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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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 U S WEST Communications, Inc. For Relief from Barriers to Deployment of Advanced Telecommunications Services	)	CC Docket No. 98-26
	)	
Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Services	)	CC Docket No. 98-32
	)	
Petition of the Alliance for Public Technology Requesting Issuance of Notice of Inquiry and Notice of Proposed Rulemaking to Implement Section 706 of the 1996 Telecommunications Act	)	CCB/CPD No. 98-15 RM 9244
	)	
Petition of the Association for Local Telecommunications Services (ALTS) for a Declaratory Ruling Establishing Conditions Necessary to Promote Deployment of Advanced Telecommunications Capability Under Section 706 of the Telecommunications Act of 1996	)	CC Docket No. 98-78
	)	
Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell Petition for Relief from Regulation Pursuant to Section 706 of the Telecommunications Act of 1996 and 47 U.S.C. § 160 for ADSL Infrastructure and Service	)	CC Docket No. 98-91

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REPLY COMMENTS OF U S WEST, INC.

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY 1

I. THE ONLY ISSUE IN THIS PROCEEDING IS THE STATUS OF THE TWO DSL-BASED SERVICES THAT INCUMBENTS HAVE ACTUALLY DEPLOYED: HIGH-SPEED INTERNET ACCESS AND ACCESS TO CUSTOMER NETWORKS 3

II. THE GLIB SUGGESTION THAT "AN ILEC IS AN ILEC IS AN ILEC" IGNORES BOTH THE PLAIN LANGUAGE OF THE ACT AND COMMON PRACTICE 4

A. Section 251(c) Does Refer To "Local Exchange Carriers," But "Local Exchange Carriers" Are Defined by the Particular Services They Are Currently "Engaged" in Providing 5

B. No Other Interpretation of the Act Can Explain the Universally Accepted Regulatory Treatment of Local-Entrant IXCs and Non-RBOC Incumbents 8

III. THE DSL-BASED SERVICES NOW ACTUALLY ON THE MARKET DO NOT MEET THE STATUTORY DEFINITIONS OF "TELEPHONE EXCHANGE SERVICE" OR "EXCHANGE ACCESS." 10

A. Incumbents' DSL-Based Services Do Not Meet the Act's Definition of "Telephone Exchange Service." 10

1. Currently deployed DSL-based services do not bear the defining characteristics of traditional telephone exchange services established by statutory text and Commission precedent 11

a. "Within a telephone exchange" 12

b. "Intercommunicating service" 14

c. "Covered by the exchange service charge" 16

2. The extension of the Act to reach "comparable" services is not a license to sweep in DSL-based services that bear no resemblance at all to traditional telephone exchange service 17

B. Incumbents' DSL-Based Services Do Not Meet the Statutory Definition of "Exchange Access" 20

C. Incumbents' Current DSL-Based Offerings are "Information Access" Services, Which Continue To Be a Distinct Legal Category of Services Under the Act 22

INTRODUCTION AND SUMMARY

In its opening comments, U S WEST demonstrated that its argument on brief — that entities are regulated as "local exchange carriers" *only* when they are engaged in providing the specific services that define a "local exchange carrier" — is entirely faithful to Congress's design, not an exercise in technicalities. In enacting section 251, Congress granted the Commission powerful authority (including the power to take the property of carriers and other utilities) to facilitate the transition to a self-regulating local exchange marketplace. But Congress did not permit the Commission to exercise this power boundlessly. In section 251(c), Congress permitted the Commission to regulate only those incumbent-provided services that are properly classified as "telephone exchange service" or "exchange access." Congress did not give the Commission a limitless power to require unbundling or discounted resale of every possible facility or service that an incumbent might provide, no matter how unrelated to local exchange carriage that activity may be.

In addition, U S WEST's opening comments demonstrated that obeying Congress's decisions when and when not to apply "local exchange carrier" regulation would not yield anticompetitive consequences. U S WEST went provision by provision through sections 251(a), (b), and (c), explaining how each provision would apply if the Commission accepted U S WEST's arguments. The analysis demonstrated that entrants would still be able to receive all of the inputs necessary to provide competitive advanced services, since incumbents in fact use all of their facilities that could potentially be bottlenecks to provide *other* services that do meet the definitions of "telephone exchange service" and "exchange access."

By contrast, many of the other commenters simply assert that Congress's careful efforts to define the services that make an entity a "local exchange carrier" are irrelevant, and that the Commission may apply "local exchange carrier" regulation to whatever services it sees fit. Some commenters state outright that, once an entity provides any kind of "telephone exchange service" or "exchange access," the Commission may thence apply "local exchange carrier" regulation to *any and all* of its activities — even if the Commission *agrees* that such activities fall outside the statutory definitions of LEC services. Finally, in an effort to claim that the "telephone exchange service" and "exchange access" definitions are met, these commenters resort to muddying the waters: rather than address the digital subscriber line services that incumbents have actually deployed, they conjure up all sorts of hypothetical advanced services that could be squeezed into the definitions.

