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

In the Matters of	)	
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
Petition of Bell Atlantic Corporation For Relief from Barriers to Deployment of Advanced Telecommunications Services	)	CC Docket No. 98-11
	)	
Petition of US WEST Communications, Inc. For Relief from Barriers to Deployment of Advanced Telecommunications Services	)	CC Docket No. 98-26
	)	
Petition of Ameritech Corporation to Remove Barriers to investment in Advanced Telecommunications Technology	)	CC Docket No. 98-32
	)	
Petition of the Association for Local Telecommunications Services (ALTS) for a Declaratory Ruling Establishing Conditions Necessary to promote Deployment of Advanced Telecommunications Capability Under Section 706 of the Telecommunications Act of 1996	)	CC Docket No. 98-78
	)	
Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell Petition for Relief from Regulation Pursuant to Section 706 of the Telecommunications Act of 1996 and 47 U.S.C. § 160 for ADSL Infrastructure and Service	)	CC Docket No. 98-91

REPLY COMMENTS OF AMERICA ONLINE, INC.

DONNA N. LAMPERT ASSOCIATES, P.C.
701 Pennsylvania Avenue, N.W., Suite 200
Washington, D.C. 20004
(202) 393-6410

Date: October 1, 1999

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REPLY COMMENTS OF AMERICA ONLINE, INC.

America Online, Inc. ("AOL"), by its attorneys, hereby submits its Reply Comments in response to the comments filed in the above-captioned proceedings regarding the regulatory status and classification of advanced services offered by incumbent local exchange carriers ("ILECs").[1] The issues raised by commenters underscore the need for a regulatory framework

[1] "Comments Requested in Connection with Court Remand of August 1998 Advanced Services Order," Public Notice, DA 99-1853 (rel. Sept. 9, 1999) (the "Public Notice").

that ensures that consumers are offered competitive choices among Internet Service Providers ("ISPs"), whether in the broadband or narrowband environment, so that the market, rather than the last mile facilities owner, can dictate the success or failure of Internet services.

I. INTRODUCTION AND SUMMARY

Since its founding in 1985, AOL has played a leading role in developing a vibrant Internet online service medium capable of delivering information, entertainment, and interactive services to consumers around the globe. Through its service, AOL's members receive the benefits of original programming and informational content, e-mail capabilities, access to the World Wide Web and information databases, opportunities to engage in electronic commerce, and opportunities to participate in online "chat" conferences. As mass-market wireline broadband capabilities emerge, whether DSL or cable modem services, AOL seeks to offer consumers the same diversity and innovation they today enjoy in the narrowband, dial-up world.

Significantly, the issues raised in this proceeding regarding the Telecommunications Act of 1996 ("1996 Act") and its relationship to the provision of advanced services by the ILECs must be understood in the context of the broad statutory and regulatory policies that have fostered the competitive Internet services market we enjoy today. As Congress has recognized, it is in our national interest to promote the development of advanced capabilities, regardless of the transmission media or technology.[2] Indeed, advanced services – also referred to as broadband services – are expected to promote the continued growth and future development of the Internet, which is becoming increasingly critical to our nation's progress and productivity.[3] The FCC

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[2] Section 706(c) of the Telecommunications Act of 1996, 47 USC § 157 nt (1999).

[3] See, e.g., the U.S. Department of Commerce report on "The Emerging Digital Economy II," in which it highlighted the extraordinary role of the Internet for the U.S. economy. U.S. Department of Commerce, The Emerging Digital Economy II (rel. June, 1999). See also *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, FCC 99-38, at ¶ 6 (rel. Feb. 26, 1999) ("Reciprocal Compensation Order") ("The Internet provides citizens of the United States with the ability to communicate across state and national borders in ways undreamed of only a few years ago").

cannot ignore that the wealth of social and economic benefits of the Internet, and its future, is linked fundamentally to the competitive telecommunications environment over which the Internet operates. Indeed, it has been the FCC's continued insistence that independent competitors be able to offer, on a non-discriminatory basis, services to consumers that compete with those offered by the owners of last mile infrastructure that has served the public interest well.[4]

Accordingly, the Commission should reaffirm in this proceeding the need for open and nondiscriminatory infrastructure for ISPs, regardless of the transmission facilities or technology or whether deployed by entities whose core business is telephony or cable. As the Commission addresses the regulatory classification of xDSL services, it should pursue the fundamental principle of ensuring that the providers of last mile broadband facilities cannot become "electronic gatekeepers." In this way, demand for information services will continue to grow steadily, and diversity and competition will flourish. As the FCC well understands, competition not only brings consumers better prices, more choices, and better quality services, it is also the key to attaining rapid, wide-scale broadband deployment.[5] As competition fosters these diverse choices, demand – and hence deployment incentives – will increase.

