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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	CC Docket Nos. 98-147, 98-11,
	)	98-26, 98-32, 98-78, & 98-91;
Deployment of Wireline Services	)	
Offering Advanced	)	CCB/CPD No. 98-15, RM 9244
Telecommunications Capability	)	
	)	DA 99-1853

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

SUPPORTING VARIOUS COMMENTS FILED SEPTEMBER 24, 1999 IN RESPONSE TO THE FCC'S SEPTEMBER 9, 1999 REQUEST FOR COMMENT ON THE REMAND OF THE US WEST APPEAL OF ITS AUGUST 1998 ADVANCED SERVICES ORDER

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October 1, 1999

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Deployment of Wireline Services	)	**CC Docket No. 98-147, et al.**[1]
Offering Advanced	)	
Telecommunications Capability	)	**DA 99-1853**
	)	

REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

Pursuant to Sections 1.415 and 1.419 of the Federal Communications Commission's ("FCC" or "Commission") Rules of Practice and Procedure, 47 C.F.R. §§ 1.415, 1.419 (1998), the National Association of Regulatory Utility Commissioners ("NARUC") respectfully submits these comments generally supporting, as specified *infra,* the initial comments filed by the Wisconsin Public Service Commission, the General Services Administration, Sprint Corporation, Level 3 Communications, L.L.C., MCI WorldCom, Inc., and AT&T.

Those comments were filed September 24, 1999 in response to the Commission's September 9, 1999 Public Notice titled "*Comments Requested in Connection With Court Remand of August 1998 Advanced Services Order*" in the above-captioned proceeding. That Notice sought comment on US West, Inc. ("USW") arguments that advanced services employing digital subscriber line ("DSL") and packet-switching technologies do not qualify as either "telephone exchange service" or "exchange access" and, therefore, are not subject to interconnection obligations under 47 U.S.C. § 251 of the Telecommunications Act of 1996.[2]

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1 Combined with CC Docket Nos. 98-11, 98-26, 98-32, 98-78, and 98-91, and CCB/CPD No. 98-15, RM 9244.
2 Pub. L. 104-104, 110 Stat. 56 (1996)(amending the Communications Act of 1934, 47 U.S.C. §§ 151 et. seq.)

NARUC[3] agrees with the general sentiment expressed in the listed initial comments - that US West's arguments are superficial and ignore both the technological capability of the DSL technology, and the expected expansion of using DSL as a substitute for current exchange access and telephone switched services.[4] Specifically, NARUC agrees that DSL-based advanced services, based on both their technological capabilities and anticipated use, are, in fact, substitutable for traditional circuit switched services and therefore constitute "comparable" "telephone exchange service" within the meaning of 47 U.S.C. § 153(47)(B). Accordingly, DSL-based advanced services are within the FCC's statutory jurisdiction to subject to unbundling as a "telecommunications service" under § 251(c).[5]

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[3] One NARUC member, the Maine Public Utilities Commission, has not had an opportunity to complete a thorough analysis of this proceeding and does not take a position on this issue raised by the FCC's notice at this time.

