffic to an IXC, such services plainly constitute exchange service.

Other commenters find authority in the Commission's "10% contamination" rule for treating all xDSL as exchange access.³ But this rule pertains only to the proper jurisdictional treatment of a high-capacity facility. It has nothing to do with determining whether the underlying high-capacity facility constitutes a special access service (in which case it is exchange access) or a private line service (in which case it is local service).⁴

Accordingly, without deciding which, the Commission should rule that xDSL services are clearly either exchange or exchange access, and conclude that US WEST's obligations under section 251 are unaffected by which category xDSL services fall into. If the Commission does address which category applies to xDSL, it should conclude that only xDSL services carrying interexchange traffic to IXCs voice telephone toll services constitute exchange access, and all others fall within the statutory definition of exchange service.

³ Rhythms NetConnections at 19-20.

⁴ GTE Comments, Attachment 1.

**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 Barriers 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
)	

**REPLY COMMENTS OF
FOCAL COMMUNICATIONS CORPORATION,
HYPERION TELECOMMUNICATIONS, INC., D/B/A
ADELPHIA BUSINESS SOLUTIONS
AND
KMC TELECOM INC.**

Focal Communications, Inc. ("Focal"), Hyperion Telecommunications, Inc., d/b/a Adelphia Business Solutions ("Adelphia"), and KMC Telecom Inc. ("KMC") respectfully submit these reply comments concerning issues raised by the voluntary remand of the *Advanced Services Order* in this proceeding.⁵

A "BROADBAND OASIS" SHOULD NOT BE CREATED BY REGULATORY RECLASSIFICATION

Chairman Kennard has spoken favorably of a "a broadband oasis, where anybody who wants to compete in this broadband marketplace and make the investment to deploy should be able to do so in an unregulated environment or a significantly deregulated environment."⁶ Focal, KMC, and Hyperion support the goal of a deregulated environment for the provision of telecommunications services. However, the wholesale immunization from Section 251 obligations that US West, SBC and other commenters seek in this proceeding by means of a regulatory classification of advanced services as "information access" would be the worst

⁵ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, CC Docket No. 98-147, FCC 98-188, released August 7, 1998 ("*Advanced Service Order*"). KMC, Focal, and Hyperion filed initial comments on September 24, 1999.

⁶ Remarks of William E. Kennard, Chairman, FCC at the National Association of Telecommunications Officers and Advisors 19th Annual Conference, "Consumer Choice through Competition," September 17, 1999, at 1.

regulatory mechanism for doing so.⁷ This mechanism would not permit the Commission to examine whether deregulation is warranted based on the factors that ordinarily warrant deregulation such as whether there is a competitive market for a particular advanced service. Nor would the Commission be able to examine whether the statutory standards for application of individual Section 251 obligations had been met. For example, the Commission would not be able to assess whether the unavailability as an unbundled network element of a particular network element used by ILECs in provision of advanced services would “impair” CLECs’ ability to provide advanced services.

Instead of the crude instrument of a sweeping regulatory reclassification, the Commission should use the tools that Congress intended for it to use in removing Section 251 obligations - forbearance under Section 10. Under that provision, the Commission must consider, *inter alia*, whether forbearance will promote competitive market conditions. In addition, the Congress made clear that the Commission may not forbear from application of Section 251(c) obligations until it has determined that those obligations have been fully implemented. In other words, in Section 10, Congress got it right as to what could justify removal of Section 251 obligations. Accordingly, the Commission should move toward the Chairman’s goal of a “broadband oasis” through the tools that Congress intended it to use, not the absurdity offered by ILECs that

⁷ In any event, Focal, KMC, and Hyperion do not believe that classifying advanced services as information access would be legally effectual in immunizing ILECs from Section 251 obligations. Focal, KMC, and Hyperion support the views of commenters that Section 251(c) obligations apply to all telecommunications services offered by ILECs not just “exchange access” or “telephone exchange service.” *See e.g.*, AT&T at 4; MCI WorldCom at 12; Covad at 9.

Congress never intended Section 251 obligations to apply to ILEC provision of advanced services.

