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

In the Matter of	)	
	)	
Competitive Telecommunications Association,	)	CC Docket No. 98-39
Florida Competitive Carriers Association, and	)	
Southeastern Competitive Carriers Association	)	
Petition on Defining Certain Incumbent LEC	)	
Affiliates as Successors, Assigns, or	)	
Comparable Carriers Under Section 251(h) of	)	
the Communications Act	)	

AMERITECH CORPORATION OPPOSITION

Gary L. Phillips
Counsel for Ameritech
Suite 1020
1401 H Street, NW
Washington, DC 20005
(202) 326-3817

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AMERITECH CORPORATION OPPOSITION

I. INTRODUCTION AND SUMMARY

Ameritech Corporation respectfully submits the following comments in opposition to the above-captioned petition for declaratory ruling or, in the alternative, rulemaking. In this petition, CompTel and the other petitioners (hereinafter "CompTel" or "petitioners") seek a declaratory ruling that an incumbent local exchange carrier (ILEC) affiliate "providing local service within the ILEC's service territory using resources transferred from the ILEC is a 'successor or assign' of the ILEC under Section 251(h)(1) and is a dominant carrier for the provision of interstate access and other interstate services."[1]

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[1] Petition at 8. Actually, this is just one of many iterations of petitioners' declaratory ruling request. That request is recast virtually every time it is presented. For example, petitioners state on page 1 of the petition that they seek a rulemaking regarding the regulatory status of ILEC affiliates providing in-region local exchange or exchange access service "using the same or a similar brand name and common financial resources, personnel, and/or other resources of the ILEC <u>or another corporate affiliate</u>" (emphasis added). On page 2, they request a ruling with respect to ILEC affiliates using the same or a similar brand name as the ILEC,

Alternatively, petitioners ask the Commission to propose a rule establishing a rebuttable presumption that an ILEC affiliate providing wireline local exchange service or exchange access service within the ILEC's service area under the same or a similar brand name is a "comparable" carrier under Section 251(h)(2) and thereby subject to the additional obligations of ILECs required by Section 251(c) of the Act.

CompTel's petition must be denied both for procedural and substantive reasons. Procedurally, the petition is deficient because it presents what is in reality an untimely request for reconsideration of the *Non-Accounting Safeguards Order*.[2] In the *Non-Accounting Safeguards Order*, the Commission held that an affiliate may be deemed a successor or assign of an ILEC to the extent the ILEC has transferred to that affiliate ownership of network elements access to which must be made available under section 251(c). Although CompTel purports to seek merely a clarification of the *Non-Accounting Safeguards Order*, the "clarification" it seeks would constitute nothing less than a repudiation of that decision and, as such, is impermissible. Likewise, its request for a new

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omitting the prior references to "common financial resources, personnel and/or other resources of the ILEC or another corporate affiliate." Subsequently, petitioners drop all references to resources ostensibly transferred from an ILEC affiliate, such as a corporate parent, and attempt to pass off the previously discussed resource transfers as transfers from the ILEC itself. In addition, petitioners vacillate between requesting a definitive ruling and establishment of a rebuttable presumption. *Compare, e.g.*, Petition at 8 *with* Petition at note 25. Ameritech can only conclude that petitioners' confusion as to what exactly they seek reflects the fact that their request lacks even the scent of legitimacy; otherwise, petitioners would not be tripping all over themselves in a futile attempt to frame their request in some credible fashion.

[2] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905 (1996).

rulemaking is improper since petitions for reconsideration of the *Non-Accounting Safeguards Order* remain outstanding.[3]

Substantively, the petition fares even worse. As an initial matter, CompTel ignores the distinction between an ILEC and its corporate parent, equating support from the parent with support from the ILEC itself. In this respect, CompTel not only manufactures the "problem" to which its petition is ostensibly directed, but effectively asks the Commission to find that the recipient of resources from the one entity is the assign of another. This is an obvious *non sequitur* which dooms CompTel's petition.

Even assuming that an ILEC did transfer goodwill, capital, personnel, or some other resource to its affiliate, that would not, in and of itself, demonstrate that the affiliate is a successor or assign of the ILEC. On the contrary, it is well settled that an entity may be deemed a successor or assign of an enterprise only if it has substantially replaced that enterprise. Quite obviously, the mere transfer of *some* resource from an ILEC to an affiliate would not warrant a conclusion, or even a presumption, that the affiliate has substantially replaced the ILEC. Rather, any assessment of whether an affiliate is a successor or assign of an ILEC depends upon the nature of any resources transferred and the purposes of section 251(c). In this respect, the Commission's conclusion in the *Non-Accounting Safeguards Order* that an ILEC affiliate could be considered an assign

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[3] While the Commission has, in many contexts, coupled its decisions with Further Notices to consider issues not addressed in the initial decision, that is not the same as initiating a rulemaking to change a decision while reconsideration petitions are pending.

only if the ILEC transferred to it ownership of network elements is dead-on. Because the purpose of section 251(c) is to ensure that competitive LECs obtain access to so-called bottleneck local exchange facilities, it necessarily follows that the defining characteristic of an ILEC - or its successor or assign - is ownership of the so-called bottleneck.