In these reply comments, U S WEST seeks to undo the confusion. First, the Commission should concentrate on the two types of digital subscriber line services that incumbents have actually deployed to date — high-speed Internet access and access to customer networks — and leave the hypothetical "what ifs" to the future. Next, the Commission should respect Congress's decision, plain from the text of the Act, to subject carriers to different levels of regulation according to the particular service they are actively engaged in providing. The commenters' view that "once an ILEC, always an ILEC" cannot be squared with the text of the Act or common practice, and it yields absurd results. Finally, the Commission should just follow the rather straightforward, express definitions of "telephone exchange service," "exchange

access," and "information access"the simple text of the definitions makes clear that incumbents' DSL services fall into the last category.

I. THE ONLY ISSUE IN THIS PROCEEDING IS THE STATUS OF THE TWO DSL-BASED SERVICES THAT INCUMBENTS HAVE ACTUALLY DEPLOYED: HIGH-SPEED INTERNET ACCESS AND ACCESS TO CUSTOMER NETWORKS.

Many commenters attempt to muddy the issue before the Commission by raising "what ifs" about all sorts of products and services (many not yet even on the market) that could conceivably be called "advanced services."[1/] But this proceeding is not about "what ifs." It is about the applicability of section 251 to the advanced services offered by entities that are also LECs or ILECs. Since the proper regulatory treatment of any given service will necessarily turn on the specifics of its configuration and provision, the Commission must, first and foremost, determine whether and how section 251 applies to the digital subscriber line products that incumbents are *actually offering*. As other products and services actually appear, their specifics will determine whether the same or different conclusions apply.

The two copper broadband services that incumbents have actually deployed, and that were at the heart of U S WEST's appeal that led to this remand proceeding, are two configurations of DSL. The bulk of the DSL services that incumbents are now providing allow end users to connect to Internet service providers ("ISPs") for high-speed access to the Internet. A smaller number of end users (for example, telecommuters) use these same services for high-speed connections to corporate and institutional LANs, WANs, or intranets. These two

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1/ *See, e.g.*, Comments of MCI Worldcom at 10.

applications — Internet access and access to customer networks — pretty much cover what incumbents are offering today; as explained in more detail below, no incumbent, to U S WEST's knowledge, is currently offering voice over DSL as a substitute for POTS, or any other "what if" services that commenters raise. The Commission can consider such hypothetical services when an incumbent offers one of them and its particulars can be known.

II. THE GLIB SUGGESTION THAT "AN ILEC IS AN ILEC IS AN ILEC" IGNORES BOTH THE PLAIN LANGUAGE OF THE ACT AND COMMON PRACTICE.

Remarkably, a number of commenters tell the Commission that it simply does not matter what Congress meant when it defined the specific telecommunications services that identify a "local exchange carrier"; even if incumbents' DSL services do not meet those definitions, they say, the Commission is still permitted to regulate them as if they did.[2] Perhaps the most dramatic position in this regard is taken by Covad, which states unequivocally that DSL services are *neither* "telephone exchange service" *nor* "exchange access," but then blithely suggests that all of this is irrelevant: "[R]egardless of the activity in which it engages, an ILEC is an ILEC is an ILEC."[3]

This argument — that *all* of an incumbent's activities may be subjected to "local exchange carrier" regulation even if only *some* of its offerings are actually "local exchange carrier" services — is contrary to the entire design of the Telecommunications Act. Congress intended that carriers would be subject to different kinds of regulation according to the particular

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[2] *See, e.g.*, Comments of DSLnet Communications at 5; Comments of GSA at 6; Comments of NorthPoint at 4-6.

[3] Comments of Covad at 10.

type of service they are *actively engaged in providing*, and it chose language making this clear. Moreover, the commenters' view that "once an LEC, always an LEC" simply cannot be squared with everyday practice.

A. Section 251(c) Does Refer To "Local Exchange Carriers," But "Local Exchange Carriers" Are Defined by the Particular Services They Are Currently "Engaged" in Providing.

In its Public Notice, the Commission observed that section 251(c), considered in isolation, speaks in terms of "incumbent local exchange *carriers*" rather than "particular telecommunications *services*." Public Notice at 1 (emphasis in original). But simply to stop with this observation — as most of the CLEC commenters do[4] — is to be willfully blind to the remainder of the Telecommunications Act. The Act expressly defines a "local exchange carrier" (and thereby the lawful scope of local exchange carrier regulation) by reference to the particular service the carrier is currently providing. A "local exchange carrier," says Congress, is a "person that *is engaged in the provision of* telephone exchange service or exchange access." 47 U.S.C. § 153(26) (emphasis added).