[4] *See*, e.g., Initial Comments of the Wisconsin PSC at 3-6. *Cf.*, Wilson, Carol, "*DSL: Technology In Search of A Cause*" Inter@ctive Week, Sept. 20, 1999 http://www4.zdnet.com/intweek/stories/news/0,4164,2336166,00.html] "[T]his year, DSL quite suddenly has become a method of transporting multiple voice lines on a single physical phone line. The voice-over-DSL market seems to be taking off so fast, in fact, that it may be a significant competitive force within the next six months. . . 'We are seeing a lot of [CLECs] begin deployment phases as we speak.' . . . [and while those] who have traced DSL's history find reason for caution whenever anyone expects anything to happen quickly. . . .the positive indications are many." [Emphasis Added] The article goes on to point out that the three major national DSL network providers - Covad, NorthPoint and Rhythms - are already testing voice-over-DSL technology with an eye toward deployment in late 1999 or early 2000 and one regional CLEC Picus Communications has *already* started commercial deployment of voice-over-DSL equipment in Virginia, with plans to move up the east coast. " 'If CLECs can add voice services to their repertoire using the same DSL access line that they use today to provide . . . internet access, then they can generate significant new revenues,' says [the] voice-over-DSL product manager at Cisco Systems. That market segment is moving so fast that voice-over-DSL will soon be table stakes for companies that want to be national DSL network providers." As Sprint notes in its comments in this docket at 7 " Given the fact that advanced technologies can be used to provide conventional services, such as switched voice service, [finding such services are NOT subject to 251 obligations] would permits ILECs to evade the fundamental obligations placed upon them simply through the deployment of new technology over the passage of time." {*Emphasis Added*} *See also,* Hall, Rick, "*The Many Faces of ADSL – More Than Just Internet Access*," presentation to the Supercomm '98 convention on behalf of Motorola. [http://www.mot.com/SPS/MCTG/MDAD/adsl/pubs/many_faces_may98.pdf] where he notes, on pages 2 – 3, "ASDL is not just for Internet access: its unique suite of features offers the flexibility to support a wide variety of applications and services, including . . . telecommuting, remote learning, on-line gaming, and video-on-demand . .[also] . . .[u]sing ADSL's fast, non-interleaved mode, voice conversations can be transmitted . . . A single ADSL link can offer [distance learning] while providing POTS or even digitized voice service for many people in a community." {*Emphasis Added*} *Indeed, NARUC believes these new applications, in tandem with the earlier ones focused on high speed data, only exacerbate underlying mis-allocation problems that the 1996 Act both anticipates and requires to be resolved by the Federal-State Joint Board on Separations.*

[5] *See*, e.g., Initial Comments of Wisconsin Public Service Commission ("WPSC") at 1, the General Services Administration ("GSA") at 3, Sprint Corporation ("Sprint") at 4, Level 3 Communications, L.L.C. (Level 3) at 2, MCI WorldCom, Inc. ("MCI") at 1, and AT&T Corp. ("AT&T") at 3.

I. BACKGROUND

In the August 7, 1998 Advanced Services *Memorandum Opinion and Order*,[6] the FCC considered four incumbent local exchange carrier's ("ILEC") requests for the Commission to forbear from applying § 251(c) obligations to advanced services in view of § 706(a)[7] of the 1996 Act. In the decision, the FCC concluded that "ILECs" are, *inter alia*, subject to the interconnection obligations of section §§ 251(a) & (c)(2) with respect to both their circuit-switched and packet-switched networks. The Order specifies that § 251(c) obligations apply to ILEC offerings of advanced services that employ DSL and packet-switching technologies. The Commission based that conclusion on a finding that those services were either "telephone exchange service" or "exchange access," but did not reach the issue of which category included such services. USW sought review in the D.C. Circuit, claiming such advanced services are neither exchange or exchange access services. In response, the FCC asked the Court for a remand to allow the Commission to further consider the issues raised by USW. On August 25, 1999, the court granted the Commission's request and remanded the matter back to the Commission. [8]

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[6] See, *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability; Petition of Bell Atlantic Corporation For Relief from Barriers to Deployment of Advanced Telecommunications Services; Petition of U S WEST Communications, Inc. For Relief from Barriers to Deployment of Advanced Telecommunications Services; Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Technology; Petition of the Alliance for Public Technology Requesting Issuance of Notice of Inquiry and Notice of Proposed Rulemaking to Implement Section 706 of the 1996 Telecommunications Act; Petition of the Association for Local Telecommunications Services for a Declaratory Ruling Establishing Conditions Necessary to Promote Deployment of Advanced Telecommunications Capability Under Section 706 of the Telecommunications Act of 1996; 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*, Memorandum Opinion and Order and Notice of Proposed Rulemaking of the FCC (1998), CC Docket No. 98-147; CC Docket No. 98-11, 98-26, &. 98-32; CCB/CPD No. 98-15; RM 9244; CC Docket No. 98-78; CC Docket No. 98-91, 13 FCC Rcd 24011; 13 Comm. Reg. (P & F) 1 (Adopted August 6, 1998).

[7] 47 U.S.C. § 157 under notes quotes the Telecommunications Act of 1996, Feb. 8, 1996, P.L. 104-104, Title VII, § 706, 110 Stat. 153.

[8] See, *US West Communications, Inc. v. FCC*, No. 98-1410 (D.C. Cir. Aug. 25, 1999) (*Order Granting Motion for Remand*).

On remand, the FCC cited USW's brief[9] in the appeal and sought comment on four issues:

- Do DSL-based advanced services constitute either "telephone exchange service" or "exchange access" within the meaning of the Communications Act?

