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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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 Telecommunications 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 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 LEVEL 3 COMMUNICATIONS, LLC

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Pursuant to the Public Notice released September 9, 1999 in this proceeding,[1] Level 3 Communications, LLC ("Level 3"), by undersigned counsel, hereby submits its reply comments concerning the remand of the Commission's August 1998 *Advanced Services Order* from the United States Court of Appeals for the District of Columbia Circuit.[2] The initial comments filed in this remand proceeding present in fairly stark terms what is at stake. The Commission should reject US West's attempt to harm competitors by means of unjustified statutory constructions. Instead, because DSL services easily satisfy the definition of "telephone exchange service," the Commission should rule that DSL services are subject to all obligations of carriers that attach to the provision of telephone exchange service.

A. The Competitive Provision of Advanced Services is at Stake

US West has made its intentions clear: it wants to be able to provide DSL services without the regulatory constraints that apply to telephone exchange services and exchange access. US West presents its case as if it is in the best interests of consumers and competition, but US West's position would have serious anticompetitive consequences. To adopt US West's interpretation of the Telecom Act of 1996 to exclude DSL services from the definitions of telephone exchange service

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[1] *Comments Requested in Connection with Court Remand of August 1998 Advanced Services Order*, Public Notice, CC Docket Nos. 98-11, 98-26, 98-32, 98-78, 98-91, 98-147, DA 99-1853, released September 9, 1999; *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 Services Order*").

[2] *US WEST Communications, Inc. v. Federal Comm. Comm'n*, No. 98-1410, (D.C. Cir.)

or exchange access could drastically limit the interconnection rights of competitive local exchange carriers ("CLECs") that provide non-traditional telecommunications services. Under US West's view, data CLECs would have interconnection rights under Section 251(a), but the standards for such interconnection are undefined and may potentially be far less favorable than interconnection rights under Sections 251(b) and (c). For example, without the duty to negotiate interconnection under 251(c)(1), US West could arguably impose "take it or leave it" interconnection options on data CLECs. In addition, data CLECS would be denied collocation rights unless the equipment they wish to collocate is used to provide services other than advanced services. Neither data CLECs nor voice CLECs could collocate DSLAMs in ILEC central offices. Finally, DSL services provided by ILECs would not be subject to resale provisions under Section 251(c)(4). Although other consequences could probably be identified,[3] allowing these consequences to transpire could scarcely be considered pro-competitive. Adopting US West's position would grant US West significant competitive advantages while severely restricting the ability of data CLECs to provide service.

B. The ILECs Have Not Demonstrated that DSL Service is Not Telephone Exchange Service

US West's position revolves around its conclusion that DSL service is neither exchange access nor telephone exchange service. If DSL service is either telephone exchange service or

[3]For example, Section 276(a) prohibits a Bell operating company from subsidizing its payphone service from telephone exchange service or exchange access operations. 47 U.S.C. § 276(a). Adopting US West's approach that DSL service is neither telephone exchange service nor exchange access could lead to the absurd result that US West would not be prohibited from using the revenues from DSL services to subsidize its payphone service operations. Such a result would be clearly contrary to the intent of the Act and has anticompetitive consequences to payphone service providers.

exchange access, then US West's argument that carriers that provide DSL service are not local exchange carriers or incumbent local exchange carriers as defined in the Act fails. In addition, if DSL service is either telephone exchange service or exchange access, then US West's argument that it is not subject to the requirements of 251(c) for DSL services also fails.

As Level 3 demonstrated in its initial comments, DSL service is telephone exchange service. No party has presented a reasonable argument that DSL service is not telephone exchange service. US West, GTE, and SBC rely on pre-Act interpretations of the first half of the definition of telephone exchange service to argue that telephone exchange service can only be voice communications over the switched network within a limited geographic area. Comments of US West at 7; Comments of SBC at 4; Comments of GTE at 12. To begin with, these ILECs read too much into the authority on which they rely. The reference to the *Midwest Corp.* case[4] omits key language that telephone exchange service is "ordinarily characterized by" two-way voice communications. This omission is fatal to the ILEC's argument because it clearly suggests that there may be extra-ordinary characterizations of telephone exchange service other than two-way voice communications. Such an extra-ordinary characterization of telephone exchange service is entirely appropriate for DSL services. Second, the service in *Midwest Corp.* that was argued to fall under the definition of telephone exchange service was a multipoint video distribution service, whose "service characteristics are analogous to broadcasting and cable television."[5] The difference between multipoint video distribution service and telephone exchange service is so great that the

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[4]*Application of Midwest Corp.*, 53 F.C.C.2d 294 (1975).

