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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554 DOCKET FILE COPY ORIGINAL

In the Matter of	)	
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Deployment of Wireline Services Offering Advanced Telecommunications Capability, *et al.*	))	CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91

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REPLY COMMENTS OF CABLE & WIRELESS USA, INC.

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October 1, 1999

No. of Copies rec'd 0+2
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DC01/KINNR/92400.1

SUMMARY

C&W USA joins with other competitive carriers in urging the Commission to reaffirm its *Advanced Services Order* in this remand, and continue to require ILECs to: (1) provide interconnection for advanced services; (2) provide access to unbundled network elements used to provide advanced services; and (3) offer for resale all advanced retail services that they provide to subscribers that are not telecommunications carriers. These rulings are correct under the Act and, moreover, clearly further the FCC's obligation to promote the widespread deployment of advanced service technologies to all Americans.

Specifically, in this reply, C&W USA will address ILEC arguments that advanced services fall outside the scope of Section 251 of the Act. First, C&W USA urges the Commission to be mindful of the fact that the 1996 Act is technology neutral and, further, contemplates that the market-opening provisions of Section 251 will apply to the network facilities and functionalities used by ILECs to provide advanced services. Because the Act is technology neutral, ILEC arguments that Congress intended that Section 251(c) not apply to technology not yet deployed in 1996 must be rejected – as the Commission determined in the *Advanced Services Order*. Accordingly, the Commission must reject ILEC contentions that Section 251 applies only to technologies used to provide circuit-switched, voice telephony.

Second, C&W USA agrees with those commenters that have explained that advanced services constitute "telephone exchange services" under Section 153(47)(A) and (B), and hence are subject to Sections 251(b) and (c). Advanced services satisfy the requirements of Section 153(47)(A) because they: (1) may be provided within a telephone exchange or system of exchanges defined by a packet switch or network of switches; (2) offer customers the ability to designate any location within the exchange for their communications, and so are

"intercommunicating"; and (3) are covered by the "exchange service charge." Moreover, even if the Commission were to determine that advanced services do not satisfy Section 153(47(A), it is clear that advanced services fit squarely within the far broader definition of Section 153(47)(B) added by the 1996 Act, and constitute services "comparable" to telephone exchange services.

Third, under certain circumstances, advanced services can constitute "exchange access" services. There is no technical reason preventing the use of advanced service capabilities to provide access for toll services. Further, nothing in the definition of "telephone toll service" limits its applicability to a particular transmission technology, or to the provision of voice services – and hence ILEC arguments that exchange access is limited to "ordinary telephone to telephone long distance calling" are without merit. Thus, although the Commission should not now find that DSL-based advanced services are exchange access, neither should the agency conclude that advanced services *never* can be exchange access services.

Finally, C&W USA urges the Commission to clarify that the obligations of Section 251(c) apply to ILECs generally in their provision of advanced services. Specifically, C&W USA submits that all carriers that qualify as ILECs under the Act are subject to the obligations of Section 251(c) – including the duties to negotiate, interconnect, and collocate with competitors, as well as the duties to provide unbundled access to essential network elements and to offer certain telecommunications services for resale at wholesale rates. Further, many of the obligations imposed on ILECs by Section 251(c) – including, significantly, Sections 251(c)(3) and (4) – apply to ILEC provision of *telecommunications services*. Accordingly, regardless of whether advanced services constitute either "telephone exchange" or "exchange access" services, they are, undeniably, telecommunications services subject to the requirements of Sections 251(c)(3) and (c)(4).

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REPLY COMMENTS OF CABLE & WIRELESS USA, INC.

Cable & Wireless USA, Inc. (C&W USA"), by its attorneys, hereby submits the following reply comments in connection with the remand of the United States Court of Appeals for the District of Columbia Circuit of the FCC's Memorandum Opinion and Order[1] in the above-captioned proceeding.[2]

INTRODUCTION

C&W USA is a preeminent provider of Internet and long distance services with ongoing plans to integrate and upgrade its networks in order to provide a full range of integrated, basic and advanced telecommunications services packages to consumers. As such, C&W USA remains intensely interested in the outcome of this proceeding. C&W USA currently is focusing on a two-year plan to upgrade, enhance, and expand its Internet backbone network in order to maintain its status as a preeminent provider of a full range of Internet services. In order to accomplish this goal efficiently and effectively, C&W USA must have access to essential ILEC advanced services network facilities, as mandated by the 1996 Act: effectively, C&W USA's

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1 *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 15280 (1998) ("*Advanced Services Order*").