Congress's choice of words — asking whether the carrier "*is engaged in* the provision of" certain services — is significant. Congress directed the Commission to determine what the carrier is doing *in the particular activity whose status is in question*, not to assign the carrier some absolute, Platonic classification. Congress did not declare that an entity that provides telephone exchange service or exchange access is to be regulated as a local exchange

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[4] *See, e.g.*, Comments of AT&T at 5; Comments of CoreComm at 5-6; Comments of DSLnet at 3.

carrier in every activity in which that carrier may engage, no matter how far flung that activity is from local exchange carriage. Simply to state such a rule highlights how ridiculous it would be.

The commenters' contention that a carrier's status as a LEC in one activity unalterably determines the regulatory treatment of every other service it may be "engaged" in providing is refuted even by the rest of the Act's definition of a LEC. The definition goes on to say that a person is *not* a local exchange carrier "insofar as such person is engaged in the provision of a commercial mobile service," unless the Commission specifically rules otherwise. 47 U.S.C. § 153(26).[5] Thus, the same entity can be a LEC in offering telephone exchange service or exchange access, and a non-LEC in offering CMRS. Indeed, if the CLECs were right that a carrier's offering of one service predestined the regulatory treatment of all of its other services, that could work in the other direction as well: none of the RBOCs would be a "local exchange carrier," since they all provide CMRS in addition to wireline services. The absurdity of that result reconfirms that whether a carrier is "engaged in the provision of" telephone exchange service or exchange access — and thus meets the statutory definition of a LEC — must be determined service by service.

The applicability of *the whole of* section 251(c) is therefore bounded by the scope of the term "local exchange carrier" in its first sentence, and in the definition of an ILEC in section

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[5] Congress was required to include an express carve-out for CMRS because most CMRS meets the definition of "telephone exchange service," as the Commission found. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15999 (1996) ("*Local Competition Order*"). By contrast, no carve-out was needed (or included) for advanced services because they do not meet the definition of "telephone exchange service" or "exchange access."

251(h).[6] Several CLECs try to evade these bounds by citing unqualified language contained in the *sub*sections of 251(c). AT&T notes, for example, that subsection 251(c)(4)(A) imposes a resale duty on "any" retail telecommunications service provided by a LEC, and that the term "network elements" in subsection 251(c)(3) could, by itself, refer to any facility used to provide a telecommunications service. *See* Comments of AT&T at 5-6.[7] But the specific duties of section 251(c) are all limited by the first sentence in that section stating *whose* duties they are: the duties of certain "local exchange carriers." It is a basic rule of statutory construction that when a provision uses a general term (such as "any") in conjunction with language defining a class subject to the provision, the term means "all within that particular class," not simply "all." *See, e.g.*, *O'Connor v. United States*, 479 U.S. 27, 31 (1986) (treaty provision literally exempting workers from "any taxes" must be read in the context of preceding language discussing foreign taxes only, and is similarly limited).[8] Congress expressly defined the class of service providers who must comply with the duties listed in section 251(c), and the fact that some of those duties are phrased broadly does not expand the class of who must comply in the first place.

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[6] *See* 47 U.S.C. § 251(c) ("[E]ach incumbent *local exchange carrier* has the following duties.") (emphasis added); *id.* § 251(h) (defining an "incumbent local exchange carrier" as "the *local exchange carrier* that . . . on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service" in a given area) (emphasis added).

[7] *See also* Comments of Advanced Telcom Group *et al.* at 25-26; Comments of MCI Worldcom at 11; Comments of Prism at 8-9; Comments of Rhythms Netconnections at 25-26.

[8] *See also Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997) ("Although Petitioners rely on the expansive character of the word 'any,' the Supreme Court has specifically held that in context the word 'any' may be construed in a non-expansive fashion.")

B. No Other Interpretation of the Act Can Explain the Universally Accepted Regulatory Treatment of Local-Entrant IXCs and Non-RBOC Incumbents.

U S WEST's basic proposition — that carriers are subject to different regulatory obligations depending on what services they are providing — is indisputable. Even CLECs such as Covad concede as much:

> The courts have recognized that an [*sic*] LEC can act as a common carrier in some situations, and as a non-common-carrier in other situations. For example, a LEC acts as a common carrier when it provides a basic telecommunications service, but as a non-carrier when it provides an information service. The courts further have recognized that the type and degree of regulation can differ depending on the service the LEC provides.[9]

But Covad and others dispute that a carrier's *interconnection* obligations can vary service by service just as other regulatory obligations do. Common practice proves that they can and do.