CompTel ignores this fundamental link between ILEC status and ownership of so-called bottleneck facilities. It asserts that an ILEC can somehow avoid its resale and unbundling obligations under section 251 if an affiliate using the corporate parent's brand provides in-region local service. This claim, even if true (which it is not), would not support a rule that confers ILEC status in the event of a transfer of *any* resource to an in-region local affiliate. Moreover, the claim is wholly illogical. For one thing, CompTel does not explain how an ILEC can use an affiliate to evade its section 251(c) obligations if the affiliate itself is obtaining unbundled network elements and resold services from the ILEC. It also fails to explain how an affiliate without a network of its own could possibly comply with section 251(c), since the purpose and effect of that provision is to ensure access to network facilities.

These omissions are telling in and of themselves, but they are particularly troublesome since, just a few months ago, counsel for CompTel filed another petition on behalf of LCI - whose Chairman and Chief Executive Officer is Chairman of the Board of CompTel - in which it argued that ILECs *ought to*

provide retail services through an ILEC affiliate that obtains services and/or facilities from the ILEC.[4] Although CompTel maintains that these two petitions are not inconsistent, the fact is that they are fundamentally so: while one (the LCI petition) suggests that the Commission should incent ILECs to provide retail services through a non-regulated affiliate, the other argues that provision of retail services by an ILEC affiliate is an anticompetitive device to avoid section 251.

Nor is CompTel's alternative request for rulemaking any more credible. In asking the Commission to presume that an in-region ILEC local affiliate that uses the corporate name has "substantially taken the place" of the ILEC, CompTel simply tosses aside the plain language of the Act For all of these reasons, and as further explained below, CompTel's petition must be denied.

II. ARGUMENT

A. CompTel's Declaratory Ruling Request Is Procedurally Improper and Substantively Frivolous

CompTel devotes the bulk of its petition to its request that the Commission "clarify" through a declaratory ruling that an ILEC affiliate providing local service in the ILEC's service territory using resources transferred from the ILEC is a successor or assign of the ILEC and a dominant carrier under Commission rules. According to CompTel, such clarification is necessary

[4] *See LCI Petition for Expedited Declaratory Ruling*, CC Docket No. 98-5, Jan. 22, 1998.

because "the *Non-Accounting Safeguards Order* does not address how the Section 251(h) criteria for treating affiliated entities as ILECs would be satisfied."[5] Moreover, it maintains, absent such clarification, ILEC affiliates would be able to use ILEC resources to avoid complying with important provisions of Section 251, including resale and unbundling obligations.[6] CompTel argues that its proposed reading of the term "successor or assign" is "compelled by the statutory language of Section 251(h)(1)" and " consistent with the common understanding of the terms in other fields of law."[7]

These arguments are riddled with flaws. First, they seek what is, in reality, a rule change in the guise of a petition for declaratory ruling and, for this reason, are procedurally impermissible. Second, from a substantive standpoint, they are nothing short of frivolous.

1. CompTel Seeks a Rule Change in the Guise of a Declaratory Ruling.

CompTel is simply wrong when it claims that the *Non-Accounting Safeguards Order* does not address the circumstances under which an ILEC affiliate would be deemed a successor or assign of the ILEC. The *Non-Accounting Safeguards Order* addressed this issue head-on. It held: "[W]e conclude that, if a BOC transfers to an affiliated entity ownership of any network elements that

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[5] CompTel Petition at 11.

[6] *Id.* at 6-7.

[7] *Id.* at 8-9.

must be provided on an unbundled basis pursuant to section 251(c)(3), we will deem such entity to be an "assign" of the BOC under section 3(4) of the Act with respect to those network elements."[8] In light of this holding, there is no "controversy "or "uncertainty" that would warrant a declaratory ruling under Section 1.2 of the Commission's rules.

Indeed, CompTel's petition is just a smokescreen for an untimely reconsideration request. The ruling it now seeks is flatly inconsistent with the holding of the *Non-Accounting Safeguards Order*. The Commission did not find in that order that *any* transfer of *any* resource from an ILEC to an ILEC affiliate would render that affiliate an assign of the ILEC. On the contrary, the Commission was quite specific about which types of transfers could trigger status as an assign: transfers of ownership in a network element, access to which must be provided under section 251(c).[9] That being the case, the Commission may not "clarify" that "an affiliate to which an ILEC has transferred anything that would be of value in providing in-region local service, such as brand name,

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[8] *Non-Accounting Safeguards Order* at para. 309.