CONGRESS DID NOT ESTABLISH “INFORMATION ACCESS” AS A DEFAULT CATEGORY

The Commission should reject the argument of US West, SBC, and others that advanced services that provide access to the Internet cannot constitute either “exchange access” or “telephone exchange service” and, therefore, must constitute “information access.”⁸ As noted by many commenters, “information access” is not a category that is defined in the Act or given any role in the key-market opening provisions of the Act.⁹ While Section 251(g) refers to “information access,” this reference was only for the purpose of continuing equal access obligations of the *Modification of Final Judgement* in effect until superseded by FCC regulations. There is no statutory foundation for “information access” as a separate category of ILEC services. It is simply too large a consequence to assume that under the Act the Commission may establish a new category of ILEC services exempt from Section 251(c) obligations absent an express provision to that effect, especially absent any showing that this would be consistent with the pro-competitive goals of the Act. Accordingly, even if it is correct as some commenters contend that DSL fits squarely within the definition of “information access” under the *Modification of Final Judgement*,¹⁰ that does not have any bearing on whether ILEC provision of advanced services are exempt from Section 251(c) obligations under the Act.

⁸ US West at 7-8; SBC at 2-7.

⁹ Rythms NetCommunications at 13.

¹⁰ Covad Comments at 7.

Focal, KMC, and Hyperion also agree with commenters who urge that, as a legal matter, advanced services must constitute either “exchange access” or “telephone exchange service.”¹¹ The best interpretation of the Act is that if facilities used by the ILEC are local, then the services they provide over them must constitute either “exchange access” or “telephone exchange service” under the Act. This is in accord with the Commission’s traditional view and was not altered by the 1996 Act.

In any event, as discussed below, Focal, KMC, and Hyperion submit that advanced services, including DSL service used by end users to access ISPs, constitutes “telephone exchange service.” Therefore, there is no basis for the conclusion that advanced services constitute “information access” because they do not fit into the statutory definitions of either “exchange access” or “telephone exchange service.”

ADVANCED SERVICES ARE “TELEPHONE EXCHANGE SERVICE”

The Commission should reject the view of some commenters that advanced services do not constitute “telephone exchange service.”¹² SBC contends that DSL service cannot constitute “telephone exchange service” under the Part A definition because DSL services do not begin and end “within a telephone exchange.”¹³ However, this is simply factually erroneous. DSL service originates and terminates locally even if any communications passing over it do not.

¹¹ MCI WorldCom at 12.

¹² *See, e.g.*, US West at 7; SBC at 3-6; GTE at 9.

¹³ SBC at 4.

Similarly, all of the DSL facilities are local. Accordingly, DSL service both originates and terminates “within a telephone exchange.”

SBC also contends that DSL is not an “intercommunicating” service and, therefore, cannot constitute “telephone exchange service.”¹⁴ SBC states that “DSL enables subscribers to connect only to their predesignated service providers.”¹⁵ This is manifestly incorrect in that DSL is used to connect users to corporate Intranets which are frequently in the local calling area and also permits users to send email to other users in the local area. In fact, in a separate proceeding Hyperion has submitted studies that show that the largest uses of connections to the Internet are for local communications.¹⁶ Thus, DSL provides an intercommunicating service within the local calling area.

SBC further contends that DSL cannot constitute “telephone exchange service” because that service is not covered by the exchange service charge.¹⁷ According to SBC, the exchange service charge is a carrier’s basic local calling charge.¹⁸ As noted above, DSL can be used for local intercommunicating. The DSL charge in those cases constitutes the “exchange service charge.” Therefore, DSL is covered by the exchange service charge for this service, although

¹⁴ SBC at 4.

¹⁵ *Id.* at 5.

¹⁶ *GTE Telephone Operating Cos. GTOC Transmittal No. 1148*, CC Docket No. 98-79, FCC 98-292, released October 30, 1998, *recon denied*, FCC 99-41, released February 26, 1999, Reply Comments of Hyperion Telecommunications, Inc., filed January 19, 1999. *See also* CDS Networks at 5-7.

¹⁷ SBC at 5.

¹⁸ *Id.*

the exchange service charge for DSL is different from the exchange service charge for voice calling.

The Commission should summarily reject SBC's claim that the "comparable" test under Part B of the definition encompasses essentially only voice services like CMRS service. SBC provides no support for this proposition. Moreover, it is far more likely that Congress intended to encompass the development of new advanced local services rather than limit "telephone exchange service" to current voice services. In addition, there is no support for SBC's assertion that Part B of the definition of "telephone exchange service" was included in the 1996 Act to accommodate new competitive entrants.¹⁹ Nothing in the Act or its legislative history suggests that was the purpose of the Part B definition. The original pre-1996 Act definition would have been fully adequate to define "telephone exchange service" provided by CLECs. Congress did not need to add the Part B definition in order to accommodate CLECs. In addition, ISDN services are frequently offered as local services and considered to be "telephone exchange service" under Part A of the definition. DSL services are comparable to ISDN services in being high speed data services and, therefore, meet the comparability test of Part B.