2 Pursuant to Public Notice, DA 99-1853, released on September 9, 1999, interested parties may file reply comments on the various issues raised by the Court's remand by

(continued...)

ability to invest in the necessary facilities to provide a wholly owned end-to-end service to its customers is extremely limited, if not impossible, without access to these ILEC facilities and functionalities.

In recognition of these statutory obligations placed on ILECs by the 1996 Act, and of the importance of competitive access to ILEC network facilities and functionalities used to provide advanced services, the Commission in its *Advanced Services Order* clarified that "the obligations of Sections 251 and 252 of the Act apply to advanced services and the facilities used to provide those services."[3] Specifically, the Commission determined that ILECs are obligated to: (1) provide interconnection for advanced services; (2) provide access to unbundled network elements used to provide advanced services; and (3) offer for resale, pursuant to Section 251(c)(4) of the Act, all advanced retail services that they provide to subscribers that are not telecommunications carriers.[4] These rulings are correct under the statute and, moreover, clearly further the FCC's obligation under Section 706 of the 1996 Act to promote the widespread development and deployment of advanced service technologies to all Americans.

If the Commission permits the ILECs to use this proceeding to evade their statutory obligations to provide access to these essential facilities, C&W USA would be materially and substantially delayed in entering some markets, and could be precluded entirely from entering other markets. This result is flatly contrary to the procompetitive mandates of the 1996 Act. The Commission must be careful to ensure that the scheme it adopts in this proceeding with regard to the provision of advanced services will not discourage or prevent providers such as C&W USA

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September 24, 1999, and reply comments by October 1, 1999. These reply comments therefore are timely filed.

3 *Advanced Services Order*, ¶ 32.

4 *Advanced Services Order*, ¶ 32.

from expanding and upgrading their networks and increasing service options for U.S. consumers. C&W USA therefore agrees with other competitive carriers urging the Commission to reaffirm its *Advanced Services Order* in this remand.

Specifically, in these reply comments, C&W USA will address the arguments of the incumbents that advanced services fall outside the scope of Section 251 of the Act. First, C&W urges the Commission to be mindful of the fact that the 1996 Act is technology neutral and contemplates that the market-opening provisions of Section 251 will apply to the network facilities and functionalities used by ILECs to provide advanced services. For these reasons, the Commission must reject ILEC contentions that Section 251 applies only to technologies used to provide circuit-switched, voice telephony. Second, C&W USA agrees with those commenters that have explained that advanced services constitute either "telephone exchange services" under Section 153(47)(A) and (B) or "exchange access" services under Section 153(16), and hence are subject to Sections 251(b) and (c). Finally, because, as commenters have noted, advanced services are telecommunications services as defined by the Act, C&W USA urges the Commission to clarify that the obligations of Section 251(c) apply to ILECs generally in their provision of advanced telecommunications services.

I. THE COMMISSION'S DECISION MUST REMAIN CONSISTENT WITH THE PRINCIPLES THAT THE 1996 ACT IS BOTH TECHNOLOGY NEUTRAL AND TECHNOLOGICALLY FORWARD LOOKING.

The ILECs have made great, albeit misguided, efforts to limit the procompetitive, market-opening provisions of the 1996 Act only to certain circuit-switched technologies that were deployed as of 1996. These attempts are understandable: the incumbents have a vested interest in maintaining the advantages of their monopoly positions in the market for basic local telecommunications services *and* in exploiting these advantages in the marketplace for advanced

services. These attempts also, however, are antithetical to the fundamental goals of the 1996 Act, one of which is to "promote innovation and investment by all participants in the telecommunications marketplace, in order to stimulate competition for all services, *including advanced services*."[5]

Consistent with this goal, in the *Advanced Services Order* the Commission recognized that "the pro-competitive provisions of the 1996 Act apply equally to advanced services and to circuit switched voice services."[6] Further, the agency emphasized that "Congress made clear that the 1996 Act is technologically neutral and is designed to ensure competition in all telecommunications markets."[7] This congressional mandate is perhaps most clearly expressed in the language of Section 706, which defines "advanced telecommunications capability" –

> *without regard to any transmission media or technology*, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications *using any technology*.[8]

Accordingly, the "role of the Commission is not to pick winners or losers, or select the 'best' technology to meet consumer demand," but, rather, to apply the market-opening provisions of the Act without regard to whether a telecommunications service is based on circuit- or packet-switched technology.[9]

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5 *Advanced Services Order*, ¶ 1; *see also Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 4761, ¶ 2 ("*Advanced Services Collocation Order*").