In the current market environment, the same entity may provide information services, cable services, local exchange services (that is, telephone exchange service and exchange access), *incumbent* local exchange services, and telecommunications services other than local exchange services. GTE provides all these services, for example, and AT&T provides all of them except one (incumbent local exchange services). But no one has ever seriously suggested that, even though GTE is undoubtedly an "incumbent local exchange carrier" in many parts of the country, a competitor could demand section 251(c)(4) wholesale discounts on GTE's international services originating in Hawaii, or section 251(c)(3) unbundled access to the Internet

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[9] Comments of Covad at 11.

backbone facilities located in its Los Angeles service areas. Likewise, AT&T is a "local exchange carrier" subject to the obligations of section 251(b) in every local service market that it enters, but it would presumably resist any demand for a section 251(b)(1) right to resell its cable services in those cities, or for section 251(b)(4) access to the rights-of-way containing its interexchange fibers in those cities. On the contrary, it is universally accepted that AT&T's duties under section 251(b) are limited to the specific services it provides in its capacity as a "local exchange carrier" — telephone exchange service and exchange access — and GTE's obligations under section 251(c) apply only to the services it provides as an incumbent "local exchange carrier."

Nobody explains how this state of affairs can be squared with a "once an ILEC, always an ILEC" reading of section 251.[10] To our knowledge, only one commenter even tries. In a somewhat cryptic footnote, the Telecommunications Resellers Association says, "Given that 251(c) obligations derive from an entity's classification as an incumbent LEC in a market, those obligations obviously are limited to telecommunications services provided in that market over facilities operating in the market."[11] It is unclear what TRA is saying. If it is referring to *geographic* markets, then its proposition is demonstrably incorrect: GTE and AT&T operate long-distance, Internet backbone, and cable lines in the same cities in which they provide local voice services, and with different levels of obligation under section 251. If, on the other hand,

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[10] To the contrary, AT&T *concedes* that its "once an ILEC, always an ILEC" reading of the Act *would* bring all of GTE's and Sprint's facilities — including their long-distance and Internet backbone networks — within the potential reach of section 251(c), subject only to conditions such as the "necessary and impair" test. *See* Comments of AT&T at 8.

[11] Comments of TRA at 6 n.9.

TRA is referring to *product* markets, then TRA is ignoring the fact that Congress defined telephone exchange and exchange access services as the entire "product market" to which sections 251(b) and (c) duties apply.

III. THE DSL-BASED SERVICES NOW ACTUALLY ON THE MARKET DO NOT MEET THE STATUTORY DEFINITIONS OF "TELEPHONE EXCHANGE SERVICE" OR "EXCHANGE ACCESS."

The question here is notable in at least one respect: Whereas the Commission and the industry sometimes find themselves struggling to fill in the 1996 Act's gaps and ambiguities, Congress actually provided very detailed definitions of the two services — "telephone exchange service" and "exchange access" — that define a "local exchange carrier." Several commenters urge the Commission not to worry too much about the precise terms of these definitions and to invoke instead deference to its own views,[12] but the Commission is bound to follow Congress's instructions. As the D.C. Circuit has made clear, "there is no occasion for deference" when Congress has spoken directly to the matter at hand. *Time Warner Entertainment Co. v. FCC*, 56 F.3d 141, 190 (D.C. Cir. 1995).

A. Incumbents' DSL-Based Services Do Not Meet the Act's Definition of "Telephone Exchange Service."

Multiple commenters agree with U S WEST that DSL-based services cannot be squeezed into the Act's careful definition of "telephone exchange service," especially given the Commission's consistent construction of that definition over time. These commenters include

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[12] *See, e.g.*, Comments of NorthPoint at 8-9; Comments of RCN Telecom Svcs. at 3 & n.3; Comments of Rhythms NetConnections at 15-18.

competitive DSL providers such as Covad and Rhythms NetConnections,[13] as well as incumbents such as GTE and SBC.[14] Indeed, the Commission itself just made the same arguments to the D.C. Circuit that U S WEST presents now, in addressing another service — ISP dial-up — that is in all relevant respects identical to the predominant application of DSL. *See* Brief for the Federal Communications Commission at 24-28, *Bell Atlantic Tel. Cos. v. FCC*, No. 99-1024 (D.C. Cir.) (noting that the carriage of traffic to an ISP for connection to the Internet cannot be considered "telephone exchange service" because it does not originate and terminate "within a local exchange").

The commenters that disagree with U S WEST, Covad, and the Commission try to do two things: They stretch the criteria of traditional "telephone exchange service" in the first half of the statutory definition beyond text or precedent, and they suggest that the extension of the term to cover "comparable" services permits the Commission to ignore these criteria altogether. Neither approach is lawful.

1. Currently deployed DSL-based services do not bear the defining characteristics of traditional telephone exchange services established by statutory text and Commission precedent.

Under the first half of the Act's definition, "telephone exchange service" is "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

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[13] Comments of Covad at 5-6; Comments of Rhythms NetConnections at 16.