- What is the legal significance of the 1996 Act's addition to the definition of "telephone exchange service" of "comparable service provided through a system of switches, transmission equipment or other facilities . . . by which a subscriber can originate and terminate a telecommunications service"?

- Should advanced services be categorized as "exchange access," "information access," or "information services?" Can DSL-based services be viewed as "information access," and still be classified as information services, telephone exchange services or exchange access? Why or why not? And finally . . .

- What is the proper scope of the requirements of § 251(c) upon incumbent local exchange carriers (ILECs) generally and with respect to the provision of advanced services specifically?

At least 21 entities filed comments in response to the FCC's request. The majority, including one of NARUC's member commissions and the General Services Administration, urged the FCC to reaffirm that DSL-based advanced services are within the FCC's statutory jurisdiction to subject to unbundling as a "telecommunications service" under § 251(c).[10]

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[9] See, Appellate "*Brief of Petitioner*" US West, Filed May 18, 1999 in *US West Communications, Inc. v. FCC* (D.C. Cir. Case No. 98-1410). ("USW Brief").

II. SUMMARY OF SUPPORTING ARGUMENT

Generally, NARUC supports the arguments presented in the Wisconsin Public Service Commission's initial comments.[11] Portions of the comments filed by the other commenters cited earlier agree with the PSC that DSL-based advanced services, by virtue of their technological capabilities and potential customer uses, are substitutable services for traditional circuit switched service and therefore constitute "comparable" "telephone exchange service" under 47 U.S.C. § 153(47)(B). DSL-based advanced services are not classifiable as "information access," or "information services."[12] Consequently, and in light of the language of § 251(c), DSL-based advanced services are within the FCC's statutory jurisdiction subject to unbundling as a "telecommunication service" under § 251(c). The arguments that NARUC supports from the cited comments can be broken down into three statements:

A. **DSL-BASED SERVICES ARE "TELEPHONE EXCHANGE SERVICES" BECAUSE THEY ARE FUNCTIONALLY "COMPARABLE" WITHIN THE MEANING OF § 153(47)(B).**[13]

B. **DSL-BASED SERVICES AND PACKET-BASED SWITCHING ARE NOT "INFORMATION ACCESS," OR "INFORMATION SERVICES."**[14]

C. **DSL FALLS WITHIN THE SECTION 251(C) REQUIREMENT THAT INTERCONNECTION SOUGHT FROM AN ILEC BE IN SUPPORT OF A "TELEPHONE EXCHANGE SERVICE" OR A "TELECOMMUNICATIONS SERVICE."**[15]

III. ARGUMENT

A. DSL-BASED SERVICES ARE "TELEPHONE EXCHANGE SERVICES" BECAUSE THEY ARE FUNCTIONALLY "COMPARABLE" WITHIN THE MEANING OF § 153(47)(B).

In its original brief, and in its initial comments, U S WEST argues that DSL-based services do not constitute telephone exchange service because they do not begin and end within a telephone exchange or set of exchanges in the same local area; do not use or interconnect with the traditional circuit-switched public telephone network; do not permit "any-to-any" local intercommunications

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10 NARUC takes no position in these comments on the issue of whether the FCC should require unbundling of advanced services or the desirability of any particular level of unbundling. The focus of these comments is to assure that Section 251's obligations apply to such services and that, *inter alia*, unbundling may be required.

11 *See*, generally, WPSC Comments at 3-8.

12 *See*, note 5, *supra*.

13 See, WPSC Comments at 3 – 6; AT&T Comments at 12 – 14; Sprint Comments at 4.

14 See, WPSC Comments at 6 – 7; MCI Comments at 12 – 16.

15 See, WPSC Comments at 8; GSA Comments at 3, Level 3 at 2, MCI at 1, and AT&T at 3.

service; and are not covered by the exchange service charge. Second, they suggest that DSL services are not "comparable services" under the second half of the definition of "telephone exchange services" because they are not functional or market substitutes for local, two-way, circuit-switched telephone services.[16]

As the WPSC comments note, this picture of DSL services is flawed. First, it is not true to say that DSL services make no use of the circuit switched public switched network because the service bases its usefulness upon extracting additional transmission capacity from the local loops comprising the telephone exchange. Indeed, many state commissions consider DSL and other broadband technologies that rely on the existing copper loop as enhancements to the loop itself, not totally separate services.[17]

Second, DSL service is not exclusively Internet access-oriented, nor is it accurate to say that "Internet-bound DSL communications do not stay within a local exchange."[18] This service can also function as a "work-at-home" tool connecting employees to a local area or company data network. In addition, there has been significant progress in, and, at least according to one published account - actual deployment of, DSL services that provide both internet access and digitized voice service using the same equipment.[19] Certainly, this will lead to an increased use of the DSL network as a

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[16] USW Brief at pages 11-13.