6 *Advanced Services Order*, ¶ 11.

7 *Advanced Services Order*, ¶ 11.

8 Section 706(c)(1) (emphasis added).

9 *Advanced Services Order*, ¶ 2.

Because the Act is technology neutral, ILEC arguments, whether express or implied, that Congress intended that Section 251(c) not apply to technology not yet deployed in 1996[10] must be rejected – as the Commission determined in the *Advanced Services Order*.[11] As the Commission noted, "[n]othing in the statute or legislative history indicates that it was intended to apply only to existing technology."[12] Indeed, C&W USA would emphasize that, as commenters have noted, the mandate of Section 706 – expressly instructing the Commission and the states to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans"[13] – is based on the assumption that, as advanced services are made available, they will continue to evolve and to become even more "advanced."[14] As the Commission recognized in its Report to Congress on the availability of advanced telecommunications capabilities in the United States, "as technologies evolve, the concept of broadband will evolve with it: we may consider today's 'broadband' to be narrowband when tomorrow's technologies are deployed. . . ."[15]

In that regard, in the *Advanced Services Collocation Order* the Commission also recognized that both incumbent and competitive carriers "are at the early stages of developing and deploying *innovative new technologies* to meet the ever-increasing demand for high-speed,

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10 *See, e.g.*, U S West at 2-3; SBC at 6-7; GTE at 5-10.

11 *Advanced Services Order*, ¶ 49.

12 *Advanced Services Order*, ¶ 49.

13 Section 706(a).

14 *See, e.g.*, AT&T at 8, 13; CDS at 2-3; CoreComm at 7-8; MGC at 5-7; RCN/Connect at 3; Sprint at 7; Wisconsin PSC at 1.

15 *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Report (rel. Feb. 2, 1999) ("*NOI Report*").

high-capacity advanced services."[16] Thus, the Commission determined that "[i]n order to encourage competition among carriers to develop and deploy new advanced services, it is critical that the marketplace for these services be conducive to investment, innovation, and meeting the needs of consumers."[17] Many of the competitive commenters have emphasized the importance of access to ILEC advanced services facilities and functionalities pursuant to Section 251 in order to be in a position to develop and deploy new, advanced services;[18] the Commission must not permit the ILECs to evade these obligations imposed on them by Section 251 merely as a result of the very technological developments contemplated and enabled by the Act.

II. ADVANCED SERVICES, INCLUDING DSL-BASED SERVICES, CONSTITUTE "TELEPHONE EXCHANGE SERVICES" WITHIN THE MEANING OF SECTIONS 153(47)(A) AND (B) OF THE COMMUNICATIONS ACT.

Telecommunications services constitute "telephone exchange service" if they satisfy one of two alternative definitions in the Act. Specifically, Section 153(47) provides:

> The term "telephone exchange service" means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

As will be discussed in more detail below, DSL-based and other advanced services constitute telephone exchange service under both Sections 153(47)(A) and (B) of the Act.

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16 *Advanced Services Collocation Order*, ¶ 2.

17 *Advanced Services Collocation Order*, ¶ 2.

18 *See, e.g.*, DSLnet at 2-3; MGC at 3-5; MindSpring at 3.

A. Advanced Services Constitute "Telephone Exchange Service" Under Section 153(47)(A).

Before enactment of the 1996 Act and the addition of Section 153(47)(B), the Communications Act defined "telephone exchange service" to include only service: (1) "within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area"; (2) "operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange"; and (3) "which is covered by the exchange service charge."[19] A telecommunications service had to satisfy each of these three requirements in order to constitute a "telephone exchange service" under Section 153(47)(A); advanced services satisfy these requirements.

First, it is clear that DSL-based services, and other advanced services, may be provided within a telephone exchange or system of exchanges. As several of the commenting parties note, frame relay, ATM, and DSL-based services – like traditional circuit-switched services – all are designed to provide customers with a transmission path connecting points anywhere within a specified serving area.[20] Packet-switched networks are the equivalent of an exchange in the area served by a single packet switch; similarly, systems of multiple connected packet switches qualify as a "system of exchanges." That the technology used to connect points within a packet-switched network is different from the technology used to connect points within a circuit switched network is irrelevant for purposes of Section 153(47)(A): interconnected packet switches operate in a manner functionally similar to interconnected circuit switches.