[9] Indeed, the position CompTel now advances is inconsistent with the position it took in its comments in the *Non-Accounting Safeguards Proceeding*. In those Comments, CompTel argued that a BOC affiliate to which a BOC transfers "local exchange network capabilities" should be treated as an ILEC. CompTel Comments in CC Docket No. 96-149, filed August 15, 1996, at 22 (emphasis added). Significantly, CompTel also asked the Commission to prohibit BOC section 272 affiliates from "using the brand name of the local exchange carrier." *Id.* at 16. The Commission did not grant this request and it is not free effectively to reverse itself in a declaratory ruling.

capital, or personnel" is a successor or assign of the ILEC.[10] Any such holding would require a rule change.[11]

Likewise, the Commission may not issue a declaratory ruling that ILEC affiliates to which an ILEC has transferred any resources are dominant in their provision of interstate services. The Commission has already ruled that non-incumbent LECs are nondominant in their provision of interstate access services.[12] No exception was made for non-incumbent LECs that are affiliated with ILECs or that receive resources that are not network elements from their ILEC affiliate. The only circumstance in which dominant status could even conceivably apply to an ILEC affiliate would be if the ILEC transferred to that affiliate ownership of section 251(c)(3) network elements. Even then, it would not be clear that the ILEC affiliate would be dominant under existing rules because the ILEC affiliate would be deemed an ILEC only with respect to the

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[10] CompTel Petition at 11.

[11] CompTel suggests that the *Non-Accounting Safeguards Order* is not dispositive because the Commission did not consider whether its analysis would be different for affiliates providing in-region and out-of-region services. Petition at note 24. The fact that the Commission did not see any need to distinguish between in-region and out-of-region services does not alter the fact that the rule adopted in the *Non-Accounting Safeguards Order* applies to in-region, as well as out-of-region affiliates. In any event, to the extent CompTel means to imply that the Commission might not have contemplated that its rule would apply to an in-region affiliate, CompTel is ignoring the very text of the *Non-Accounting Safeguards Order*. For example, the *Non-Accounting Safeguards Order* rejects as contrary to law and public policy any limit on the ability of a BOC section 272 affiliate to resell the services of the BOC or purchase access to network elements from the BOC. Obviously, that discussion assumes that the affiliate will be providing local service in-region since a BOC does not own network elements or provide facilities-based local service for resale outside of its region.

[12] *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing End User Common Line Charges*, First Report and Order, 12 FCC Rcd 15982 (1997) at para. 360.

network elements that were transferred to it. In any event, one thing is clear: absent a transfer of network elements an ILEC affiliate could not possibly be deemed an ILEC, and thus could not possibly be classified as dominant under existing rules.

2. CompTel's Request for Declaratory Ruling is, in any Event, Frivolous.

Because of its procedural deficiencies, the Commission could just dismiss CompTel's declaratory ruling request without addressing the substantive issues it raises. The Commission should, however, go further and deny this request on substantive grounds so that industry and Commission resources are not wasted with a rehash of these frivolous arguments in some future proceeding.

The substantive deficiencies in the petition are almost too numerous to cover in these comments. For starters, CompTel's claim is built on pretense - that ILECs (most notably, BellSouth) plan to transfer, or have transferred, significant resources to their in-region local affiliates. The basis for this pretense is CompTel's deliberate obfuscation of the distinction between an ILEC and its corporate parent – a distinction that is codified in the 1996 Act.[13]

CompTel makes much of the fact, for example, that BellSouth Telecommunications has admitted that its in-region local affiliate "will present itself to customers using the same corporate name, logo, and other indicia of

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[13] *See* § 3(4)(C)..

corporate identity as BellSouth Telecommunications, without paying BellSouth Telecommunications or its ratepayers anything for this use of corporate goodwill." Indeed, CompTel suggests that this "transfer" is, in itself, grounds for treating the BellSouth affiliate as an ILEC.

CompTel's assumption that the operating companies of an RBOC own the company brand and logo is false. Rather, it is the corporate parent – the RBOC itself – that owns the company trademark and logo. For example, all rights to the Ameritech brand name and logo are held by Ameritech Corporation. The Ameritech operating companies have no independent legal rights to the Ameritech name.[14] In this respect, CompTel's suggestion that use by an ILEC affiliate of the corporate parent's brand constitutes a siphoning of resources from the ILEC to the affiliate is just plain wrong. Since the ILEC has no ownership interest in the brand, it could not possibly have transferred such interest to another entity.

