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FEDERAL COMMUNICATIONS COMMISSION

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

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

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REPLY COMMENTS OF AT&T CORP. IN CONNECTION WITH COURT REMAND OF AUGUST 1998 ADVANCED SERVICES ORDER

Pursuant to Public Notice dated September 9, 1999 (DA 99-1853), AT&T Corp. ("AT&T") respectfully submits these reply comments on the issues raised in U S WEST's petition for

review of the Commission's *Advanced Services Order*,[1] which is on remand from the United States Court of Appeals for the District of Columbia Circuit.[2]

INTRODUCTION AND SUMMARY

The commenters are almost unanimous in their rejection of U S WEST's claims. As they recognize, DSL-based services are both "telephone exchange service" and "exchange access" under 47 U.S.C. §§ 153(47) & (16). Indeed, even the incumbent local exchange carriers ("ILECs") do not support U S WEST; GTE is the only other ILEC that filed comments supporting U S WEST's claim. Because DSL-based services are both "telephone exchange service" and "exchange access," Section 251(c) unquestionably applies to those services. The commenters are equally united, however, in their agreement that most of Section 251(c)'s duties would apply to DSL-based services and facilities *regardless* of whether they were "telephone exchange service" or "exchange access." By their plain terms, most of the provisions of Section 251(c) apply to a broader range of services than "telephone exchange service" and "exchange access."

The comments also starkly expose the bait-and-switch that U S WEST is attempting. U S WEST seeks sweeping regulatory relief for a broad (and undefined) set of services that use DSL capabilities, but its claims focus only on a single kind of DSL service involving connections to Internet service providers. As shown in the comments, even those services qualify as "telephone exchange service " and "exchange access." But as the commenters also demonstrate in detail, DSL

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[1]*Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147 et al., Memorandum Opinion and Order, 13 FCC Rcd. 24012 (1998) ("*Advanced Services Order*").

[2]*See U S WEST Communications Inc.* v. *FCC*, No. 98-1410, Order (D.C. Cir., August 25, 1999) (granting FCC motion for voluntary remand).

capabilities are used to provide a broad array of services, most of which are traditional local and long distance services. U S WEST effectively seeks sweeping deregulation of all ILEC services to the extent that they are provided over the next generation of technology; that request is contrary to the plain terms of the Act and should be rejected.

I. THE COMMENTERS OVERWHELMINGLY AGREE THAT DSL SERVICES ARE BOTH "TELEPHONE EXCHANGE SERVICE" AND "EXCHANGE ACCESS."

In its Comments, AT&T demonstrated that U S WEST's DSL services are both "telephone exchange service" and "exchange access," AT&T at 8-16, and the vast majority of commenters agree.[3] U S WEST has made no attempt here to remedy the deficiencies of the arguments it made in the D.C. Circuit, *see* U S WEST at 5-7, and the remaining comments convincingly demonstrate that DSL services are in fact "telephone exchange service" and "exchange access."

Telephone exchange service. First, the comments confirm that DSL service is "telephone exchange service" under Section 153(47)(A) because it is a telecommunications "service" that is provided "within a telephone exchange." 47 U.S.C. § 153(47)(A). Indeed, U S WEST concedes -- as it must, *see, e.g., Advanced Services Order*, ¶ 57 -- that "DSL and other advanced services constitute telecommunications services." US WEST at 5. Moreover, by averring that the "majority" of advanced services communications do not stay within a local exchange, U S WEST implicitly acknowledges that some DSL calls do stay within the exchange. *Id.* at 7; *see also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No.

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[3]*See* MCI WorldCom at 3-10; CoreComm at 8-14; Prism at 9-11; RCN at 4; Mindspring at 4-5; CDS at 4-7; Sprint at 2-4; Northpoint at 15-16; Level 3 at 7; Focal at 7-10; GSA at 5.

