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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, Et al.	)	**CC Docket Nos. 98-11, 98-32, 98-78, 98-91, and 98-147**
Proceedings on Voluntary Remand From the U.S. Court of Appeals For the D.C. Circuit	)	

REPLY COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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SUMMARY

With approximately 350 members, CompTel is the principal industry association representing U.S., international and global competitive telecommunications carriers and their suppliers. CompTel's members represent a cross-section of the competitive industry itself, with carriers offering all types of voice and data services, including local services, interexchange services, international services. For over 18 years, CompTel has advocated policies which expand the opportunities of carriers to serve customers in an open and competitive environment. CompTel submits that the gains of the past 18 years must be preserved by prompt and clear action by the Commission to ensure that the market-opening initiatives of the Telecommunications Act of 1996 are applied to the provision of advanced telecommunications services.

In this reply, CompTel addresses the arguments of the ILECs claiming that "advanced services" are outside the scope of Sections 251(b) and (c). First, CompTel points out that the ILECs continue to "hide the ball" as to the scope of the ruling they request, and ask the Commission to make findings for an entire set of technologies based on the alleged characteristics of a single type of service made possible by the technology. The category of advanced services is much broader than the DSL application the ILECs focus upon, and the variety of those services confirm the Commission's original conclusion that advanced services are subject to Section 251. Second, CompTel explains that, although packet-switching technology differs in many respects from (and is more efficient than) circuit-switched technology, advanced services using packet-switching nonetheless fit the definition of "telephone exchange services" provided in the Act. Third, CompTel addresses arguments that advanced services are not "exchange access," and demonstrates that the proposed conclusion is

overbroad because there is no technological reason why advanced technologies cannot be used to offer exchange access as defined under the statute. Finally, CompTel agrees with those commenters who argue that Section 251 applies to all network elements and telecommunications services of the ILECs. The ILECs' attempts to limit the broad applicability of the statute contradict the plain language of the Act and must be rejected.

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REPLY COMMENTS OF
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, respectfully submits the following reply to the initial comments filed in response to the Commission's *Public Notice* on remand from the United States Court of Appeals for the District of Columbia Circuit.[1]

With approximately 350 members, CompTel is the principal industry association representing U.S., international and global competitive telecommunications carriers and their suppliers. CompTel's members represent a cross-section of the competitive industry itself, with carriers offering all types of voice and data services, including local services, interexchange services, and international services. For over 18 years, CompTel has advocated policies which

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1 *Public Notice*, Comments Requested in Connection with Court Remand of August 1998 Advanced Services Order, DA 99-1853 (Sept. 9, 1999). The Court of Appeals granted the Commission's motion for a voluntary remand in this case. *U S West Communications, Inc. v. FCC*, No. 98-1410, 1999 WL 728555 (D.C. Cir. Aug. 25, 1999) (order granting motion for remand).

expand the opportunities of carriers to serve customers in an open and competitive environment. CompTel submits that the gains of the past 18 years must be preserved by prompt and clear action by the Commission to ensure that the market-opening initiatives of the Telecommunications Act of 1996[2] are applied to the provision of advanced telecommunications services.

I. INTRODUCTION

In August 1998, the Commission released its *Advanced Services Order*.[3] In the *Order*, the Commission clarified that "the obligations of sections 251 and 252 of the Act apply to advanced services and the facilities used to provide those services."[4] Accordingly, the Commission held that ILECs are obligated (1) to provide interconnection for advanced services, (2) to provide access to unbundled network elements used to provide advanced services, and (3) to offer for resale, pursuant to Section 251(c)(4) of the Act, all advanced services that they generally provide to subscribers who are not telecommunications carriers.[5] These rulings are correct under the statute and undoubtedly will further the FCC's obligation under Section 706 of the 1996 Act to promote the widespread deployment of advanced service technologies to all Americans. CompTel therefore agrees with the CLECs urging the Commission to reaffirm its *Advanced Services Order* in this remand.

