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

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| Deployment of Wireline Services Offering Advanced Telecommunications Capability | ) ) ) | CC Docket Nos. 98-11, 98-26, 98-32, 98-78, 98-91, 98-147 |

## REPLY COMMENTS OF NETWORK ACCESS SOLUTIONS CORPORATION

On voluntary remand of its appeal of the FCC's Advanced Services Order to the Court of Appeals for the D.C. Circuit, U S West requests that the FCC find that (1) advanced services are neither "telephone exchange service" nor "exchange access service"; (2) therefore, when it provides advanced services U S West is not acting as an incumbent LEC; (3) and therefore, U S West is not subject to any obligations imposed on incumbent LECs by Section 251(c) in its role as a provider of advanced services. Each of these claims is highly questionable, and not one commenting party agrees with the entire chain of U S West's reasoning.

Adopting U S West's position would greatly imperil the market-opening goals of the 1996 Act by allowing incumbent LECs to evade their responsibilities under Section 251(c). Moreover, each of the specific forms of relief that U S West claims it wants -- freedom from certain unbundling and resale requirements -- can be achieved by other means.

## DISCUSSION

The advanced services at issue in this proceeding are high-speed wireline data transmission services. Their predominant use is for communications between Internet service providers ("ISPs") and their customers, and to a lesser extent between employers' computer networks and the home computers of their employees.

AT&T and others have explained in opening comments why they believe advanced services are telephone exchange service.[1] But even if advanced services are *not* exchange service, they clearly *are* exchange access service. Exchange access is a service that permits a customer to originate and terminate long-distance transmissions. It makes no difference whether that customer is an end user or a telecommunications carrier, as the Commission has acknowledged.[2] There are two forms of exchange access service. One form, switched access service, is provided to telecommunications carriers. It gives the end user customers of those carriers the ability to originate and terminate long-distance dialup calls. The other form of exchange access -- special access service -- is provided either to carriers or non-carriers. It provides a dedicated (*i.e.*, non-dialup) transmission path that permits end users to originate and terminate long distance transmissions with an always-on connection. Advanced service clearly is special access service since it permits end users to originate and terminate long distance transmissions with an always-on connection, and the Commission has so held.[3]

Even if U S West were correct that advanced service is neither telephone exchange service nor exchange access service (which it is not), the company's conclusion that it does not act as an

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1. *See, e.g.*, Comments of AT&T at 8-14

2. Implementation of the Local Comp. Provisions in the Telecomm. Act of 1996, *First Report and Order*, 11 FCC Rcd 15499, 15934 (1996) ("*Local Competition Order*").

3. GTE Tel. Oper. Cos., *Memorandum Op. and Order*, 13 FCC Rcd 22466 (1988). The Commission had previously stated that exchange access is available only to telecommunications carriers. *See* Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Commun. Act of 1934, as amended, *First Report and Order and Further Notice of Prop. Rule Making*, 11 FCC Rcd 21905, 22024 (1996). However, this view is inconsistent with the agency's later determination that advanced services are special access, and the Commission should clarify that it is no longer good law.

incumbent LEC in providing advanced service still is glaringly incorrect. Not surprisingly, not a single commenter agreed with U S West on that score. An entity is an incumbent local exchange carrier under the Act if that entity provided exchange service or exchange access service on the date of enactment of the 1996 Act regardless of whether the entity provides other services as well.[4] U S West indisputably provided exchange service and exchange access service on the date of enactment of the 1996 Act.

Even if the Commission had discretion to declare that U S West is not acting as an incumbent LEC when it provides advanced services (which it does not), it should not do so since the benefits of doing so are far outweighed by the dangers. U S West identifies only two benefits of a declaration that it is not an incumbent LEC in its role as a provider of advanced services: (i) freedom from the obligation to unbundle DSLAMs under Section 251(c)(3),[5] and (ii) freedom from the obligation to offer advanced services for resale under Section 251(c)(4).[6] But the FCC does not need to hold that U S West is not an incumbent LEC in its role of providing advanced services in order to achieve those two benefits. First, incumbent LECs are required to unbundle a given network

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4. *See* 47 U.S.C. § 251(h).