[14] Comments of GTE at 6-8; Comments of SBC at 3-6.

the character ordinarily furnished by a single exchange, and which is *covered by the exchange service charge*." 47 U.S.C. § 153(47)(A). DSL service satisfies none of these criteria.

a. *"Within a telephone exchange."*

The commenters insisting that DSL service stays "within a telephone exchange" simply ignore Commission precedent. With regard to the high-speed Internet access services that constitute the bulk of DSL-based services deployed today, the Commission ruled, in the *GTE ADSL Order*, that Internet-bound communications "do not terminate at the ISP's local server . . . but continue to the ultimate destination or destinations, very often at a distant Internet website accessed by the end user."[15] In the analogous context of dial-up Internet access, the Commission found the same thing and concluded that Internet-bound communications were therefore predominantly "non-local."[16] As noted above, in defending the order containing this finding to the D.C. Circuit (the same court that oversees this proceeding), the FCC asserted that the connection of a subscriber to an ISP cannot be "telephone exchange service" for this very reason.[17]

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[15] *GTE Tel. Operating Cos., GTOC Tariff No. 1*, 13 FCC Rcd 22466, 76 (1998) ("*GTE ADSL Order*").

[16] Declaratory Ruling, *Intercarrier Compensation for ISP Bound Traffic*, CC Dkt. No. 96-98, ¶ 26 n.87 (rel. Feb. 25, 1999) ("*Reciprocal Compensation Declaratory Ruling*").

[17] *See* Brief for the Federal Communications Commission at 24-28, *Bell Atlantic Tel. Cos. v. FCC*, No. 99-1024 (D.C. Cir.).

Some commenters point to the practice of "caching" Internet content,[18] and to the fact that some end users use DSL to connect to corporate networks,[19] and assert that it is possible for a DSL-based communications to stay within the same local *geographic* area. This is true to some extent, although the mere fact that content is cached or located on a corporate network does not automatically mean the communication is geographically local.[20] But even communications that do begin and end in the same city do *not* stay "within" the network of "telephone exchange[s]" that constitute the PSTN.[21] As the Commission has recognized, DSL transmissions are taken off the PSTN at the first feasible point — the end of the copper loop.[22] This brief overlap with the PSTN is not enough to make DSL a telephone exchange service.[23] In addition, intracity DSL communications do not meet any of the other criteria of "telephone exchange service" (such as providing any-to-any intercommunication), as described below.

18/ *See, e.g.*, Comments of CDS Networks at 5-7.

19/ *See, e.g.*, Comments of Focal Communications *et al.* at 6-7.

20/ "Caching" content simply means mirroring it on some server other than the original. The server containing the cache may or may not be located in the same vicinity as the end user. Similarly, content in a corporate WAN or intranet may be stored on a geographically dispersed network of servers.

21/ *Cf.* Comments of CoreComm at 9 (noting that the "telephone exchange" has historically "referred to a local switching center and whatever wires lead from that switching center to an individual customer premises").

22/ *See* Deployment of Wireline Services Offering Advanced Telecomm. Capability, 13 FCC Rcd 24011, 24027 (1998).

23/ *See American Tel. & Tel.*, 38 F.C.C. 1127, 1134 (1965).

Implicitly conceding that DSL-based communications do not stay "within a telephone exchange," several commenters argue that the boundaries of the exchange can be stretched to cover wherever it is that DSL communications happen to go.[24] Focal and its cohorts, for example, argue that a DSL provider determines the boundaries of the "exchange area" when it determines what areas will be covered by the same flat rate.[25] But this ignores the Act's language, which refers to the existing "*telephone* exchange." Moreover, this approach would produce absurd results: a communication between points A and B could be within a single "exchange area" under one DSL provider's rate plan, while the same communication could cross from one exchange area into another under a different provider's plan. Again, all these proposals for redefining "telephone exchanges" simply highlight that DSL communications do not stay within them.

b. *"Intercommunicating service."*

The DSL-based services that incumbents have actually deployed do not involve any-to-any "intercommunicating service." While some commenters suggest (without explanation) that the Commission should just ignore this statutory language,[26] the Commission and courts have

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[24] *See, e.g.*, Comments of Advanced Telcom Group *et al.* at 12; Comments of Focal Communications *et al.* at 7-8.

[25] *See* Comments of Focal Communications *et al.* at 8.