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19 47 U.S.C. § 153(47)(A).

20 *See, e.g.*, Advanced Telecom Group/Allegiance/e.spire/Intermedia/NEXTLINK/WinStar at 11 ("Advanced Telecom Group").

C&W USA agrees with many commenters that the fact that the "exchange area" for an advanced service might in some cases exceed the size of the traditional circuit-switched exchange area does not prevent classification of the advanced service as a telephone exchange service.[21] C&W USA submits that, consistent with the technology-neutral nature of the Act, the Commission should interpret that which constitutes an "exchange" or an "exchange area" based on the nature of the services being provided. As the agency concluded in its *Local Competition* proceeding, the determination of "what geographic areas should be considered 'local areas'" for reciprocal compensation purposes might vary depending on the service involved.[22] The Commission should be guided by this principle in the context of advanced services, the technological nature of which clearly affects the geographic areas in which "local" service is provided.

Moreover, in many cases transmissions carried over DSL and other advanced facilities do *not* leave the traditional circuit-switched exchange area. U S West has attempted, both in proceedings before the D.C. Circuit and in its initial comments here, to limit the nature of the services under examination in a way that will skew the Commission's ultimate determination in this proceeding. Specifically, U S West has argued, both implicitly and explicitly, that DSL-based services (U S West does not appear to contemplate the uses of other advanced services) are used only to provide Internet access, and hence are jurisdictionally interstate and, by definition, do not originate and terminate within a single exchange or system of exchanges. Even if U S West were correct, and this proceeding were only about DSL-based Internet access, it is clear

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21 *See, e.g.*, Advanced Telecom Group at 11-12; AT&T at 9-10.

22 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 1036 (1996) ("*Local Competition First R&O*") (for reciprocal compensation purposes local service area for calls to or from a CMRS network is the Major Trading Area).

that some – if not many – Internet transmissions carried over DSL facilities do not leave the exchange.[23]

In addition, in a broader context, DSL and other advanced transmission services – such as frame relay and ATM services – often are used to connect points within a single exchange. Indeed, U S West itself markets several different services using advanced transmission capabilities, such as high-speed faxing, connections to corporate LANs, and video conferencing. Sprint, Bell Atlantic, and Southwestern Bell all provide similar services. These services – especially telecommuting – often involve transmissions between points within a single exchange or system of exchanges, and hence clearly satisfy the requirements of Section 153(47)(A).

Second, notwithstanding ILEC arguments to the contrary,[24] advanced services are operated to furnish subscribers with "intercommunicating service." Significantly, neither the Act nor FCC precedent offers a definition of what constitutes "intercommunicating service." However, C&W USA submits that the essence of an "intercommunicating service" is the ability to reach any user within a defined service area, regardless of the technology used to make the connection. Frame relay, ATM, DSL, and other advanced services offer customers the ability to designate any location within the exchange for their communications. As the FCC explained in the *Advanced Services Order*, in an advanced services environment the local exchange carrier

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23 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689, ¶¶ 18, 36 (1999) ("some Internet traffic is intrastate") ("*Reciprocal Compensation Order*"). In addition, as several commenters have noted, many ISPs engage in so-called "caching" of websites that regularly receive a large number of hits. ISPs cache websites by copying information from those websites, storing them in the same exchange area as its customers, and directing customer requests to the locally stored cache. *See Reciprocal Compensation Order*, ¶ 18; *see also* AT&T at 10, CDS Networks at 5.

24 *See, e.g.*, GTE at 6-7; SBC at 4-5.

directs the end-user's traffic into a packet-switched network, and across that network "to a terminating point selected by the end-user."[25] The Commission went on to explain that:

> [e]very end-user's traffic is routed onto the same packet-switched network, *and there is no technical barrier to any end-user establishing a connection with any customer located on that network* (or, indeed, on any network connected to that network).[26]

In that regard, as commenters have indicated, any number of "permanent virtual connections" ("PVCs") may be established between a subscriber and any other subscriber on a packet-switched network or connected networks.[27] Further, users may change at any time the PVCs they have established. Although many users may prefer to establish only one or a few PVCs, this is entirely a matter of the user's choice rather than a limitation imposed by packet-switched technology. The relative ease in establishing and changing PVCs gives packet-switched technology a functionality equivalent to circuit-switched call routing.