[17] xDSL has been colloquially described as "a loop on steroids". It relies on a modem installed at the customer's premises and a modem installed in a carrier's central office to derive additional bandwidth from the existing copper loop. This reliance upon existing copper loops has enormous implications for jurisdictional separations and allocation of joint and common costs. ***Cf. note 3, supra.*** The Act's definition of exchange service covers traditional analog, voice grade service - a service which is unquestionably telecommunications and within FCC jurisdiction. The DSL-based services are not significantly different. Packet switches, not traditional circuit switches, perform the switching functions but the functions are comparable. The content being transmitted by both services are the same at each end, no matter how they may be temporarily transformed to fit various transmission media during transport. If traditional voice grade service provides "transmission...without change in the form or content of the information sent and received", then the same can be said of DSL-based services.

[18] USW Brief at 15.

[19] See, e.g., note 3, *supra.* Current service offerings fail, for a variety of reasons, to take advantage of the full range of service possibilities the DSL technology supports. That is rapidly changing. Accordingly, to correctly evaluate this issue, it is necessary to examine the technology as it could be – and, in some cases, already is - being - deployed. As an example, consider an Asymmetrical DSL network. Typically, ADSL uses copper facilities from the customer premises to the DSLAM, and a packet-switched backbone service, such as ATM or Frame Relay, to provide a connection between the DSLAM and the ISP. At present, the service is only provided using permanent virtual channels to route calls from the DSLAM to the ISP. This means that the packets from a given DSLAM are routed automatically to the ISP, as if using a dedicated channel. In other words, the service is being offered as if the connections were a private line. However, the backbone services, like ATM or Frame Relay, are packet-switched networks. The networks

telephone exchange service medium as additional types and volumes of traffic (voice) are carried by the DSL network. The FCC implicitly recognized this potential local "telephone exchange service" aspect of DSL service when it noted in the Advanced Services order the need for intrastate tariffing of such of a "work-at-home" offering.[20] More and more, even local businesses establish Internet Web sites to facilitate customer access to their goods and services. There can be little doubt that such communication within a local area that coincides with a typical telephone exchange, means that DSL services provide "comparable" service.

The second part of the definition of "telephone exchange service"--- "comparable service provided through a system of switches, transmission equipment, or other facilities" --- was clearly enacted because Congress wanted the Act to accommodate the evolution of the technologies that would service the local markets Congress wanted to open to competition. US West's arguments construe § 251(c) to confine unbundling of network elements to the technological state of network as of 1996. Such a perspective would permit an ILEC to alter the technological architecture of its network, escape unbundling duties under § 251(c), and thereby potentially maintain local market dominance that Congress intended to replace with a competitive market. A narrow construction is also inconsistent with Congress' view in § 254(c)(1) that universal service "is an evolving level of telecommunications services that the Commission shall establish periodically . . . taking into

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are capable of routing packets from a given DSLAM to a number of recipients, including other local customers also attached to the packet switched network. The same is true for individual customers: customers could have their packets routed to varying destinations, without violating the technical specifications of ADSL service and without having to go through the ISP. This is also true for the other DSL-based services. If current networks do not have this capability, it is only because existing providers have chosen not to implement it, not because the capability does not exist. Moreover, some analysts expect this capability to be deployed and in use within a relatively short time frame. One thing is clear: it will be demanded by customers. Customers will use DSL-based services for Internet access and for work-at-home applications. An employee doing work at home may also wish to use the Internet in off hours. Under the present method of deployment, however, that customer has a permanent virtual circuit connected either to the work location or the customer's ISP. Under the present deployment, it is not feasible for an employee to log off the work network at lunchtime and connect to their ISP for personal activities. (Businesses are also unlikely to want employees connecting to entertainment sites through the business' network.) Instead, the customer will demand the ability to make different connections, at will, over the packet-switched network. Once that demand is felt, it is likely that providers will cease offering DSL-based services only in the current, limited manner. Where customers can chose whether to route their packets to an ISP or to their work location, that will clearly constitute "telephone exchange service" because those communications will "begin and end within a telephone exchange or set of exchanges in the same local area." Moreover, in such a circumstance, connections between individual customers would also be possible. The packets coming from one customer could be routed to another customer, instead of to a work-at-home employer or ISP. Such connections are well within the capability of packet-switched services today, and would permit "any-to-any" local inter-communications service.