Focal, KMC, and Hyperion agree with those commenters that contend that advanced services constitute telephone exchange service under Section 3(47).²⁰ In particular, as pointed out by Focal, KMC, and Hyperion in initial comments, DSL service used to connect to ISPs is "telephone exchange service" under the part B definition because it is "comparable" to

¹⁹ SBC at 6.

²⁰ *See, e.g.,* Mindspring at 5; Prism at 12; GSA at 5.; AT&T at 8; Wisconsin PSC at 3.

“telephone exchange service” as defined in part A. Thus, DSL service can be used to intercommunicate with other subscribers in the same local area, DSL service is subject to the same charge throughout the DSL service area, and the DSL service originates and terminates in the local service area.

Focal, KMC, and Hyperion also point out that the *GTE DSL Order*²¹ does not provide any precedential value supporting characterization of DSL service as “exchange access service” under the Act. In that order, the Commission was interpreting and applying Part 69 of the rules, not statutory definitions. Moreover, private line services are dedicated services which can be local. Therefore, the Commission’s reasoning in the *GTE DSL Order* that DSL service is special access because it is dedicated is faulty since dedicated services can also be local.

In addition, Focal, KMC, and Hyperion also emphasize that the Commission has already determined that ISPs do not purchase exchange access service. Thus, as noted, in the *Non-Accounting Safeguards Order*, the Commission found that “... ISPs do not provide telephone toll services ..”²² Focal, KMC, and Hyperion submit that the absence of usage restrictions in federal access tariffs and the fact that ISPs may be able to take special access service out of a tariff does not mean that as a matter of statutory construction ISPs are receiving “exchange access service.” Accordingly, the absence of usage restrictions in federal tariffs does not convert them to “exchange access” under the Act even if ISPs are able to purchase them.

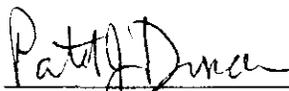
²¹ *GTE DSL Order*, 13 FCC Rcd 22466 (1998).

²² 11 FCC Rcd 21905, 22024 (1996).

The Commission should additionally reject US West's contention that advanced services are not subject to reciprocal compensation because they are interstate.²³ As noted, however, advanced services can be local. Moreover, for all the reasons advanced by Focal, KMC, and Hyperion in proceedings before the Commission, reciprocal compensation applies to connections to ISPs notwithstanding any view that calls to ISPs can be jurisdictionally interstate in some cases.

CONCLUSION

For these reasons, the Commission should determine that advanced services constitute "telephone exchange service" under the Act and not determine that advanced services constitute "information access."



Patrick J. Donovan
Michael W. Fleming
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007
(202) 424-7500

Dated: October 1, 1999

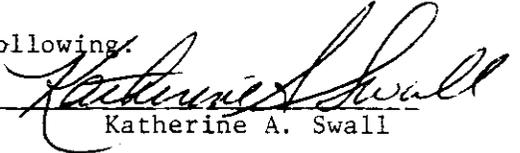
Counsel for Focal Communications
Hyperion Telecommunications, Inc.
d/b/a Adelpia Business Solutions
Corporation and KMC Telecom, Inc.

²³

US West at 15.

CERTIFICATE OF SERVICE

I, Katherine A. Swall, hereby certify that on this 1st day of October, 1999 the foregoing Reply Comments of Focal Communications Corporation, Hyperion Telecommunications, Inc., d/b/a Adelphia Business Solutions, and KMC Telecom were delivered by hand and first class mail to the following.