C&W USA agrees with those commenters that have noted that telecommunications services need not be two-way, circuit-switched voice communications in order to be "intercommunicating."[28] As the Commission itself has recognized, the agency never has "suggested that two-way voice service is a *necessary* component of telephone exchange service."[29] Quite simply, efforts to restrict the definition of "telephone exchange service" to circuit-switched voice services are antithetical to the procompetitive, technological neutrality of

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25 *Advanced Services Order*, ¶ 42.

26 *Advanced Services Order*, ¶ 42 (emphasis added).

27 *See, e.g.*, Advanced Telecom Group at 16-17; *see also Advanced Services Order*, n.73.

28 *See, e.g.*, AT&T at 8-9.

29 *Advanced Services Order*, ¶ 43.

the 1996 Act.[30] However, C&W USA would note, in this regard, that even if most advanced services facilities are not now being used to carry voice traffic, there is no technological reason why voice traffic cannot be carried on, for example, DSL lines. Indeed, many carriers already use or are in the process of rolling out DSL-based technology to carry voice traffic; U S West itself recently announced plans to offer DSL-based voice services.[31]

Similarly, the Commission never has found that a service must be connected with the circuit-switched network in order to be considered a "telephone exchange service." As with the argument that telephone exchange services must be voice transmissions, C&W USA agrees that any such determination would be inconsistent with both the service and technological neutrality of the Act.[32] Indeed, as noted above, many carriers are now in the process of transitioning from a circuit-switched network to a packet-switched network for both data and voice services.[33] As discussed, the Act clearly contemplates the evolution of the technologies used to provide telecommunications services. It is not unlikely that circuit-switching eventually will become entirely obsolete; when that happens, if the Commission adopts the ILECs' interpretation of the section, Section 153(47)(A) would be nullified.

Third, advanced services are covered by the "exchange service charge." As with the concept of "intercommunicating service," neither the Act nor the FCC has provided a definition for what constitutes the "exchange service charge."[34] C&W USA submits that the concept of an

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30 *See Advanced Services Order*, ¶ 41 ("Nothing in the statutory language or legislative history limits these terms to the provision of voice, or conventional circuit-switched service.").

31 *See, e.g.*, CDS at 1, 4; MGC at 5; Sprint at 3-4.

32 *See, e.g.*, GSA at 4-5; MGC at 4-5.

33 *See, e.g.*, AT&T at 8-9; MGC at 6.

34 C&W USA agrees with AT&T that this requirement is potentially circular. AT&T at 11. If an advanced service is a telephone exchange service, then, by definition, the charges

(continued...)

exchange service charge must be tied to local calling areas, whether determined by a circuit-switched or packet-switched network. Specifically, as discussed above, packet-switched networks and network systems present the equivalent of an exchange or system of exchanges in the area served by the packet switch or switches – which constitute a local calling area, served by an advanced service, covered by an exchange service charge. Consistent with this principle, as commenters have noted, certain advanced services currently offered by incumbents – like U S West's frame relay service – are offered at a single rate LATA-wide, based on the number of PVCs loaded onto a user-to-user network interface, regardless of the distance covered by the PVCs, if each PVC is defined by two end points within the LATA. Accordingly, the entire LATA serves as the exchange area for that service, and all communications within that area are covered by the exchange service charge.

B. Section 153(47)(B) Further Clarifies That Advanced Services Constitute "Telephone Exchange Service."

Even if the Commission were to determine that advanced services do not constitute "telephone exchange service" under Section 153(47)(A), C&W USA submits that the far broader definition of Section 153(47)(B) added by the 1996 Act certainly sweeps all advanced services into the category of "telephone exchange service" – and, further, disposes utterly of all contentions that "telephone exchange services" must be circuit-switched voice communications. Specifically, Section 153(47)(B) includes in the definition of "telephone exchange service" "comparable service provided through a system of switches, transmission equipment, or other

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(...continued)

for that service would be the "exchange service charge." For this reason, C&W USA suggests that the exchange service charge requirement must refer in some manner to an equivalent of a "local" calling area.

facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service."[35]