Essential to this vigorous broadband service competition, however, are Commission policies and rules promoting open and accessible last mile facilities. As the competitive local

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[4] *In the Matter of Regulatory and Policy Problems Presented by the Independence of Computer and Communications Services and Facilities (Computer I)*, Final Decision, 28 F.C.C. 2d 267 (1971) (subsequent history omitted); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, Final Decision, 77 F.C.C. 2d 384 (1980) (subsequent history omitted); Report and Order *(Computer III)*, 104 F.C.C. 2d 958 (1986) (subsequent history omitted).

[5] Thus, the FCC has stated: "[C]ompetition among providers of broadband service may occur on price (different prices and different rate structures (flat-rate and usage-sensitive)), quality of service (different volumes and speeds of transmission in one or both directions), warranties against outages, technical features (symmetrical and asymmetrical bandwidth, storage space), geography (one technology working best in one kind of topography), and user-friendliness (some customers wanting just easy-to-use e-mail and fast web access and others wanting their own personal web pages and major multimedia applications)." *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible* (footnote continued)

exchange carrier ("CLEC") commenters have pointed out, broadband service competition requires that competing telecommunications providers obtain the open access contemplated under the 1996 Act.[6] And, as the FCC has long recognized, it is equally important that ISPs, that produce, organize, and host directly the wealth of information on the Internet, also are afforded access so that they may offer their services to consumers.

These principles are the basis of the 1996 Act and longstanding Commission precedent, and must be retained as the FCC defines its policies and rules in the advanced services context. In this way, all potential broadband transport providers, as well as ISPs, will have the opportunity to serve consumers. Indeed, were the FCC to promote only CLEC transport competition, without its policies fostering ISP access and competition, the American public would be deprived of the diversity and richness offered by the competitive ISP market. Simply put, only by affording consumers the ability to select freely the ISP that best meets their needs, whatever the broadband medium, can the Commission foster multi-dimensional competition that serves the public interest.

II. THE FCC SHOULD REAFFIRM OPEN ACCESS PRINCIPLES IN ASSESSING THE REGULATORY STATUS OF xDSL SERVICES

A. The FCC Should Ensure Continued Development of All Advanced Services To Promote Competition, Diversity and Choice

A fundamental premise of the 1996 Act is that to promote rapid, expansive deployment, advanced transmission capabilities must develop competitively, with the underlying essential network components open for all potential competitors to offer services. Not only does Section 706(a) of the 1996 Act direct the Commission to encourage broadly competition for advanced

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Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Report, CC Docket 98-149, FCC 99-5, at ¶ 2 (rel. January 28, 1999).

[6] See e.g., Comments of Northpoint Communications, Inc. at 2-3.

services deployment,[7] the Commission has explained that by "ensuring that all markets are open to competition" as envisioned by the 1996 Act,[8] "consumers will ultimately benefit through lower prices and increased choices in advanced services."[9] Critically, in evaluating its role in implementing this core statutory goal, the FCC has recognized that the goal of advanced services deployment is continually confronted by "the problem of the 'last mile'" and has made a fundamentally sound decision. The FCC has concluded that "the 1996 Act is technologically neutral and is designed to ensure competition"[10] among competing providers of advanced services "so as to make advanced telecommunications and information technologies and services available to all Americans."[11]

Building upon this basic premise, the FCC in its Advanced Services Order upheld the obligation of the ILECs to open their "last mile" networks to competition so that copper-based advanced transmission capabilities – xDSL – could flourish. In so doing, the FCC rejected arguments that open access obligations would "reduce [ILEC] incentive to invest in these new facilities, and are not necessary given their lack of market power in this [advanced services] area."[12] As the Commission has explained, the principles of openness and access that are fundamental to promoting competition in the ISP market apply fully in the broadband context.[13]

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[7] Telecommunications Act of 1996, § 706(a); Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong. 2nd Sess. at 1 (1996) (1996 Act provides for a pro-competitive national regulatory policy "designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition"). See also 47 U.S.C. § 254 (b)(2) (statute sets USF policy goal of "[a]ccess to advanced telecommunications and information services" for "all regions of the Nation").