99-68, 14 FCC Rcd. 3689 (¶¶ 18, 36) (1999) ("some Internet traffic is intrastate"). As other commenters show, the practice of "caching" popular websites locally is increasing, and thus more and more DSL transmissions in fact terminate within the local exchange. *See, e.g.*, CDS at 5-7 (the "percentage of Internet communications that reach only a local cache is increasing rapidly," because of the need to avoid bottlenecks at the server and other remote interconnection points and because storage costs are declining faster than bandwidth costs).

Similarly, even if Section 153(47)(A) is read to require an "any-to-any" service within the exchange, the comments conclusively demonstrate that DSL capabilities satisfy that criterion. As MCI WorldCom makes clear (at 3), DSL "is a technology, not a service." Specifically, "DSL is simply a loop that has been conditioned to permit the transmission of intelligence on a digital basis at a high rate of speed." Sprint at 2. Thus, as MCI WorldCom notes (at 9 n.14), "an ADSL-equipped loop by itself cannot provide an end-to-end service between two end-users; the loop must be interconnected at the LEC central office to some type of switching or transport capability." That DSL-equipped loop can be used to provide many different kinds of services "[d]epending on the facilities to which the loop is connected." Sprint at 2. Those facilities can be packet-switched or circuit-switched; Sprint notes that Lucent has recently introduced a product that can carry 16 voice channels over a single DSL-equipped loop, which are routed to a conventional circuit switch. *Id.* at 3-4. In short, "DSL" is simply a high-capacity, high-speed loop that can be used in the provision of virtually any kind of telecommunications service.

Indeed, the commenters demonstrate in detail that DSL capabilities are in fact used today to provide many different kinds of services, including traditional local service. One kind of DSL service, High-bit-rate DSL (HDSL), is used primarily for DS-1 voice-grade local loop circuits,

which are used to make traditional *local* and long-distance voice calls. MCI WorldCom at 8-9; *see also* Sprint at 3 (HDSL "has been routinely deployed by ILECs for the past four years to provision T-1 lines," which are used for traditional local service). Similarly, although ADSL services are used predominantly today to connect end-users to ISPs, the ILECs' ADSL tariffs permit an end-user to connect to *any* packet-switched, ATM, or frame relay service, such as an IXC's packet-switched network. *See* Sprint at 3. And as AT&T showed, even U S WEST today offers a version of its ADSL service for ISP connections that is not "always on" -- *i.e.*, the end user must dial up an ISP for each Internet session and may get a busy signal, as with traditional POTS service. *See* AT&T at 11 & n.10. In addition, as one commenter notes, U S WEST itself has announced its intention to use DSL capabilities to offer traditional voice channels to end-users for as little as $10 per month. *See* CDS at 4 & n.5 (citing Chuck Moozakis, "DSL to Deliver Voice, Data," Internet Week (April 5, 1999)). As these examples make clear, DSL services are "telephone exchange service."

Finally, even if DSL services are not "telephone exchange service" under Section 153(47)(A), the comments show that they are undoubtedly "comparable" services under Section 153(47)(B).[4] As several commenters note, the ILECs have provided data services, such as fax, over POTS lines for many years. Such services are of course "telecommunications services," not information services, and fall clearly within the definition of "telephone exchange service." Thus, even if U S WEST were correct that "comparable" services under subsection (B) must be substitutes

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[4]U S WEST incorrectly states (at 8) that the Commission has "held" that DSL services do not meet the definition of "telephone exchange service." The orders U S WEST cites do not address that question at all; rather, the FCC there held merely that DSL transmissions were both jurisdictionally mixed and inseverable, and thus federal tariffing was appropriate. The fact that DSL transmissions that terminate within the local exchange are "telephone exchange service" is entirely consistent with those decisions. *See* AT&T at 14.

for traditional local services, U S WEST's new DSL services are unquestionably a substitute for the carriage of data by means of POTS lines. *See* CoreComm at 12-13; MCI WorldCom at 10, 12-13; Level 3 at 7. Indeed, U S WEST *markets* its DSL services as a substitute for having to buy a second POTS line for data and other advanced services.[5]