In this reply, CompTel addresses the arguments of the ILECs claiming that "advanced services" are outside the scope of Sections 251(b) and (c). First, CompTel points out

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2 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 et seq. (1996).

3 *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24011 (1998) (*Advanced Services Order*).

4 *Advanced Services Order*, ¶ 32.

5 *Id.*

that the ILECs continue to "hide the ball" as to the scope of the ruling they request, and ask the Commission to make findings for an entire set of technologies based on the alleged characteristics of a single type of service made possible by the technology. The category of advanced services is much broader than the DSL application the ILECs focus upon, and the variety of those services confirm the Commission's original conclusion. Second, CompTel explains that, although packet-switching technology differs in many respects from (and is more efficient than) circuit-switched technology, advanced services using packet-switching nonetheless fit the definition of "telephone exchange services" provided in the Act. Third, CompTel addresses arguments that advanced services are not "exchange access," and demonstrates that the proposed conclusion is overbroad because there is no technological reason why advanced technologies cannot be used to offer exchange access as defined under the statute. Finally, CompTel agrees with those commenters who argue that Section 251 applies to all network elements and telecommunications services of the ILECs. The ILECs' attempts to limit the broad applicability of the statute contradict the plain language of the Act and must be rejected.

II. THE ILEC COMMENTS ASK FOR A SWEEPING DECLARATION BASED ON ONLY ONE TYPE OF ADVANCED SERVICE

The ILECs' use of the term "advanced services" is misleading at best. Critically, although they ask the Commission to declare that "advanced services" are not subject to the Act, they never define the term, and focus on only one type of advanced service – DSL.[6] Even then,

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6 *See, e.g.,* GTE Comments at 3-6 (heading refers to "DSL and other advanced services," but comments discuss only DSL services); U S West Comments at 7-11 (nominally referring to "advanced services," but comments do not define the term and only DSL is discussed). Unless otherwise specified, references to a party's "Comments" in this

the ILECs ignore the variety of uses of DSL-based services and instead focus solely on one application of the technology. The Commission cannot make the findings the ILECs request based on such a stunted vision of advanced services. To the contrary, when the breadth of advanced services are considered, it becomes clear that advanced services are telecommunications services which are (or can be) either telephone exchange service and/or exchange access services. As a result, they clearly fall within the scope of Section 251, and the Commission's approach is required by the statute.

Section 706 of the 1996 Act defines "advanced telecommunications capability" as follows:

> The term "advanced telecommunications capability" is defined, 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.[7]

This definition encompasses *any* "high-speed, switched broadband" telecommunications service, including all services using packet-switched technologies. In addition, by making clear that advanced services were to be defined "without regard to any transmission media or technology," Congress intended the term to be forward looking and to encompass new services and new technologies yet to be developed. The ILECs' insistence on pigeon-holing services as either replicas of POTS services or "something else" thus is out of step with the purpose and meaning of "advanced services."

(..continued)

proceeding refer to comments filed in CC Docket Nos. 98-147 et al. on September 24, 1999.

7 Telecommunications Act of 1996, § 706(c)(1), 47 U.S.C. § 157 Note (c)(1) (1999).

"Advanced services" include services such as frame relay services and ATM-based services, in addition to all services made possible by DSL technology. Frame relay, for example, is a packet-based technology that provides a very efficient and reliable means of transporting information (such as files or video) between geographically dispersed LANs.[8] Similarly, Asynchronous Transfer Mode ("ATM") is a very high speed, low delay, connection-oriented, packet-like switching and multiplexing technique.[9] The Commission has already determined that such services are "basic services" even though they employ packet-switched technology to transmit information.[10] They also clearly are the type of broadband services Congress envisioned in enacting Section 706.