[26] *See, e.g.*, Comments of Advanced Telcom Group *et al.* at 4 (stating, without explanation, that "'any-to-any communications' — the ability of every subscriber to intercommunicate with every other subscriber — is not a prerequisite of telephone exchange service").

long held — correctly — that any-to-any intercommunication is a defining characteristic of telephone exchange service.[27] Significantly, the Commission has reaffirmed the essentiality of this criterion *since* the passage of the 1996 Act, and has even gone so far as to say that Congress intended to *ratify and incorporate* the agency's longstanding interpretation.[28]

DSL service does not involve any-to-any intercommunication among subscribers. An end user receives a dedicated "pipe" connected exclusively to a party he predesignates. To be sure, as several commenters note,[29] an end user may set up more than one such pipe and switch among them, but that does not make the service any-to-any; each and every pipe must be set up individually in advance of any communication and connected to a predesignated party. As a coalition of CLECs acknowledges, "PVCs [permanent virtual connections] must be established in advance for each such end-to-end user connection," which involves contacting the service provider and having the provider perform "a keyboard operation that takes seven minutes" for

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[27] *See Offshore Tel. Co. v. South Cent. Bell Tel. Co.*, 6 FCC Rcd 2286, 2287 (1991) (defining telephone exchange service as "a local calling capability that permits a community of interconnected customers to make calls to one another over a switched network"); *Application of Midwest Corp.*, 53 F.C.C.2d 294, 300 (1975) (defining service as "the provision of individual two-way voice communication by means of a central switching complex to interconnect all subscribers within a geographic area); *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d at 1081, 1093 n.8 (7th Cir. 1983) (telephone exchange service "enables the calling party to dial any telephone connected to the switched network within that exchange area").

[28] *See Application of BellSouth Corp. et al. for Provision of In-Region, InterLATA Services in Louisiana,* 13 FCC Rcd at 20599, 20621-22 & n.64 (1998).

[29] *See, e.g.*, Comments of Advanced Telcom Group *et al.* at 8-9; Comments of AT&T at 10-11; Comments of Focal Communications *et al.* at 7.

each and every pipe the subscriber wishes to establish.[30] This is a far cry from true local telephone exchange service, where any subscriber can pick up the phone and dial any other local subscriber without having to set up any kind of special arrangement with the called party in advance.[31]

c. *"Covered by the exchange service charge."*

No commenter can point to an incumbent carrier that includes DSL service in its basic monthly "exchange service charge." As the Commission told the D.C. Circuit in the context of dial-up Internet access, this fact alone disqualifies a service from the definition of "telephone exchange service." *See* Brief for the Federal Communications Commission at 29, *Bell Atlantic Tel. Cos. v. FCC*, No. 99-1024 (D.C. Cir.).[32]

Several commenters resort to circularities that effectively drain the statutory requirement of any meaning. AT&T, for example, suggests that any charge for a service that is

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[30] *See* Comments of Advanced Telcom Group *et al.* at 9 n.7.

[31] AT&T's observation that U S WEST offers a DSL service (Megabit 256 Select) that is not "always on" is irrelevant. *See* Comments of AT&T at 11 & n.10. That service uses shared DSLAM ports, and a subscriber must request and establish a connection with a DSLAM port each time he wishes to begin a session (and he may find the line busy). This is hardly the same thing as any-to-any dialing and calling: the subscriber only dials the DSLAM, can establish a high-speed connection only to a predesignated ISP, and lacks the capability to set up a high-speed connection at will with other subscribers to the telephone network.

[32] AT&T's suggestion that this criterion applies only when the service in question is provided over multiple exchanges, *see* Comments of AT&T at 11 n.11, runs counter to the grammar and punctuation of the statute. The phrase "covered by the exchange service charge" is separated from the preceding phrase ("a connected system of telephone exchanges within the same exchange area") by a comma, indicating that it applies to both types of service (single-exchange and multiple-exchange) that come before.

"telephone exchange service" is an "exchange service charge."[33] But this turns what Congress intended to be a defining characteristic of telephone exchange service — a service's inclusion in the price for basic local calling — into a triviality: *every* service alleged to be "telephone exchange service" will, of course, have some price associated with it. By turning the statutory language into a nullity, these commenters violate the most basic principles of statutory construction.[34]

2. The extension of the Act to reach "comparable" services is not a license to sweep in DSL-based services that bear no resemblance at all to traditional telephone exchange service.

Contrary to the straw man that many commenters fight,[35] U S WEST's argument has *never* been that the definition of "telephone exchange service" is frozen at the state of technology in 1996. Just the opposite: U S WEST has always stated forthrightly that Congress presumably added section 153(47)(B) — broadening the definition to include "comparable service provided through a system of switches, transmission equipment, or other facilities" — to reflect the fact that the traditional local telephone services described in the old definition might in the future be provided using different network technologies than the ones originally contemplated. *See* Brief of U S WEST at 23. U S WEST's argument is simply that the extension of the term to include "comparable" services did not license a free-for-all that permits the Commission to ignore

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33/ *See* Comments of AT&T at 11.

34/ *See Mackey v. Lanier Collection Agency & Svc., Inc.*, 486 U.S. 825, 837 n.11 (1988) (collecting cases).