Exchange Access. The commenters overwhelmingly acknowledge that DSL-based services are also "exchange access." 47 U.S.C. § 153(16). *See, e.g.*, Sprint at 6; CoreComm at 13 n.35. As shown above, DSL capabilities are used in part to carry traditional long distance calls, and thus clearly fit within the definition of "exchange access." Moreover, as many commenters note, information services have an underlying telecommunications component, and therefore the completion of out-of-exchange information service calls would necessarily involve the origination or termination of the underlying telecommunications service, and are "exchange access" for that reason as well. *See, e.g.*, Northpoint at 8 ("telephone toll service" encompasses the underlying telecommunications in an information service transmission, and is not limited to transmissions between the "hand-cranked phones" of 1934).[6]

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[5]http://www.uswest.com/home/solutions/homeoffice/telecommuting.html (October 1, 1999) ("Traditionally, both your phone and computer used the same connection -- at different times. . . . With DSL there's no need to purchase an additional phone line to get high-speed access to the Internet. DSL works with your existing phone line").

[6]A large number of commenters question whether Congress intended to establish "information access" as a statutory category separate from "exchange access." *See, e.g.*, CoreComm at 13 & n.35; RCN at 5-6; MCI WorldCom at 14-16; Level 3 at 8-9; Focal at 10-11. As these commenters note, the term "information access" appears only twice in the statute. In one instance (Section 251(g)), the statute makes explicit reference to the MFJ and carries forward certain provisions of the MFJ until the FCC adopts rules overriding those provisions. In the other instance (Section 274(h)(2)(A)), the statute provides merely that "electronic publishing" does not include "information access" as defined by the MFJ. By contrast, the "Definitions" section of the Act (Section 3) contains definitions for "telephone exchange service" and "exchange access," but not "information access." *See* 47 U.S.C.
(continued...)

II. THE COMMENTERS AGREE THAT SECTION 251(c) APPLIES TO DSL SERVICES EVEN IF THEY ARE NOT "TELEPHONE EXCHANGE SERVICE" OR "EXCHANGE ACCESS."

The commenters also agree that the obligations of Section 251(c) (except those of Section 251(c)(2)) would apply to the ILECs' DSL capabilities regardless of whether DSL-based services are "telephone exchange service" or "exchange access." *See, e.g.*, CoreComm at 5-7; Prism at 7-9; MCI WorldCom at 11; Northpoint at 4-6; Covad at 10-11 & 15-18; DSLnet at 3-5; GSA at 6. By its plain terms, Section 251's duties apply to ILECs, and the extent to which those duties apply to particular services is established in the particular provision in which the duty is set forth -- none of which, with the exception of Section 251(c)(2), are limited to "telephone exchange service" and "exchange access."

Indeed, the Commission has already so held, in a portion of the *Advanced Services Order* that was *not* appealed by U S WEST. Specifically, in addressing the unbundling obligations imposed on "incumbent local exchange carriers" by Section 251(c)(3), the Commission stated:

> We further grant ALTS' petition to the extent that ALTS requests a declaratory ruling that advanced services are telecommunications services, and that the facilities and equipment used to provide advanced services are network elements subject to the obligations in section 251(c). Given our conclusion above that advanced services offered by incumbent LECs are *telecommunications services*, all equipment and facilities used in the provision of advanced services are "network elements" as defined by section 153(29).[7]

The Commission there was following the plain language of Sections 153(29) and 251(c)(3), which hinge the obligations of those provisions on the use of facilities to provide "telecommunications

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[6](...continued)
§§ 153(47) & (16). The Act's treatment of the term "information access" is thus inconsistent with the notion that Congress intended "information access" to be a permanent statutory category of services, on an equal plane with "telephone exchange service" and "exchange access."