Throughout their comments, ILECs refer exclusively to "DSL services" as if they were monolithic and representative of all possible advanced services.[11] They are neither. Digital Subscriber Line or "DSL" is a technology for delivering high-bandwidth information over ordinary copper telephone lines. "xDSL" refers to the many different variations of DSL technology, such as ADSL, HDSL, RADSL and "DSL-Lite." Each of these technologies offer different data transmission speeds and have different technical requirements for the provision of service. What they have in common is the use of DSL as a transmission technology, like SS7 or analog transmission, useful to deliver broadband telecommunications to consumers and businesses.

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8 *Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling that AT&T's InterSpan Frame Relay Service is a Basic Service*, 10 FCC Rcd 13717, 13718 (1995) (*Frame Relay Order*).

9 *See 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*, Report, FCC Docket No. 98-146, FCC 99-5, at n.77 (Feb. 2, 1999).

10 *Frame Relay Order*, 10 FCC Rcd at 13721-22; *see also Advanced Services Order*, ¶ 35.

11 *See* U S West Comments at 7-11.

In a typical DSL service configuration, a customer installs a DSL modem on its premises, which is connected to the ordinary copper telephone lines currently used to provide voice services. DSL uses a clean copper loop from the customer premises to the nearest central office. At the central office, a DSL service provider installs multiplexing equipment known as a Digital Subscriber Line Access Multiplexer or DSLAM. The DSLAM segregates and routes traffic originating on the line according to the user's specifications. Ordinarily, but not necessarily, voice traffic is separated and routed over circuit-switches while data traffic is routed over packet switches.[12] The DSLAM is connected to a packet-switched network (frequently an ATM network) for routing of data traffic. Specific paths are "reserved" in advance by establishing a "permanent virtual circuit" ("PVC") between customer-designated points.

Using this technology, carriers can offer a variety of broadband services to customers. While high-speed connections to ISPs certainly are one of the potential uses of DSL technology, it is not the only use. For example, U S West offers DSL services under the brand name of MegaBit service. U S West advertises its MegaBit service as useful for a number of purposes, citing specifically to high-speed connections to ISPs or to company LANs, transmission of large files between users, desktop-based video conferencing and telecommuting.[13] Underscoring these uses, U S West instructs customers that each access link must be connected to a designated location, which "could be a business LAN, another business

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12 *See* Sprint Comments at 3. In addition, U S West is developing a version of DSL which will route voice traffic over the packet-switched network along with data traffic. CDS Networks Comments at 4 and Attachment.

13 *See* U S West, *MegaBit Services: for Small Business,* (visited Sept. 22, 1999) <http://www.uswest.com/pcat/small_business/product/0,1084,43_3_3,00.html>.

location, or an ISP such as U S West."[14] Other ILEC providers similarly describe their service as useful for "satellite offices, teleworking, telemedicine, distance learning and more."[15]

Thus, the Commission undoubtedly was correct when it concluded that advanced services, including specifically xDSL and packet-switched services, are transmission technologies which "transport information of the user's choosing between or among user-specified points, without change in the form or content of the information as sent and received," and therefore involve telecommunications under the Act.[16] CompTel agrees with MCIWorldCom that the capabilities possessed by these technologies "cannot logically be reduced to any one of its possible services."[17] Yet that is exactly what U S West and other ILECs ask the Commission to do when they engage in broad generalizations based on use of DSL technology to connect to ISPs. Advanced services simply encompass too many types of services to generalize based on a single application.

In the context of this proceeding, the Commission must consider all of the varied purposes of advanced services in addressing how Section 251 applies to this category of services. The Commission should not make blanket pronouncements based on only a single use of one type of advanced services. Rather, the Commission's obligation is to consider the category as a whole and to determine whether the Act covers these capabilities. When the Commission does this, CompTel submits, it will be clear that advanced services fall within the definition of "telephone exchange service" and can also constitute "exchange access" in appropriate contexts. The applicability of these statutory definitions is discussed below.

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14 *Id.*

15 *See, e.g.,* Bell Atlantic, *InfoSpeed DSL,* (visited Sept. 27, 1999) <http://www.bellatlantic.com/business/adsl>.