[8] *In the Matter of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, 13 FCC Rcd. 24011, ¶ 1 (1998) ("Advanced Services Order").

[9] *In the Matter of Wireline Services Offering Advanced Telecommunications* Capability, First Report and Order, CC Docket No. 98-147, FCC 99-48, ¶ 4 (rel. March 31, 1999).

[10] Advanced Services Order, at ¶¶ 8, 11.

[11] Id., ¶ 20.

[12] Id., ¶ 10.

[13] Id., ¶ 37 (Computer III ONA, unbundling, and nondiscrimination obligations apply fully to the ILEC's xDSL services).

Today, ILEC broadband xDSL and narrowband services are key components in the rapid deployment of a diversity of Internet services to Americans. The ISP market today offers all Americans the power to choose among myriad competing Internet service providers, including national, regional and local offerings.[14] These providers offer a range of different services, price points and functions to attract consumers, including Internet access, web hosting, web design, and computer networking services.[15] ISP web-hosting and on-line services form the data centers across the Internet, where residential and business consumers can both post and search for an endless array of consumer and educational information as well as news and entertainment. ISPs also offer consumers a number of services to communicate either point-to-point or point-to-multipoint with one another, including e-mail; file transfer programs; instant messaging; video and Internet Protocol-based ("IP") telephony media. The ILECs deployment of xDSL services promise even greater levels of consumer use and value from ISP services and the Internet through such applications as video streaming; greater telecommuting capabilities; higher-speed downloading and file transfers for convenient access to music, graphics, and larger files.

AOL strongly supports the Commission's policy goal of allowing competition to meet best consumer demands for broadband and Internet services. Heavy-handed government regulation or policies that favor one market player or another are certainly not in the American consumer's interest. Indeed, government policies should foster, rather than interfere with, the ability of a consumer to select conveniently an Internet provider or service. Experience repeatedly underscores that ensuring the openness of the underlying transmission medium on which Internet services ride is precisely the type of policy that permits an environment of

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[14] Downes, Thomas and Greenstein, Shane, "Do Commercial ISPs Provide Universal Access," (Dec. 1998), *found at* http://skew.2.kellogg.nwu.edu/~greenste/research/papers/prcbook.pdf (study finds that over 98% of Americans have access to four or more local ISPs).

[15] S. Greenstein, "Building and Delivering the Virtual World: Commercializing Services for Internet Access," at 12 (June 9, 1999) (study finds that approximately 60% of ISPs in the United States offer more than just Internet access).

competition and consumer choice. As AT&T recognizes, the ownership of "bottleneck facilities" allow the facilities owner to "use that monopoly power to thwart competition not only in the provision of traditional local exchange services, but in *any* service provided over bottleneck facilities . . . ."[16] Thus, as a first step, to promote diversity and choice in this proceeding on xDSL, the FCC must reaffirm its commitment to open and accessible infrastructure.

B. Open Access Policies For "Last Mile" Networks Are the Key to Flourishing Competition In the Information Services Market

While the comments correctly recognize that the Commission's classification of xDSL services in the Advanced Services Order affords competitive telecommunications carriers with critical rights to ILEC functions and facilities,[17] it is equally significant for the opportunities it affords to competing ISPs to offer consumers choice and diversity of services. By classifying xDSL as "telecommunications" and "exchange access," the Commission made a significant first step to continue the policies and rules of openness in the narrowband context for the emerging broadband marketplace.[18] Notably, however, these policies are so well-grounded in both the 1996 Act and Commission precedent that regardless of the particular label that is used to describe the ILEC's advanced services – whether local exchange, exchange access or information access – openness and accessibility for ISPs can and should continue to be required.

First, the Commission must continue to apply the nondiscrimination principles inherent in common carriage to the ILECs' broadband services.[19] As the Commission noted in the

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[16] See Comments of AT&T at 7 (emphasis in original). AOL agrees wholeheartedly with AT&T's statement, and urges AT&T to apply this same standard to open its last mile facilities to competition in the ISP market.

[17] See Comments of Northpoint Communications, Inc. at 3-4.

[18] ILEC xDSL services are telecommunications services and not information services. The Commission has thoroughly articulated the statutory and continuing policy basis to distinguish telecommunications service from information service. See, e.g., *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 8776 (1998).