[7] *See Advanced Services Order*, 13 FCC Rcd. at 24038-24039 (emphasis added).

services," not their use to provide "telephone exchange service" or "exchange access." U S WEST's contrary claim that "the [unbundling] obligation does not apply to elements that the company uses solely in the provision of advanced services" is merely a bald and erroneous assertion, made without any citation or other statutory support.[8]

It is thus ironic that U S WEST makes such frequent appeals to the "plain language" of the statute.[9] Its "plain language" rhetoric notwithstanding, U S WEST never actually quotes the statutory language, because that language forecloses its claim. Indeed, the only way U S WEST can argue that the statute says otherwise is by rewriting it. For example, U S WEST describes the resale obligation of Section 251(b)(1) as follows: "When a local telephone company provides telephone exchange service or exchange access, it must not 'prohibit, and not . . . impose unreasonable or discriminatory conditions or limitations on' the resale of those services." U S WEST at 12. But Section 251(b)(1) says nothing about the resale of "those services." Instead, it imposes "[t]he duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of *its telecommunications services*." 47 U.S.C. § 251(b)(1) (emphasis added). And even U S WEST is forced to concede that DSL services are "telecommunications services." U S WEST at 5.

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[8]Equally devoid of citation or support is U S WEST's claim that Congress "implicitly performed" the "necessary and impair" analysis for advanced services and found that they did not need to be unbundled. U S WEST, p. 2. To the contrary, that obligation was *explicitly* assigned to the Commission by Section 251(d)(2), and the Commission therefore applied that test itself in the recently-adopted *UNE Remand Order* -- where it found that facilities used to provide advanced services must be unbundled in certain limited circumstances. *See FCC Promotes Local Telecommunications Competition*, FCC News Release, FCC 99-238 (Sept. 15, 1999).

[9]*See, e.g.*, U S WEST at 2, 5.

U S WEST also argues that its reading of the Act is supported by the Commission's finding in the *Local Competition Order* that the duties of Section 251(a) -- which apply to "telecommunications carriers" -- apply only insofar as an entity is acting *as* a telecommunications carrier. U S WEST at 9-10; *see Local Competition Order*, 11 FCC Rcd. 15499, 15990 (¶ 990) (1996). U S WEST therefore claims that, just Section 251(a) applies only to telecommunications carriers as telecommunications carriers, so to Section 251(c) applies only to ILECs as ILECs. But the Commission's holding in the *Local Competition Order* refutes, rather than supports, U S WEST's position here. As the Commission noted in the *Local Competition Order*, the statutory definition of "telecommunications carrier" includes a proviso stating that "A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services."[10] Thus, in the *Local Competition Order*, the Commission was appropriately limiting the scope of the common carrier obligations of Section 251(a) in keeping with this statutory directive. By contrast -- and tellingly -- the statutory definitions of "local exchange carrier" and "incumbent local exchange carrier" do not contain any analogous proviso stating that LECs or ILECs shall be treated as such only insofar as they offer "telephone exchange service" or "exchange access." 47 U.S.C. §§ 153(26), 251(h).[11]

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[10]*See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, 15988 (¶ 992) (1996) (quoting 47 U.S.C. §153(44)).

[11]Had Congress wished to create a similar limitation in those definitions, it easily could have done so. Indeed, it did -- but only for mobile services. *See* 47 U.S.C. § 153(26) ("Such term ["local exchange carrier"] does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term").

CONCLUSION

For the foregoing reasons, the Commission should declare DSL services to be "telephone exchange service" and "exchange access," and should further declare that the obligations of Section 251(b) and 251(c) are not limited to such services or to the facilities used to provide such services.

Respectfully submitted,

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Certificate of Service

I, Cassandra M. de Souza, do hereby certify that I caused one copy of the foregoing Reply Comments of AT&T Corp. in Connection With Court Remand of August 1998 Advanced Services Order to be served by First Class mail on all parties on the attached service list, this 1st day of October, 1999.

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