16 *Advanced Services Order*, ¶ 35.

17 MCIWorldCom Comments at 6.

III. ADVANCED SERVICES FIT WITHIN BOTH PRONGS OF THE DEFINITION OF "TELEPHONE EXCHANGE SERVICE"

Local telecommunications services constitute telephone exchange services if they satisfy one of two alternative definitions in the Act. Specifically, the Act defines "telephone exchange service" as:

> (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.[18]

As will be discussed in more detail below, advances services – including DSL-based services – constitute telephone exchange service under both definitions.

A. Advanced Services Constitute "Telephone Exchange Service" Under Section 3(47)(A).

Prior to 1996, the Communications Act defined "telephone exchange service" to include: (1) "service 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] Telecommunications services provided using advanced service capabilities satisfy each of these three prongs.

1. Advanced services are provided within an exchange or system of exchanges.

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

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18 47 U.S.C. § 153(47).

services – all are designed to provide customers with a transmission path connecting points anywhere within a specified serving area.[20] Packet-switched networks present 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 purposed of Section 3(47)(A): interconnected packet switches operate in a manner functionally similar to interconnected circuit switches.[21]

Moreover, in many cases transmissions carried over DSL and other advanced facilities do *not* leave the originating 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 are used only to provide Internet access, and hence are jurisdictionally interstate.[22]

(..continued)

19 *Id.*, § 153(47)(A).

20 *See, e.g.,* Joint Comments of Advanced Telecom Group et al. at 11 ("Joint CLEC Comments").

21 CompTel agrees with many commenting parties 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. CompTel submits that, consistent with the technology-neutral nature of the Act, the Commission should interpret what 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. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16013-14 (1996) ("*Local Competition First R&O*") (local service area for reciprocal compensation purposes where a CMRS provider interconnects with a LEC is the Major Trading Area).

22 U S West Appellate Brief at 11; U S West Comments at 7.

But the Commission's jurisdictional finding does not pertain to the classification of the underlying service. "Local" services can be interstate in nature, just as "long distance" services clearly can be intrastate. Further, the Commission's orders rested on a "mixed use" rationale; that is, the orders recognized that some unknown percentage of the traffic in this configuration was intrastate.[23] Thus, these cases do not stand for the proposition that DSL-based services connected to ISPs do not terminate within an exchange. They clearly do.

In addition, in a broader context, DSL and other advanced transmission services – such as frame relay and ATM services – may be 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.[24] These services – especially telecommuting – easily may involve transmissions between points within a single exchange or system of exchanges, and hence clearly satisfy the requirements of Section 3(47)(A).

2. Advanced services are operated to furnish subscribers intercommunicating service.

U S West and other ILECs also attempt to make much of the argument that advanced services cannot qualify as telephone exchange services because they are not operated to furnish subscribers with "intercommunicating service." Significantly, neither the Act nor FCC

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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* at ¶ 18; *see also* AT&T Comments at 10, CDS Networks Comments at 5.

precedent offers a definition of what constitutes "intercommunicating service." However, CompTel 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 Commission explained in the *Advanced Services Order*, in an advanced services environment the local exchange carrier 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 note 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]

U S West and others suggest that since packet-switched services are configured in "permanent virtual circuits" ("PVCs"), the services are "dedicated" and therefore cannot provide "any to any" communications. This argument is unfounded for several reasons. First, no FCC precedent requires "any to any" communication as a prerequisite of telephone exchange service. The cases on which U S West relies merely note – usually in *dicta* – that local service enables dial-up access to any subscriber within an exchange.[27] This observation is merely a reflection of historical technology and service provisioning, not of the legal requirement of telephone exchange service.

(..continued)

24 *See supra,* pp. 6-7.

25 *Advanced Services Order*, ¶ 42.

26 *Id.* (emphasis added).

27 *See, e.g., Application of BellSouth Corp. et al. for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20599, 20622 (1998) ("*BellSouth Louisiana Order*") (finding that PCS users can call and receive calls from wireline and wireless subscribers).