[20] See *In re GTE Telephone Operating Cos.*, GTOC Tariff No.1 , GTOC Transmittal No. 1148, 13 F.C.C.R. 22466, ¶ 27 (1998).

account advances in telecommunications and information technologies and services." Congress also anticipated, by such provisions as §§ 251(f), 271, 272 and 706, that competition would not necessarily appear everywhere all at once. Congress clearly wanted both technology and competition to work together when it declared that the purpose of the 1996 Act is to "promote competition . . . and encourage the rapid deployment of new telecommunications technologies." (Emphasis added). When construing a statute, the first goal is to ascertain legislative intent.[21] With respect to § 153(47)(B), the only reasonable construction that harmonizes and effectuates the two policy goals with their differing timing issues is that Congress intended the amendment to the definition of "telephone exchange service" to prevent technological changes from trumping a policy of competitive markets.

B. DSL-BASED SERVICES AND PACKET-BASED SWITCHING ARE NOT "INFORMATION ACCESS," OR "INFORMATION SERVICES."

Both WPSC and MCI's comments provide consistent basis for rejecting USW's speculation that there is a third category - "information access" - as untenable in light of the scope and purpose of the 1996 Act.[22] The obvious effort of Congress to be comprehensive in its 1996 overhaul of the Communications Act, and the corresponding lack of any specific legislative history recognizing such a category of service completely undermines this USW contention. Congress defined "exchange access," "telecommunications," "telecommunications service," "telephone exchange service," and "telephone toll service," [23]yet USW would have one believe that "information access" is another service on the same level of industry recognition, even though the term is not defined or substantially addressed by the 1996 Act. Such an interpretation is not sustainable on its face,[24] especially as acceptance of such a construction, as described above, could potentially open a pathway to frustration of the explicit Congressional goal to make local markets competitive.

C. DSL FALLS WITHIN THE SECTION 251(C) REQUIREMENT THAT INTERCONNECTION SOUGHT FROM AN ILEC BE IN SUPPORT OF A "TELEPHONE EXCHANGE SERVICE" OR A "TELECOMMUNICATIONS SERVICE."

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21 73 Am. Jur. 2d, Statutes, § 145 (1974).

22 *See*, generally, WPSC Comments at 6 – 7; MCI Comments at 12 – 16.

23 47 U.S.C. §§ 153(16), (43), (46), (47), and (48), respectively.

24 73 Am. Jur. 2d Statutes, § 265 (1974).

The last issue raised in the notice is the proper scope of the requirements of § 251(c) on ILECs generally and with respect to the provision of advanced services specifically. The WPSC's comments note that § 251(c) imposes duties upon ILECs, but carefully defines those duties in relation to the service sought to be provided by the requesting provider and provides examples.[25] NARUC recognizes these sections place some limitations on the scope of duties imposed by § 251(c). Nevertheless, NARUC submits that, at a minimum, the statute provides clear authority for unbundling of advanced services as such services fall with in the definitions of "telephone exchange service" and "telecommunications service" as discussed in A. and B. *supra*.

[25] WPSC at 8.

III. CONCLUSION

NARUC respectfully urges the FCC to specify that DSL-based advanced services (1) based on both their technological capabilities and anticipated use, are, in fact, substitutable for traditional circuit switched services and therefore constitute "comparable" "telephone exchange service" within the meaning of 47 U.S.C. § 153(47)(B), and (2) are potentially subject to unbundling as a "telecommunications service" under § 251(c).

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Certificate of Service

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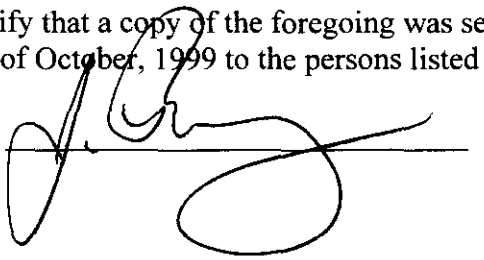

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