35/ *See, e.g.*, Comments of AT&T at 8-9; Comments of CDS Networks at 2-4; Comments of Covad at 14-15; Comments of Rhythms NetConnections at 8-11.

the old definition entirely; the "comparable" services in part B of the definition still have to be fundamentally like (though not precisely identical) the services described in the original part A.

U S WEST suggested that the best standard of "comparability" — indeed, the only one ever articulated — was the standard the Commission itself used in the *Local Competition Order* to determine that CMRS services were "comparable" to their wireline counterparts: functional and market equivalence. The DSL-based services that incumbents are currently offering are not the functional equivalent of the ordinary local calling service at the core of the Act's definition, nor can they substitute for such service; hence, they are not "comparable" to traditional telephone exchange service. Rather than offering freely switched connections among all the subscribers within a limited local calling area, these DSL services provide only a dedicated connection to a predesignated local recipient.

To be sure, one *potential* use of DSL technology could be to split loops into multiple voice channels so that a single telephone line would be able to carry multiple switched voice calls that could be routed through the PSTN. Such an application *would* be a functional substitute for ordinary local calling service, and U S WEST agrees that an incumbent providing such service in the future *would* be providing "telephone exchange service." But the roadblocks to launching a commercial offering of this type are significant,[36] and U S WEST is not aware of any carrier — let alone any *incumbent* potentially subject to section 251(c)— that currently offers end users voice over DSL on any significant scale. U S WEST is exploring this technology itself,

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[36] *See* Liane H. Labarba, "Roadblocks to Voice over DSL: Just What Is Standing in the Way?," *Telephony*, Apr. 19, 1999, at 37.

but it has not yet conducted technical trials for any finished voice-over-DSL service, and it is some time away from any commercial launch.

Some commenters argue that DSL services are "comparable" to ISDN services, which, although they have never been classified as such by the Commission, are tariffed at the state level like some telephone exchange services (and other services) are.[37] Whatever the proper regulatory classification of ISDN, the analogy is not proper: ISDN is a bundled service that *includes* two voice channels and therefore *does* provide the customer's basic local calling dialtone.[38] By contrast, U S WEST's DSL offerings, like those of every other incumbent, are sold as *supplemental* data services to customers who purchase basic dialtone separately. Unlike ISDN, currently offered DSL services do not include a capability for basic, any-to-any local exchange calling. How ISDN is tariffed, therefore, is irrelevant to determining the proper characterization of DSL.

Finally, several commenters suggest that even an admittedly *non*local service can be considered "comparable" to traditional telephone exchange service as long as *some* leg of "service" is provided within the exchange.[39] But such a reading would have the effect of expanding the definition of "telephone exchange service" to swallow up "exchange access," unlawfully turning that statutory term into surplusage. These commenters are merely trying to get

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[37] *See* Comments of Focal Communications *et al.* at 9; Comments of MCI WorldCom at 9.

[38] *See, e.g., Overview of ISDN*, <http://www.isdnzone.com/telcom/isdnover.htm>.

[39] *See* Comments of Focal Communications *et al.* at 8; Comments of Mindspring at 6; Comments of Sprint at 5.

around the fact that Congress limited the definition of "exchange access" to services used for "telephone toll" calling — a restriction discussed next.

B. Incumbents' DSL-Based Services Do Not Meet the Statutory Definition of "Exchange Access."

Congress defined 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." 47 U.S.C. § 153(16). Again, a broad cross-section of commenters — including Covad, Focal, GTE, Hyperion, KMC, Level 3, MCI WorldCom, SBC, and the Wisconsin Public Service Commission[40] — agree with U S WEST that incumbents' current DSL-based service offerings do not meet this definition, and for the same reason that U S WEST states: These services are used primarily for Internet access and other information services, not to originate and terminate ordinary station-to-station telephone toll calls. This reasoning comes directly from the Commission's own *Non-Accounting Safeguards Order*.[41]

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[40] Comments of Covad at 4-5; Comments of Focal *et al.* at 2-4; Comments of GTE at 8-10; Comments of Level 3 at 3-4; Comments of MCI WorldCom at 17-18; Comments of SBC at 7-10; Comments of the Wisconsin Pub. Svc. Comm'n at 6-7.

In addition MCI WorldCom, RCN, and the Telecommunications Resellers Association just filed a brief in the D.C. Circuit arguing strenuously that the carriage of traffic to an ISP cannot be "exchange access" because ISPs do not provide telephone toll service. *See* Brief for MCI WorldCom, Inc. and Supporting Intervenors at 19-21, *Bell Atlantic Tel Co. v. FCC*, No. 99-1094 (D.C. Cir.).

[41] *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, 11 FCC Rcd 21905, 22023-24 (1996) ("*Non-Accounting Safeguards Order*").