Second, PVCs provide interconnectivity with other subscribers within the exchange area. PVCs may be established between a subscriber and *any other* subscriber on a packet-switched network or connected networks.[28] Moreover, in many applications, users may establish multiple PVCs from a single originating point, thus enabling them to connect with multiple subscribers within the exchange area.[29] PVCs in essence operate as pre-call routing instructions, allowing packet-switches to "plan" for the bursty communications that will follow. Rather than capture an open circuit on a real time basis (as circuit switches do), packet switches "reserve" transmission paths through the use of PVCs.[30] In any event, the function of the exchange area served by the switch (or series of switches) is the same: to permit subscribers to reach any other designated point within the exchange area.

Third, PVCs, despite their name, are not in fact permanent, and may be added or modified at any time. For example, U S West's frame relay service allows the customer "to add or delete virtual connections with software, so that [the customer] can easily reconfigure [its] network to meet changing business needs, anytime [the customer] want[s]."[31] These software changes may be made in as little as seven minutes or less.[32] CompTel submits that the relative ease in establishing and changing PVCs gives packet-switched technology a functionality equivalent to circuit-switched call routing.

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28 Joint CLEC Comments at 9-10. *See also Advanced Services Order*, n.73.

29 US West's interstate frame relay tariff, for example, recommends a maximum of 30 PVCs for a 56 kbps port and 125 PVCs for 1.544 Mbps port. U S West Communications, Tariff F.C.C. No. 5, 7th Rev. Page 8-15, § 8.2.2.A.8.

30 Carriers maintain efficiency in the network by providing minimum "committed interval rates," or transmission speeds, and by "oversubscribing" their networks so that capacity is not unused at any particular time.

31 U S West, *Frame relay services: small business data,* (visited Sept. 22, 1999) << http://www.uswest.com/pcat/small_business/product/0,1084,93_3_2,00.html>>.

32 Joint CLEC Comments at 9 n.7.

A couple of other points regarding "intercommunicating service" bear emphasis. CompTel agrees that telephone exchange services are not limited to voice services.[33] Any effort to restrict the definition of "telephone exchange service" to circuit-switched voice services is antithetical to the procompetitive, technological neutrality of the 1996 Act. As the Commission itself has recognized, the agency has never "suggested that two-way voice service is a *necessary* component of telephone exchange service."[34] Indeed, the cases cited by U S West state only that telephone exchange service "*ordinarily* is characterized by the ... provision of individual two-way voice communication by means of a central switching complex to interconnect with all subscribers within a geographic area."[35] The use of the qualifier "ordinarily" in this context demonstrates that telephone exchange service is not *required* to possess these qualities.[36]

Similarly, the Commission has never found that a service must be connected via circuit switching or with the PSTN in order to be considered a "telephone exchange service." As with the argument that telephone exchange services must be voice transmissions, CompTel believes that any such determination would be inconsistent with both the service and technological neutrality of the Act. Indeed, 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. It is not outside the realm of the possible that at some point circuit-switching will become

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33 *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.").

34 *Advanced Services Order*, ¶ 43.

35 *Application of Midwest Corp.* 53 F.C.C. 2d 294, ¶ 10 (1975) (emphasis added).

36 Of course, even if voice telecommunications were considered important, 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. *See, e.g.*, CDS Networks Comments at 4; MGC Comments at 6; Sprint Comments at 3.

entirely obsolete – should that eventuality arise, under U S West's interpretation, Section 3(47)(A) also would be rendered obsolete. Such a result qualifies as an absurdity.