[19] See e.g., 47 U.S.C. § 202(a) (common carrier may not "make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services . . . by any means or device . . .").

Advanced Services Order, xDSL services are clearly "telecommunications services" offered to the public,[20] and Title II precedent requires common carriers to serve all customers, including ISPs who may compete with the carrier in the ISP market. Under this well-established regulatory framework, it is the end-user consumer that ultimately decides whether the carrier's affiliated ISP, or another, independent ISP that uses the carrier's transmission facilities, actually serves the customer best. Through the application of core nondiscrimination obligations to the telecommunications service,[21] consumers are ensured the opportunity to choose from several competing ISP services, and facilities owners are prevented from unilaterally foreclosing competitors from offering products or services that better meet consumers' demands.

Second, Commission policy and rules today correctly require that every facilities-based telecommunications carrier participating in the ISP market offer the basic transmission service separately to all competing ISPs, on the same terms that it offers to affiliated ISPs.[22] Significantly, this obligation applies to all carriers, including ILECs, and on a technologically neutral basis so that all network facilities, including "packet-based" technologies such as Frame Relay, are included.[23] The impetus for this requirement – to ensure competition by all enhanced (now information) service providers – remains vitally important. Indeed, it is now more important than ever for the Commission to apply vigorously its open access policies and precedent as these networks are being deployed and industry standards and practices are being developed. Thus, as xDSL services are rolled out, the FCC must reaffirm its commitment to consumer choice and competition by ensuring that consumers can connect to their ISP of choice.

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[20] Advanced Services Order, ¶ 35.

[21] See n. 19, above.

[22] *In the Matter of Independent Data Communications Manufacturers Association, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd. 13717, ¶ 59 (CCB 1995).

[23] Id.

Moreover, the FCC should apply and enforce this principle broadly, ensuring that it applies to all broadband wireline services and facilities, rather than solely to the ILECs.

Finally, the Commission's Computer III nondiscrimination requirements and principles correctly apply to the Regional Bell Operating Companies' ("RBOCs") "last mile" networks. The Commission has recently reaffirmed the continuing public interest in these rules to ensure "the operation of a fair and competitive market for information services" and to "help[] make vigorous competition possible, which ultimately benefits consumers."[24] Significantly, while these important open access safeguards remain in place, the Commission has also deregulated where appropriate and allows RBOCs to deploy information services without regulatory delay, demonstrating again that open access obligations need not be burdensome or difficult.

C. Re-Classifying xDSL Services As "Information Access" Is Unnecessary and Would Only Serve to Add Uncertainty to Open Access Principles

Some parties contend that its xDSL services are "information access" services, a term used (sparingly) in the AT&T divestiture context to the obligation of an RBOC to offer "exchange telecommunications services" on a nondiscriminatory basis between an end user to an information service provider.[25] These parties further contend that as an "information access" service, xDSL is not an "exchange service" or "exchange access" and, as such, it is not a "local exchange carrier" service subject to the ILEC obligations of Sections 251(b) or (c) of the Communications Act. AOL asserts that it is largely unnecessary to go down the uncharted "information access" path.

Most importantly, classifying the xDSL services of ILECs as "information access" services would add significant uncertainty to the regulatory scheme with no offsetting benefits.

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[24] *In the Matter of Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, Report and Order, CC Dockets 95-20, 98-10, FCC 99-36, at ¶¶ 5, 11, 16 (rel. March 10, 1999).

[25] United States v. AT&T, 552 F. Supp. 131, 229 (D.D.C. 1982) ("AT&T MFJ"); id. at n.40 ("Operating companies must also provide access to link their subscribers with companies providing information services").

The Commission's precedent ensuring open access to the ILEC networks, of course, speaks in terms of access to the local exchange and exchange access services of the ILEC; it does not comport with the lexicon and specialized terms of the AT&T MFJ, such as "information access." Nor has the Commission articulated whether the MFJ "equal access" obligations vary from the Commission's extant Title II and Computer Inquiry precedent designed to provide ISP access and consumer choice.[26] Ultimately, while the Commission's open access precedent would apply fully to these xDSL services, it could be unsettling to the ISP and Internet markets to engage in contentious proceedings, debate, and uncertainty only to re-establish these fundamental principles for "information access" services.