5. Comments of U S West at 19.

6. *Id.* at 20. U S West also argues that it has no duty to provide interconnection to a competitor offering advanced services. However, this argument does not depend on a finding that an incumbent LEC is not an incumbent LEC in its role as a provider of advanced services. Instead, it would be true if those services were neither telephone exchange service nor exchange access service as U S West contends. See 47 U.S.C. § 251(c)(2) (requiring interconnection only for the purposes of "transmission and routing of telephone exchange service or exchange access.").

element *only* if failure to do so would impair the ability of a competitor to provide service.[7] The Commission already has declined to require that incumbent LECs unbundle DSLAMs in most cases because it found that access to DSLAMs as an unbundled element is not required under this standard.[8] Second, incumbent LECs are required to offer for resale at wholesale discounts *only* those telecommunications services that are provided "at retail to subscribers who are not telecommunications carriers."[9] The Commission already has agreed to rule on whether incumbent LECs must offer advanced services at wholesale discounts for resale by competitors by applying this standard.[10]

Not only is it unnecessary for the Commission to hold that U S West is not an incumbent LEC in its role of providing advanced services in order to achieve the specific benefits that the company seeks, issuing that ruling would open a Pandora's box that would have far broader implications than simply providing the modest relief that U S West claims it deserves. For example, holding that an incumbent LEC is nonetheless not an incumbent LEC when providing advanced services might permit incumbent LECs to escape their obligation to make DSL-capable loops available on an unbundled basis. Issuing this ruling could have that effect by giving incumbent LECs the ability to claim that they use "DSL-capable loops" only in connection with the provision

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7. 47 U.S.C. § 251(d)(2).

8. *See* News Release, FCC Promotes Local Telecommunications Competition, FCC 99-238 (Sept. 15, 1999).

9. 47 U.S.C. § 251(c)(4).

10. *See* Bell Atlantic Revisions to Tariff F.C.C. No. 1 & 11, CC Docket No. 99-201, *Partial Suspension Order*, DA-1060 (rel. June 2, 1999).

of advanced services since not all voice-grade loops are DSL-capable.[11] Exempting incumbent LECs from the obligation to unbundle DSL-capable loops would effectively end the provision of advanced services on a competitive basis.

Holding that an incumbent LEC is not an incumbent LEC in its role of providing advanced services also might permit incumbent LECs to escape their obligation under Section 251(c)(5) to provide advance notice to the public of network changes that they make in order to accommodate their advanced services.[12] For example, U S West then might change the electrical characteristics of its advanced services without public disclosure in a way that produces widespread interference to competitors' advanced services, thereby effectively disabling any competitively provided advanced services.

Holding that an incumbent LEC is not an incumbent LEC in its role of providing advanced services likewise could permit incumbent LECs to escape their obligation to offer *other* telecommunications services to competitors for resale at wholesale discounts. For example, incumbent LECs currently have an obligation to permit the resale of intraLATA toll service.[13] But since intraLATA toll service is neither telephone exchange service nor exchange access service, an incumbent LEC might refuse to offer to sell its intraLATA toll service at a wholesale discount to

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11. See *Local Competition Order*, 11 FCC Rcd at 15691-92.

12. *See* Comments of U S West at 20 (asserting that a telephone company need not comply with the notice requirement in connection with its provision of advanced services).

13. *See* Public Utility Comm'n of Texas, *Memo. Op. and Order*, 13 FCC Rcd 3460, 3540 (1997) (Texas law does not overcome ILECs' obligation to resell intraLATA toll service under Section 251(c)(4)).

competitors on the theory that it does not act as an incumbent LEC in its role as an intraLATA toll carrier.

## CONCLUSION

The Commission should not hold that U S West is exempt from Section 251(c) in its role as a provider of advanced services for reasons set forth above.

Respectfully submitted,

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