Finally, the Commission's decision in *Offshore Telephone* is inapposite here.[37] That case involved a dispute relating to pre-Divestiture Bell System toll sharing, in which Offshore, a specialized radio communications carrier, complained that the Bell System discriminated against it by refusing to enter into toll sharing arrangements with it. The consequence of permitting Offshore to enter into a toll sharing arrangement apparently would have resulted in Offshore providing a joint service with AT&T and its Bell System affiliates.[38] The Commission concluded that Offshore was not like the carriers with whom AT&T entered into toll sharing arrangements, and therefore, AT&T had not engaged in any discrimination.[39]

The unique historical context of *Offshore Telephone*, however, is starkly dissimilar from the circumstances surrounding the provision of advanced services. First, Offshore was not certified as a local exchange carrier and served only a "limited group" of industrial customers.[40] Second, Offshore apparently had no switching facilities of its own and relied upon South Central Bell to route all communications to the subscriber's intended recipient.[41] Third, communications between Offshore's customers either bypassed Offshore's service or were routed through South Central Bell's switches, to the extent they occurred at all.[42]

(..continued)

37 *Offshore Tel. Co. v. South Central Bell et al.,* 6 FCC Rcd 2286 (1991) (*Offshore Telephone*).

38 *Id.* at 2288 n.1.

39 *Id.* at 2286-87.

40 *Id.* at 2287 (¶ 11).

41 *Id.* (¶ 12).

42 *Id.* The Bureau found the record "devoid of any probative support" for the claim that there was any significant inter-rig calling. *Offshore Tel. Co. v. South Central Bell et al.*, 2 FCC Rcd 4546 , ¶ 39 (Com. Car. Bur. 1987) (*Bureau Order*).

By contrast, providers of advanced services are certified as local exchange carriers by the states and serve a broad base of customers. Advanced service providers typically have invested extensively in deploying a packet-switched network, and use their own facilities (including UNEs) to route subscriber communications. Finally, subscriber-to-subscriber communications are common and often are completed entirely through the carrier's own facilities.

Moreover, the Commission concluded that Offshore's services were most like other services excluded from historical toll sharing arrangements, including mobile services.[43] Those mobile services today clearly are considered telephone exchange services, as the ILECs admit.[44] Thus, the continued validity of the conclusion reached in *Offshore Telephone* is uncertain at best.

3. Advanced services are covered by the exchange service charge.

Advanced services meet the last requirement of Section 3(47)(A). As with the concept of "intercommunicating service," neither the Act nor the FCC has provided a definition for what constitutes the "exchange service charge."[45] CompTel submits that an exchange service charge is demonstrated by 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

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43 *Offshore Telephone*, 6 FCC Rcd at 2287 (¶ 12). These "specialized" services were not included within the revenue sharing arrangements used for "traditional" local exchange services. *Id.* The order emphasizes that toll sharing was only used for "traditional" services having common or averaged costs. *Id.* at 2286-87 (¶ 9).

44 *See* U S West Appellate Brief at 21 n.11 (citing conclusion in *BellSouth Louisiana Order* that PCS is a telephone exchange service).

45 CompTel agrees with AT&T that this requirement is potentially circular. AT&T Comments at 11 and n.11. If the service provided is a telephone exchange service, then, by definition, the charge assessed for it would be the "exchange service charge." For this reason, CompTel suggests that the exchange service charge requirement must refer in some manner to an equivalent of a "local" calling area.

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 on to 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.

4. Advanced Services Constitute "Telephone Exchange Service" Under Section (47)(B).

Even if the Commission were to determine that advanced services do not constitute "telephone exchange service" under Section 3(47)(A), CompTel submits that the far broader definition of Section 3(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 3(47)(B) includes in the definition of "telephone exchange service" "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."[46]

Clearly, advanced service capability permits subscribers to "originate and terminate a telecommunications service." On its face Section 3(47)(B) does not limit the type of facilities or equipment that may be used – like packet switches and DSLAMs – and does not limit the type of telecommunications services that may be offered – including nontraditional

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[46] 47 U.S.C. § 153(47)(B).