Nor is there any good reason to engage in the process of regulatory semantics to define "information access" when the AT&T MFJ has been superceded by Section 601(a) of the 1996 Act. The Commission has full authority to continue to apply Title II and Computer Inquiry precedent to the network services used by ISPs, irrespective of any historical debate over the nebulous term "information access." Indeed, Section 251(g) vests the Commission with broad discretion to supercede the "information access" protections. Thus, the preservation of a competitive ISP market should be the Commission's continuing policy objective, whether expressed as the "equal access" obligation of the MFJ or the Commission's existing rules and orders. To redefine these services and embark on a proceeding introducing a new set of delays and uncertainty for ISPs and consumers would certainly be counterproductive.

As a legal matter, the term "information access" was defined under the AT&T MFJ as "the provision of specialized *exchange telecommunications services* . . . ."[27] Thus, "information access" was simply a form of exchange service under the AT&T MFJ – the term did not describe

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[26] The Commission has suggested, however, that Section 251(g) currently permits ISPs "to obtain the services they require on a nondiscriminatory basis." *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272,* First Report and Order, 11 FCC Rcd. 21905, n.621 (1996) ("Non-Accounting Safeguards Order").

a distinct set of services separate from exchange service or exchange access service. Indeed, the AT&T MFJ Court referred often to the RBOC services provisioned for independent ISPs as local exchange services, not as some unique category of service distinct from the traditionally offered ILEC exchange and exchange access services.[28] Moreover, the AT&T MFJ expressly limited the RBOCs to offer only "exchange telecommunications and exchange access service."[29] Therefore, "information access," which was required by the AT&T MFJ, was either "exchange telecommunications" or "exchange access service." The RBOC's practices during the term of the AT&T MFJ confirms that services rendered to ISPs were purchased from the RBOCs' local exchange and exchange access service tariffs; the services were not separately classified as "information access."[30]

Finally, it is also unnecessary to define a new category of "information access" services for xDSL because the Commission may reasonably classify xDSL services as a "local exchange carrier" service, as they are either "local exchange" or "exchange access." AOL agrees with those commenters that point out that xDSL technology may be deployed by the ILECs in a myriad of service applications.[31] Only when xDSL technology is integrated into a specific service may the Commission discern whether that service is "exchange service" or "exchange

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[27] AT&T MFJ, 552 F.Supp. at 229 (emphasis added).

[28] See, e.g., United States v. Western Electric Co., 714 F.Supp. 1, 3 (D.D.C. 1988) (ISPs are "especially vulnerable to even slight manipulation and discrimination" of RBOCs in their provision of "local exchange facilities"); United States v. Western Electric Co , 767 F. Supp. 308 (D.D.C. 1993) (Court notes the argument of RBOCs that discrimination against ISPs may cause RBOC to "lose local exchange revenues from that competitor"); id. at n 40 (Court notes the argument of the Department of Justice that ISPs may rely on "BOC's local exchange facilities and services"), & n. 45 (Court notes the position of the Department of Justice that may ISPs have no competitive substitute for ILEC "local exchange services").

[29] AT&T MFJ, 552 F.Supp. at 228.

[30] We note that Section 251(g) does not establish a separate regulatory classification for "information access." Rather, it provides for the nondiscrimination protections of the AT&T MFJ to continue with the passage of the 1996 Act, as administered by the Commission, until the Commission supercedes such protections. Non-Accounting Safeguards Order, n.621. The statute does not carve out a new class of ILEC services, distinct from the ones defined in the 1996 Act and the Communications Act, merely by referencing the "information access" nondiscrimination provisions of the AT&T MFJ.

[31] See Comments of MCI Worldcom, Inc. at 7-10.

access" service.[32] As discussed above, under both the AT&T MFJ and the Commission's open access precedent, ISPs have historically obtained narrowband access by using ILEC local exchange services.[33] Moreover, several of the RBOCs formerly subject to the AT&T MFJ have chosen to define their xDSL services as "special access," and a form of "exchange access," for FCC tariffing and separations purposes. In its GTE DSL Order, the Commission has also answered the question of the proper regulatory classification of ILEC xDSL services and concluded, after much public debate, that the services are "special access" and a form of "exchange access."[34] As the FCC recognized, special access services take many forms, including interstate or international private lines, ranging from telegraph grade to high capacity analog and digital channels, telex, telegraph, video, voice, and digital signals between end users and IXCs.[35] Thus, whether a given service is local exchange or exchange access depends on the facts of the service offering; the xDSL services, however, are legitimately within the range of services offered by local exchange carriers.[36]