Clearly, advanced service capability permits subscribers to "originate and terminate a telecommunications service." Further, the plain language of Section 153(47)(B) does not limit the type of facilities or equipment used – like packet switches and DSLAMs – and does not limit the type of telecommunications services that may be offered – including nontraditional advanced telecommunications services such as DSL, frame relay, and ATM. Further, as commenters note, that advanced telecommunications services may involve the transmission of information services is irrelevant to their classification as telecommunications services and as telephone exchange services.[36] In short, in Section 153(47)(B) Congress broadened the scope of the definition of "telephone exchange service" to include "comparable service" – based on *any* technology – provided by a telecommunications carrier.[37] As the Commission has pointed out, the plain, all-inclusive language of Section 153(47)(B) "thus refutes any attempt to tie these statutory definitions to a particular technology."[38]

Given the expansive language of Section 153(47)(B), the arguments of the incumbents that a "comparable" telephone exchange service must be functionally equivalent to and substitutable for two-way switched voice telephony are entirely without merit.[39] As discussed,

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35 47 U.S.C. § 153(47)(B).

36 *See, e.g.*, AT&T at 15-16. Indeed, the definition of enhanced services is of services "*offered over common carrier transmission facilities*." 47 C.F.R. § 64.702(a) (emphasis added).

37 *Advanced Services Order*, ¶ 41.

38 *Advanced Services Order*, ¶ 41.

39 *See, e.g.*, U S West at 8, SBC at 6-7. C&W USA would note, however, that even if these arguments were correct, and "comparable" services must be fully functional alternatives, under some circumstances voice telephony provided via advanced transmission services easily could satisfy that test. *See, e.g.*, Sprint at 5.

the language of Section 153(47)(B) clearly does not limit "comparable" services to circuit-switched voice services. If, as the incumbents argue, Section 153(47)(A) applied only to circuit-switched voice services (they do not), then Section 153(47)(B) would be nothing more than a redundancy. In this regard, C&W USA notes that, although there is no contemporaneous legislative history to explain the meaning of "comparable service," Senators Conrad and Burns have made clear, in the universal service context, that Section 153(47)(B):

> would not have been necessary had Congress intended to limit telephone exchange service to traditional voice telephony. The new definition was intended to ensure that the definition of local exchange carrier, which hinges in large part on the definition of telephone exchange service, was not made useless by the replacement of circuit switched technology with other means – for example packet switches or computer intranets – of communicating information within a local area.[40]

In sum, any contrary interpretation of Section 153(47)(B) would eviscerate the meaning of that section and permit the incumbents to continue to evade the fundamental obligations imposed on them by the procompetitive, market-opening provisions of the 1996 Act.

III. ADVANCED SERVICES, UNDER SOME CIRCUMSTANCES, CAN CONSTITUTE "EXCHANGE ACCESS" SERVICE.

The ILECs also claim that advanced services do not constitute "exchange access" under the Act. While C&W USA agrees that the statutory definition of "exchange access" requires access for the provision of toll services, and hence advanced services provided to end users today do not satisfy this definition, C&W USA disagrees with the ILECs' conclusion that these services cannot, under any circumstances, constitute exchange access. There is no technical impediment to the use of advanced service capabilities to provide access for toll services. Thus,

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[40] Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (Report to Congress) (filed Jan. 26, 1998), at 2, n.1.

although the Commission should not now find that DSL-based advanced services are exchange access, neither should the agency conclude that advanced services *never* can be exchange access services.

Section 153(16) defines "exchange access" as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services."[41] The language of Section 153(16) indicates, first, that exchange access involves the offering of "telephone exchange services," which suggests that exchange access is a subset of telephone exchange service. This means, for example, that a service which is classified as exchange access also, if provided to a non-carrier, would constitute telephone exchange services. Second, exchange access involves the offering of telephone exchange service to carriers and for a particular purpose. Thus, classification of a service as exchange access requires a determination of to whom the service is offered and for what purpose it is used.

C&W USA agrees with commenters – including incumbents – that most advanced services, including the use of DSL services to connect to ISPs, are not exchange access services. The typical configurations of high-speed broadband services are not established for the purpose of providing telephone toll service, which is defined by the Act as interexchange telephone service.[42] Moreover, since advanced services, including DSL services connected to ISPs, often are offered to end users, not to telecommunications carriers, the services cannot constitute exchange access services. The tariffs and industry practice for most advanced services, including DSL services connected to ISPs, reflect that DSL services are offered to end users for their data communication needs, and not to carriers for originating or terminating toll services.