advanced telecommunications services such as DSL, frame relay, and ATM. Further, as several commenters note, the fact that advanced telecommunications services may involve the transmission of information services is irrelevant to their classification as telecommunications services and as telephone exchange services.[47] In short, in Section 3(47)(B) Congress expanded the scope of the definition of "telephone exchange service" to include "comparable service" – based on *any* technology – provided by a telecommunications carrier.[48] As the Commission has pointed out, the plain, all-inclusive language of Section 3(47)(B) "thus refutes any attempt to tie these statutory definitions to a particular technology."[49]

Given the broad language of Section 3(47)(B), the arguments of U S West, SBC, and others that a "comparable" telephone exchange service must be functionally equivalent to and substitutable for two-way switched voice telephony are entirely without merit.[50] "Comparable" does not mean "identical;" only that the items compared share significant characteristics.[51] As shown above, advanced services at a minimum share enough characteristics with "traditional" telephone exchange services as to be comparable. If, as the incumbents argue, Section 3(47)(B) required services which were exact substitutes (it does not), then the section would be nothing more than a redundancy. In this regard, CompTel 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 proceeding, that Section 3(47)(B):

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47 *See* Sprint Comments at 5 & n.9. All information services are provided "via telecommunications." 47 U.S.C. § 153(20).

48 *Advanced Services Order*, ¶ 41.

49 *Advanced Services Order*, ¶ 41.

50 *See, e.g.*, U S West Comments at 8, SBC Comments at 6-7. CompTel 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 Comments at 5.

> 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.[52]

In sum, any contrary interpretation of Section 3(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.

CompTel's interpretation of Section 3(47) is confirmed by common sense. Competitive carriers offering DSL-based services receive certification under state law as "local exchange carriers." These carriers file exchange tariffs specifying their services and providing exchange maps. They also obtain NXX codes as local carriers, and are subject to state law obligations of local exchange carriers. The ILECs' argument would lead to the contrary conclusion that these carriers were not required to obtain (or even eligible for) such certification and tariffing. Moreover, it would, as Northpoint notes, deprive these carriers of access to ILEC elements,[53] including the collocation necessary to install DSLAMS in ILEC central offices. Surely, that is not what Congress could have intended in drafting Section 251.

IV. ADVANCED SERVICES CAN CONSTITUTE "EXCHANGE ACCESS" UNDER THE ACT

The ILECs also claim that advanced services do not constitute "exchange access" under the Act. While CompTel agrees that the statutory definition of "exchange access" requires access for the provision of toll services, and thus CompTel believes that advanced services

(..continued)

51 *See* Sprint Comments at 4-5.

52 Comments of Senators Stevens and Burns, at 2 n.1, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 (filed Jan. 26, 1998).

53 Northpoint Comments at 16.

provided to end users today do not satisfy this definition, CompTel disagrees with the ILECs' conclusion that these services cannot constitute exchange access. There is no technical reason why advanced service capabilities could not be used to provide access for purposes of toll services. Thus, although the Commission should not find that DSL-based advanced services are exchange access, neither should it conclude that advanced services can never 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."[54] Two observations are apparent from the statutory language. First, exchange access involves the offering of "telephone exchange services," thereby suggesting that exchange access is a subset of telephone exchange service. This means, for example, that a service which is classified as exchange access would also, if provided to a non-carrier, constitute telephone exchange services. Second, exchange access involves the offering of telephone exchange service *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.

CompTel agrees with commenters (including the ILECs) that most advanced services, including the use of xDSL 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 services, which is defined by the Act as interexchange telephone service.[55] Moreover, the tariffs and industry practice for most advanced services, including

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54 47 U.S.C. § 153(16).

55 *Id.* § 153(48).

xDSL services connected to ISPs, confirm that the services are offered for the subscriber's data communication needs within a specified area, not for originating or terminating toll services.

Of course, nothing in the above discussion 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, nor to the provision of voice services, for that matter.[56] Accordingly, ILEC arguments that exchange access is limited to "ordinary telephone to telephone long distance calling" go too far.[57] Advanced service technologies are just 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.[58] Therefore, although the Commission need not conclude that any particular advanced services today are offered as exchange access services, neither can it conclude that it would be impossible to do so.