AT&T acknowledges that the *Non-Accounting Safeguards Order* says exactly what U S WEST and the above-listed commenters say it does, so it asks the Commission to wish its precedent into the cornfield. AT&T's proffered map for reversing course leads nowhere. AT&T notes that ISPs purchase interexchange telecommunications links as components of their information services; therefore, a communication that travels on a DSL link to an ISP will ultimately traverse an interexchange telecommunications link as well.[42] But the Act defines "exchange access" as an access link used specifically "for the purpose of the origination or termination of *telephone toll services*" — a particular kind of telecommunications service specially defined in the Act — ***not*** for the "origination or termination of *telecommunications services*" generically.

This difference is especially significant in light of the history of the provision defining "exchange access." The term "exchange access" (like "information access") was defined in the MFJ, and it originally had a broader definition similar to what AT&T is advocating in this proceeding. The MFJ defined "exchange access" as "the provision of exchange services for the purpose of originating or terminating *interexchange telecommunications*" generically. *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 228 (D.D.C. 1982) (emphasis added). In adopting the 1996 Act, however, Congress consciously *narrowed* the MFJ's definition, replacing "interexchange telecommunications" with "telephone toll service." *See* 47 U.S.C. § 153(16). AT&T is, at base, arguing that Congress's amendment of the language was nugatory, and that the

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[42] *See* Comments of AT&T at 15-16.

Commission should ignore Congress's action and apply the *MFJ* definition of "exchange access." The Commission should resist AT&T's invitation to ignore Congress.

Moreover, even if "exchange access" did encompass the provision of access links for the purpose of originating or terminating any or all interexchange telecommunications services (in other words, even if the limitation to "telephone toll services" did not exist), the ISP services that subscribers access through their DSL links are "information services," not "telecommunications services." *See Federal-State Joint Bd. on Universal Svc.*, 13 FCC Rcd 11501, 11540 (1998). As we now discuss, the origination of information services is and always has been "information access," a category mutually exclusive of "exchange access."

C. Incumbents' Current DSL-Based Offerings Are "Information Access" Services, Which Continue To Be a Distinct Legal Category of Services under the Act.

Several commenters, including Covad,[43] agree with U S WEST that incumbents' DSL-based services fall squarely in the definition of "information access" established by the MFJ.[44] And whereas Congress specifically *modified* the MFJ's definition of "exchange access" in adopting the Telecommunications Act, it left the definition of "information access" alone, even as it carried the term forward in several provisions of the 1996 legislation. *See* 47 U.S.C. §§ 251(g), 274(h)(2). The strong implication is that Congress intended to ratify the existing judicial and

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[43] *See, e.g.*, Comments of Covad at 7-9; Comments of GTE at 8-10; Comments of SBC at 9.

[44] Several commenters wrongly accuse U S WEST of trying to argue that DSL is an information *service*. *See, e.g.*, Comments of CIX at 3-4; Comments of CoreComm at 14-15; Comments of Rhythms NetConnections at i, 4-8. U S WEST makes no such argument.

administrative definition of the term. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *Dutton v. Wolpoff & Abramson*, 5 F.3d 649, 655 (3d Cir. 1993). Most recently, in the *Non-Accounting Safeguards Order*, the Commission itself acknowledged that "information access" continues to be a distinct legal category of services under the Act, one that is mutually exclusive with "exchange access." *See* 11 FCC Rcd at 22024 n.621.

Nevertheless, several commenters argue that Congress's references to "information access" are meaningless. Two contend that Judge Greene's recognition of a separate category of "information access" was superfluous; in their view, the category was only a subset of "telephone exchange service" or "exchange access," listed separately by the judge only out of "belt-and-suspenders" caution.[45] But even if the definitions as phrased in the MFJ did overlap (and U S WEST believes they did not), Congress *modified* the definitions of "telephone exchange service" and "exchange access" in adopting the Act, and the final definitions it adopted plainly *do not* overlap with the unchanged definition of "information access." Moreover, Congress's decision to adopt new statutory provisions regarding "information access" (*see* 47 U.S.C. §§ 251(g), 274(h)(2)) acknowledged that carriers were continuing to offer (and information service providers continuing to purchase) information access services long after the MFJ. The Commission had it exactly right in *Non-Accounting Safeguards Order* when it

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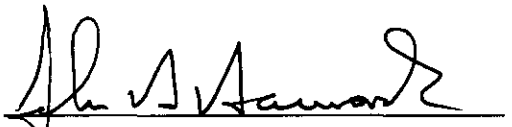
[45] *See, e.g.*, Comments of Advanced Telcom Group *et al.* at 22-23; Comments of MCI WorldCom at 15-16.

recognized that carriers still provide information access services to ISPs, and that these services remain a distinct legal category even after passage of the 1996 Act.

Respectfully submitted,



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