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41 47 U.S.C. § 153(16).

42 47 U.S.C. § 153(48).

However, nothing *precludes* carriers from using advanced telecommunications capabilities for exchange access purposes. Nothing in the definition of "telephone toll service" limits its applicability to a particular transmission technology, or to the provision of voice services – and hence ILEC arguments that exchange access is limited to "ordinary telephone to telephone long distance calling" are without merit.[43] Advanced service technologies are as capable of carrying toll services as are circuit-switched technologies. Several commenters note that ILECs already routinely use HDSL capabilities to provide T-1 lines, which are sometimes used for exchange access purposes.[44] Further, GTE admits that the use of advanced services to provide IP telephony would constitute "exchange access."[45] Therefore, although the Commission need not conclude that any particular advanced services are offered today as exchange access services, neither can the agency conclude that it would be impossible to do so.

Finally, C&W USA would dispute SBC's argument that "exchange access" does not include special access services.[46] The Commission consistently has equated special access with exchange access,[47] the services typically are described as exchange access in the LECs' tariffs,[48]

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43 *See, e.g.,* SBC at 7; U S West at 8.

44 Sprint at 3; MCI WorldCom at 8.

45 GTE at 13.

46 SBC at 8.

47 *See, e.g., Investigation of Access and Divestiture Related Tariffs*, 97 F.C.C.2d 1082, 1248-49 (1984) (describing special access as "[a]ll exchange access arrangements that do not use local end office switching, as well as the facilities dedicated solely to an [IXC's] use").

48 *See* 47 U.S.C. § 251(c)(2) (requiring ILECs to offer interconnection "for the transmission and routing of telephone exchange service and exchange access"). SBC's argument also suggests that the BOCs had no obligation to provide special access on a nondiscriminatory basis under the MFJ (but did have an obligation to offer switched access), because special access would fit none of SBC's proposed definitions of "telephone exchange services," "exchange access," or "information access." *See United States v. American Tel. & Tel. Co.*, 552 F.Supp. 131, 228 (D.D.C. 1982), *aff'd mem. Sub. Nom. Maryland v. United States*, 460 U.S. 1001 (1983).

and there is no legal or policy reason to distinguish between the two. Indeed, SBC's argument would lead to the ludicrous conclusion that a requesting carrier could establish an interconnection arrangement if its customer requested switched access to the requesting carrier, but *not* if the customer wished to connect via a DS-1.[49] Of course, perhaps the only reason SBC makes this argument is its desire to restrict "telephone exchange service" to circuit-switched voice telephony. Recognizing that the ordinary meaning of exchange access would include dedicated connections, and recognizing that the Act defines exchange access as the provision of "telephone exchange services," SBC has no choice but to present the untenable claim that special access cannot constitute exchange access. Notably, SBC does not receive support in this argument even from U S West, which admits, as it must, that "exchange access" can include dedicated connections.[50]

IV. THE OBLIGATIONS OF SECTION 251(c) APPLY TO ILECs GENERALLY IN THEIR PROVISION OF TELECOMMUNICATIONS SERVICES, INCLUDING ADVANCED SERVICES.

At the heart of the incumbents' comments is the proposition that, unless the Commission finds advanced services to be either telephone exchange or exchange access services, advanced services are not subject to the market-opening obligations of Section 251(c).[51] This premise, quite simply, is without merit. The definitions of "telephone exchange services" and "exchange access" are relevant to determining *who* is a LEC (and an ILEC), but, with the exception of Section 251(c)(2), the definitions have no relevance to *what* interconnection and unbundling

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49 *See* 47 U.S.C. § 251(c)(2) (requiring ILECs to offer interconnection "for the transmission and routing of telephone exchange service and exchange access").

50 *U S West Appellate Brief* at 29 n.19 ("Special access can be either information or exchange access, depending upon whether the access link is used to originate telephone toll service or information services").

51 *See, e.g.*, GTE at 5, n.9; SBC at 10-11; U S West at 4-6, 11, 16-17.

obligations those entities have. Generally, the obligations of Section 251(c) apply to all telecommunications services and facilities offered by an ILEC.