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[32] Thus, some parties errantly claim that the Commission's Non-Accounting Safeguards Order, (at n. 624) found that ISPs may never purchase "exchange access" service, and further err to assert that xDSL service cannot be an "exchange access" service because ISPs purchase it. First, the FCC and commenters have dispelled this misinterpretation of that order. See Comments of AT&T at 15-16; Brief of FCC, *Bell Atlantic Telephone Cos. v. FCC*, Case No. 99-1094, at 32-34 (filed Sept. 2, 1999); *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* First Report and Order, 11 FCC Rcd. 15499, 15934-35 (¶ 873) (1996) (non-carriers "do occasionally purchase" exchange access services, including special access) ("Local Competition Order"); *In the Matter of MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 F.C.C. 2d 682, 711 (1983) (FCC requires ILECs to offer exchange access to all users, including enhanced service providers). Second, the issue of whether an xDSL service offering directed at the ISP market could be "exchange access" was not before the Commission at the time, and such an xDSL service was first offered *more than a year after* the release of the Non-Accounting Safeguards Order.

[33] The Commission continues to recognize that ISPs use local exchange services as access services. Reciprocal Compensation Order, ¶ 4.

[34] *In the Matter of GTE Telephone Operating Cos.*, Memorandum Opinion and Order, 13 FCC Rcd. 22466, ¶¶ 28, 29 (1998); Local Competition Order, ¶ 873 (non-carries may purchase exchange access services, "including special access").

[35] *In the Matter of Investigation of Access and Divestiture Related Tariffs*, CC Docket No. 83-1145, 57 RR 2d 1459 (rel. Feb. 19, 1985).

[36] 47 U.S.C. § 153(26).

CONCLUSION

For the reasons stated herein, the Commission should uphold and extend its open access policies that foster the growth and diversity of the Internet services market and that afford consumers the ability to choose their preferred ISP, regardless of the broadband transmission medium they use.

Respectfully Submitted,

Donna N. Lampert
Mark J. O'Connor
Melissa A. Roover
DONNA N. LAMPERT ASSOCIATES, P.C.
701 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20004
(202) 393-6410

George Vradenburg, III
Jill A. Lesser
Steven N. Teplitz
Robert C. McDonald
AMERICA ONLINE, INC.
1101 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036

Counsel for AMERICA ONLINE, INC.

Date: October 1, 1999

CERTIFICATE OF SERVICE

I, Cheryl S. Flood, hereby certify that on this 1st day of October, 1999, I caused a copy of the foregoing, "Reply Comments of America Online, Inc." to be sent by messenger to the following:

Cheryl S. Flood

Chairman William Kennard
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Harold Furchtgott-Roth
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Susan Ness
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Gloria Tristani
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Michael Powell
Federal Communications Commission
The Portals
445 12th Street, S.W.
Suite 8A204
Washington, D.C. 20554

Lawrence E. Strickling
Chief
Common Carrier Bureau
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Jane Jackson
Chief
Competitive Pricing Division
Common Carrier Bureau
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Yog R. Varma
Deputy Bureau Chief
Common Carrier Bureau
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Judith Nitsche
Chief
Tariff and Pricing Analysis
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Robert M. Pepper
Chief
Office of Plans and Policy
Federal Communications Commission
445 12th Street, S.W.
Room 822
Washington, D.C. 20554

Tamara Preiss
Attorney Advisor
Competitive Pricing Division
Common Carrier Bureau
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Staci Pies
Attorney Advisor
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Tom Power
Office of Chairman Kennard
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Kathryn Brown
Office of Chairman Kennard
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Kyle Dixon
Office of Commissioner Powell
Federal Communications Commission
The Portals
445 12th Street, S.W.
Suite 8A204
Washington, D.C. 20554

Paul Jackson
Office of Commissioner Powell
Federal Communications Commission
The Portals
445 12th Street, S.W.
Suite 8A204
Washington, D.C. 20554

Helgi Walker
Legal Advisor
Office of Commissioner Furchtgott-Roth
Federal Communications Commission
Room 802
445 12th Street, S.W.
Washington, D.C. 20554

Sarah Whitesell
Office of Commissioner Tristani
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Linda Kinney
Office of Commissioner Ness
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Eugene Gold
Competitive Pricing Division
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

ITS
1231 20th Street, N.W.
Washington, D.C. 20036