Finally, CompTel disagrees with SBC's argument that "exchange access" does not include special access services.[59] The Commission has long equated special access with exchange access,[60] and there is no legal or policy reason to differentiate between the two. Indeed, SBC's argument would lead to the absurd conclusion that a requesting carrier could establish an interconnection arrangement if its customer requested switched access to the

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56 "Telephone toll service" is defined as a "telephone service" which, like the more generic "telecommunications service," can apply to both voice or data services. *Id.*

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

58 Sprint Comments at 3; MCIWorldCom Comments at 8.

59 SBC Comments at 8.

60 *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").

requesting carrier, but not if the customer desired to connect via a DS-1.[61] Of course, perhaps the only reason SBC presents this absurd position is its desire to restrict "telephone exchange service" to POTS-like switched voice services. 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 its sister BOC, U S West, which admits, as it must, that "exchange access" can include dedicated connections.[62]

V. REGARDLESS OF HOW THE COMMISSION CLASSIFIES ADVANCED SERVICES, NOTHING DIMINISHES THE ILECS' OBLIGATIONS TO COMPLY WITH SECTION 251(C)

The undercurrent of the ILECs' comments is that, unless the Commission finds advanced services to be either telephone exchange services or exchange access, they are not subject to Section 251(c)'s market-opening obligations. This premise, however, is fundamentally incorrect. 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 obligations those entities have.

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61 *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 non-discriminatory 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. And 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).

62 *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").

Section 251(c) states that each incumbent LEC has the duties specified therein. The plain language of that section refutes the ILECs' claims. Critically, with the exception of Section 251(c)(2) – which speaks of 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 service or facilities are "telephone exchange service" or "exchange access." This plain language permits no limits based on the type of service to be provided by the requesting carrier. Indeed, the existence of a service limitation in Section 251(c)(2) shows that Congress intentionally omitted such a limitation elsewhere within Section 251(c).

Section 251(c)(3), for example, requires ILECs to offer "nondiscriminatory access to network elements on a unbundled basis."[63] The only requirement is that the requesting carrier be a "telecommunications carrier."[64] Similarly, the definition of "network element" includes any equipment or facility "used in the provision of a *telecommunications service*."[65] Congress could have – but did not – limited this definition to equipment or facilities used in the provision of telephone exchange services or exchange access, if that had been what it intended. Moreover, Section 251(c)(2)'s interconnection rights do not limit the applicability of Section 251(c)(3). The Commission has made clear that Section 251(c)(3) establishes a *separate* interconnection duty, different from Section 251(c)(2)'s interconnection duty.[66] Accordingly, the ILECs must interconnect for purposes of accessing network elements, even if such access is for purposes other than providing the services identified in Section 251(c)(2).

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63 47 U.S.C. § 251(c)(3).

64 *Id.*

65 *Id.*, § 153(29) (emphasis added).

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

A similar analysis holds for total service resale under Section 251(c)(4). That section requires ILECs to offer at wholesale rates *any* retail telecommunications service, not just telephone exchange or exchange access services.[67] Any service which constitutes a "telecommunications service" is potentially eligible for (c)(4)'s wholesale discount. Accordingly, regardless of how the Commission classifies advanced services, it should make clear that services provided at retail are subject to Section 251's resale obligations.

CONCLUSION

For the foregoing reasons, CompTel urges the Commission to promptly reaffirm its findings that advanced services are subject to the market-opening provisions of the 1996 Act. Advanced services clearly fall within the categories of telephone exchange service or exchange access, or both. ILEC attempts to confuse jurisdiction with the classification of service are misguided and, in any event disregard the breadth of services made possible by advanced

[67] 47 U.S.C. § 251(c)(4).

telecommunications capabilities. Accordingly, the Commission should order ILECs to make advanced services available consistent with Section 251 of the Act.

Respectfully submitted,

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