[5]*Id.* at ¶ 11.

broad brush strokes used to portray telephone exchange service in the *Midwest Corp.* case are simply not applicable in this situation.[6]

In addition, US West's and SBC's reliance on *Offshore Tel. Co. v. South Cent. Bell Tel. Co.*[7] is likewise misplaced. US West Comments at 7; SBC Comments at 5. US West and SBC omit key qualifying language from that case that undermines their position. In describing "local exchange carriers," the decision says local exchange carriers "first of all" provide a local calling capability over a switched network. Again, the language suggests that "local exchange carriers" may provide other services as well. More importantly, *Offshore Tel. Co.* never attempts to apply the statutory definition of "telephone exchange service" to the service in question. General statements about local calling capability certainly do not rise to the level of statutory construction necessary to be able to exclude DSL services from the statutory definition of "telephone exchange service." Finally, the only term that *Offshore Tel. Co.* attempted to define was "local exchange carrier," not telephone exchange service, and *Offshore Tel. Co.* predates the statutory definition of "local exchange carrier" by five years. The case cannot be considered a binding interpretation of a statutory term that did not even exist at the time. As a result, none of the cases relied upon by the ILECs support their positions that DSL services do not satisfy the definition of telephone exchange service.

In fact, DSL service is simply an enhancement to local loop technology that makes it comparable to traditional local exchange service. The Commission has already recognized that the

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[6] *Domestic Public Radio Svc.*, 76 F.C.C.2d 273, 281 (1980) also uses the term "ordinarily characterized" to describe telephone exchange service in comparison to multipoint video distribution service. The language is almost identical to the language in the *Midwest Corp.* case. It, too, is not applicable in this situation.

[7] *Offshore Tel. Co. v. South Cent. Bell Tel. Co.*, 6 FCC Rcd 2286 (1991).

provision of "alternative local loops" satisfies the definition of telephone exchange service.[8] As Level 3 explained in its initial Comments, DSL service may be considered "telephone exchange service" under (B) of the definition for no other reason than it is an enhancement to local loop transmission technologies to enable communications between end users. There is no reason not to conclude that DSL service is also telephone exchange service.

C. DSL Service is Neither Information Access, Interstate Access, nor Special Access

US West's reliance on previous Commission statements that service to ISPs is "interstate access" or "special access" is likewise misplaced. US West Comments at 8. Just as "information access" has no statutory basis, "interstate access" and "special access" also have no statutory predicate. The Act recognizes two services provided by local exchange carriers – telephone exchange service and exchange access. Because ISPs do not obtain exchange access, service to ISPs must be telephone exchange service. In addition, the Commission's characterization of dial-up traffic to ISPs as "interstate access" is the subject of an appeal before the United States Court of Appeals for the District of Columbia Circuit.[9] The Commission should not repeat the errors in the

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[8] *Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11528 (¶ 54) (1998) ("*Universal Service Report to Congress*") ("It appears from the legislative text that Congress' redefinition of 'telephone exchange service' was intended to include in that term not only the provision of traditional local exchange service (via facilities ownership or resale), but also the provision of alternative local loops for telecommunications services, separate from the public switched telephone network, in a manner "comparable" to the provision of local loops by a traditional local telephone exchange carrier.")

[9] *Bell Atlantic Tel. Cos. v. Federal Comm. Comm'n,* No. 99-1094 et al. (D.C.Cir.)

ISP Reciprocal Compensation Declaratory Ruling[10] in this proceeding by classifying traffic to ISPs as exchange access, interstate access, special access, or anything other than telephone exchange service. In any event, the Commission's decision that DSL constitutes special access applied the Commission's Part 69 rules. The Commission did not determine that DSL service is exchange access as defined in the Act.

D. Conclusion

For the foregoing reasons, none of the Comments demonstrate that DSL service to ISPs is anything other than telephone exchange service. As Level 3 discussed in its initial Comments, the 1996 amendment to the definition of telephone exchange service granted the Commission considerable discretion to determine whether a particular service is "comparable" to services previously described as two-way voice communications within a geographic area. The Commission has an obligation to interpret specific sections of the Act in order to give effect to the overarching intent of the Act. The overarching intent of the Act is to curb the monopoly power of the incumbent LECs, to open local markets to competition, and to *accelerate rapidly* the deployment of advanced telecommunications and information technologies. Conf. Rep. No. 104-458, at 1 (1996). A ruling that DSL services are neither telephone exchange service nor exchange access will accomplish none of these objectives. It will grant considerable power to the incumbent LECs to exploit their market position as incumbents and monopolists to preclude entry to the provision of DSL services. Because

[10] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic,* CC Dkt. Nos. 96-98, 99-68 (rel. Feb. 26, 1999) ("*ISP Reciprocal Compensation Declaratory Ruling*").

DSL service cannot be exchange access, it must be telephone exchange service. The Commission should so rule, and make DSL services subject to all obligations of local exchange carriers under Section 251 of the Act.

Respectfully submitted,

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Dated: October 1, 1999

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CERTIFICATE OF SERVICE

I, Carolyn W. Shaw, hereby certify that on this 1st day of October, 1999 the foregoing Reply Comments of Level 3 Communications, LLC. were delivered by hand and first class mail to the following:

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