U S West and the other incumbents cannot dispute that, regardless of how the Commission classifies advanced services, they are in fact incumbent LECs as defined by the Act. Specifically, Section 153(26) defines a "local exchange carrier" as "any person that is engaged in the provision of telephone exchange service or exchange access." It is undeniable that, by any conception of those terms, U S West and the other ILECs are such "persons." Moreover, these entities also meet the definition of an "incumbent" LEC in Section 251(h).

Section 251(c) provides that each incumbent LEC has the duties specified therein – including the duties to negotiate, interconnect, and collocate with competitors, as well as the duties to provide unbundled access to essential network elements and to offer certain telecommunications services for resale at wholesale rates.[52] Significantly, with the exception of Section 251(c)(2) – which refers to interconnection "for the transmission and routing of telephone exchange service and exchange access" – all of the ILECs' interconnection duties are defined broadly and without reference to whether the services or facilities are "telephone exchange" or "exchange access" services. Section 251(c)(3), for example, requires ILECs to offer access to unbundled network elements. The definition of "network element" includes any equipment or facility used for the provision of telecommunications – not just equipment or facilities used in the provision of telephone exchange or exchange access services. Moreover, the Commission has made clear that Section 251(c)(3) establishes an interconnection obligation distinct and in addition to the interconnection duty of Section 251(c)(2).[53] Accordingly, the

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52 47 U.S.C. § 251(c).

53 *Local Competition First R&O*, ¶ 269.

ILECs must interconnect for purposes of providing access to network elements, even if such access is for purposes other than providing the services identified in Section 251(c)(2). Similarly, Section 251(c)(4) requires ILECs to offer at wholesale rates *any* retail telecommunications service, not just telephone exchange or exchange access services.

In sum, the obligations imposed on ILECs by Section 251(c) – including, significantly, Sections 251(c)(3) and (4) – apply to ILEC provision of *telecommunications services*: as AT&T points out, the statutory language is "unambiguous on this point."[54] The Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public. . . ."[55] And, further, the Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information. . . ."[56] Clearly, as the Commission consistently has emphasized, advanced services – whether DSL, frame relay, ATM, or another advanced technology – are in fact telecommunications services.[57] Accordingly, regardless of whether advanced services constitute either "telephone exchange" or "exchange access" services, they are, undeniably, telecommunications services subject to the requirements of Sections 251(c) – including Sections 2512(c)(3) and (c)(4).[58] C&W USA submits that the Commission must not permit the ILECs to use this proceeding as a means of rewriting the plain language of the statute

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54 AT&T at 5.

55 47 U.S.C. § 153(46).

56 47 U.S.C. § 153(43).

57 *Advanced Services Order*, ¶ 35.

58 *See, e.g.*, Advanced Telecom Group at 25; AT&T at 4-8; CoreComm at 14-15; Covad at 16-19; Level 3 at 2-3; Northpoint at 4-6; Rhythms NetConnections at 4-8; TRA at 3-5.

with regard to their provision of telecommunications services and the procompetitive obligations imposed thereon.[59]

CONCLUSION

For the foregoing reasons, C&W USA urges the Commission to reaffirm promptly its determination that advanced services are subject to the procompetitive, market-opening mandates of the 1996 Act. As discussed, advanced services clearly constitute either telephone exchange or exchange access service, and hence also are telecommunications services subject to the full range of obligations imposed on incumbents by Section 251 of the Act. Accordingly, C&W USA also urges the Commission to take this opportunity to ensure that, consistent with their statutory obligations, ILECs make advanced services available to competitors in a timely and fully compliant fashion. Only by so doing can the Commission successfully achieve its goal of "removing barriers to competition so that competing providers are able to compete effectively

[59] In addition, C&W USA would note, as commenters have explained, that alternative sources of statutory authority permit the Commission to impose market-opening obligations on the ILECs similar to those established by Section 251(c) – including Section 201(a), Section 201(b), and 202(a). *See, e.g.*, CoreComm at 16-17; Covad at 19-21; Rhythms NetConnections at 25-28.

with incumbent LECs and their affiliates in the provision of advanced services,"[60] thereby making advanced services widely available to all Americans.

Respectfully submitted,

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October 1, 1999

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[60] *NOI Report*, ¶ 3.

CERTIFICATE OF SERVICE

I, Rebekah J. Kinnett, hereby certify that on this 1st day of October, 1999 copies of the foregoing Reply Comments of Cable & Wireless USA, Inc. were served by hand on the following:

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DC01/KINNR/92400.1