Katherine A. Swall

Magalie Roman Salas (orig +7)
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Glenn B. Manishin
Christy C. Kunin
Lisa N. Anderson
Stephanie A. Joyce
Blumenfeld & Cohen
Technology Law Group
1625 Massachusetts Avenue, N.W. - Suite
300
Washington, D.C. 20036

Jeffrey Blumenfeld
General Counsel
Rythms NetConnections Inc.
6933 So. Revere Parkway
Englewood, Colorado 80112

Mark C. Rosenblum
Stephen C. Garavito
James J.R. Talbot
295 North Maple Avenue
Basking Ridge, New Jersey 07920

David W. Carpenter
Peter D. Keisler
David L. Lawson
James P. Young
1722 Eye Street, N.W.
Washington, D.C. 20006

Janice Myles
Common Carrier Bureau
Policy and Program Planning Division
Federal Communications Commission
445 12th Street, S.W. - Room 5-C327
Washington, D.C. 20554

Alfred G. Richter, Jr.
Roger K. Toppins
Michael J. Zpevak
Tracy A. Parks
One Bell Plaza - Room 3021
Dallas, Texas 75202

International Transcription Service
1231 20th Street, N.W.
Washington, D.C. 20036

Thomas M. Koutsky
Jason Oxman
Covad Communications Company
3560 Bassett Street

Jonathan Jacob Nadler
Brian J. McHugh
Squire, Sanders & Dempsey, L.L.P.
1201 Pennsylvania Avenue, N.W.

Steven Gorosh
Michael Olsen
NorthPoint Communications, Inc.
303 2nd Street
San Francisco, California 94107

George N. Barclay
Associate General Counsel
Personal Property Division
Michael J. Ettner
Senior Assistant General Counsel
Personal Property Division
General Services Administration
1800 F Street N.W. - Room 4002
Washington, D.C. 20405

Earl W. Comstock
John W. Butler
Sher & Blackwell
1850 M Street, N.W. - Suite 900
Washington, D.C. 20036

Mitchell Lazarus
Counsel for CDS Networks, Inc.
Fletcher, Heald & Hildreth, P.L.C.
1300 North 17th Street - 11th Floor
Arlington, Virginia 22209-3801

Jeffrey Blumenfeld
General Counsel
Rythms NetConnections Inc.
6933 So. Revere Parkway
Englewood, Colorado 80112

Christopher A. Holt
Assistant General Counsel
Regulatory and Corporate Affairs
CoreComm Limited
110 East 59th Street - 26th Floor
New York, New York 10022

David N. Porter

Ruth M. Milkman
Charles W. Logan
Lawler, Metzger & Milkman, LLC
1909 K Street, NW - Suite 820
Washington, D.C. 20006

Snavely King Majors O'Connor & Lee, Inc.
1220 L Street, N.W. - Suite 410
Washington, D.C. 20005

Dave Baker
Vice President
Legal and Regulatory Affairs
MindSpring Enterprises, Inc.
1430 West Peachtree Street - Suite 400
Atlanta, Georgia 30309

Brad E. Mutschelknaus
Jonathan Canis
Edward A. Yorkgitis, Jr.
Kelley, Drye & Warren, LLP
1200 Nineteenth Street, N.W. - Fifth Floor
Washington, D.C. 20036

Glenn B. Manishin
Christy C. Kunin
Lisa N. Anderson
Stephanie A. Joyce
Blumenfeld & Cohen
Technology Law Group
1625 Massachusetts Ave. N.W. - Suite 300
Washington, D.C. 20036

James L. Casserly
Casey B. Anderson
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
701 Pennsylvania Avenue, N.W. - Suite 900
Washington, D.C. 20004

Richard S. Whitt

Kent F. Heyman, General Counsel
Scott A. Sarem, Assistant Vice President
Richard E. Heatter, Assistant Vice President
MGC Communications, Inc.
3301 N. Buffalo Drive
Las Vegas, Nevada 89129

Leon M. Kestenbaum
Jay C. Keithley
H. Richard Johnke
1850 M Street N.W. - 11th Floor
Washington, D.C. 20036

Randall B. Lowe, Chief Legal Officer
Julie A. Kaminski, Deputy Chief Counsel
Piper & Marbury,, L.L.P.
1200 19th Street, N.W. - Suite 700
Washington, DC 20036-2430

Gail L. Polivy
GTE Service Corporation
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036

Charles C. Hunter
Catherine M. Hannan
Hunter Communications Law Group
1620 I Street, N.W. - Suite 701
Washington, D.C. 20006

Lynda Dorff, Secretary
Wisconsin Public Service Commission
610 N. Whitney Way
P.O. Box 7854
Madison, Wisconsin 53707-7854

Alfred G. Richter, Jr.
Roger K. Toppins
Michael J. Zpevak
Tracy A. Parks
SBC Communications Inc.
One Bell Plaza, Room 3021
Dallas, Texas 75202

John F. Raposa
GTE Service Corporation
600 Hidden Ridge, HQE03J27
Irving, Texas 75038