CompTel also complains that the BellSouth affiliate will be capitalized and funded entirely by BellSouth Corporation, the holding company which also owns BellSouth Telecommunications.[15] It asserts that an ILEC affiliate that is capitalized by the parent of the ILEC has necessarily received funds from the

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[14] The five operating companies did not even begin doing business as Ameritech Illinois, Ameritech Indiana, Ameritech Michigan, Ameritech Ohio, and Ameritech Wisconsin until 1993. Prior to then, the companies did business under the "Bell" name - *e.g.*, Illinois Bell.

[15] CompTel also suggests that BellSouth's affiliate will obtain funding that is secured, in substantial part, by the assets and expected future earnings of BellSouth Telecommunications. Petition at 5. The Commission has held, however, that Section 272(b)(4) of the Act prohibits an affiliate from obtaining debt that is secured by the assets of the ILEC.

ILEC itself. The Commission, however, rejected this very notion in the *Non-Accounting Safeguards Order* when it held that section 272(b)(4) - which prohibits BOC affiliates from using BOC assets as collateral for debt - does not prohibit the affiliates from using the assets of their corporate parent as collateral.[16] The necessary implication of this decision is that the recipient of funds from a corporate parent is not an assign of the ILEC.

In fact, it appears that the only resource addressed by CompTel that arguably *could* be transferred from an ILEC to an affiliate is what CompTel characterizes as "human capital." But even here, the specific transfers described by CompTel are of no consequence. CompTel's sole claim is that "[c]ertain high-level staff members, including some who had responsibility for negotiating interconnection agreements with independent CLECS, have been transferred from BellSouth Telecommunications to BellSouth BSE." Aside from the fact that a transfer of personnel, but no other assets, could not render an ILEC affiliate an ILEC assign, CompTel does not even allege that BellSouth Telecommunications transferred significant numbers of personnel. Indeed, what is amazing about CompTel's claim here is that CompTel purports to take umbrage specifically over the transfer of a select number of employees who were involved in the

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[16] *Non-Accounting Safeguards Order* at para. 190. In a similar vein, the *Accounting Safeguards Order* holds that the affiliate transaction rules do not apply to transactions between to unregulated BOC affiliates unless the transactions at issue are part of a chain that ultimately results in the provision of an asset or service to the BOC itself. *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of* 1996, CC Docket No. 96-150, FCC 96-450, released December 24, 1996, at para. 183.

negotiation of interconnection agreements. One would think that the transfer of such employees to an ILEC affiliate only underscores the need of the affiliate to negotiate interconnection agreements in order to provide local service. In this respect, the transfer highlights - rather than obfuscates - the fundamental distinction between the ILEC and its affiliate.

In short, CompTel's claim that ILECs are siphoning resources to their affiliates in order to evade their section 251 obligations is patently frivolous. The only resource transfer from an ILEC to an affiliate that CompTel is able to identify is the transfer of a few employees from BellSouth Telecommunications. The other resources it cites were never ILEC resources in the first place. Thus, the very premise of CompTel's petition, and the basis for its call to action, is flawed.

In addition to deliberately blurring the statutory distinction between an ILEC and its corporate parent, CompTel offers a legal analysis that is incoherent, at best, and completely at odds with the law. Although the term "successor or assign" is not defined in the 1996 Act or its legislative history, the term is commonly understood and widely used to refer to a business enterprise that has *replaced* another. For example, in considering a plan by Southern New England Telecommunications Corporation (SNET) to establish an in-region retail affiliate, the Department of Public Utility Control held:

> In Connecticut, a successor has always been interpreted to constitute another corporation which, by a process of amalgamation, consolidation, or duly authorized legal succession, has become invested with the rights and assumed

> the burdens of the first corporation. *To be a successor, the succeeding corporation should, in all material aspects, "stand in the boots of the old one."* The Department, therefore, concludes that SNET's proposal, which entails assumption of retail activities by [an affiliate], does not place [the affiliate] in the stead of the Telco in all material respects.[17]

Likewise, in addressing the spin-off by Pacific Telesis of its cellular subsidiary, AirTouch, and, in particular whether AirTouch would be subject to the Modification of Final Judgment, the Department of Justice noted that "[t]he term 'successor' generally refers to one who takes the place of another and retains the same rights, obligations, and property." [18] The Department conceded that "most transferees of BOC assets would not be successors to the BOCs for purposes of the decree." It argued, however, that, insofar as Pacific had spun off its *entire* cellular business, and that business would continue to operate *in tact*, AirTouch should be considered a successor or assign of Pacific.[19]

Since a successor or assign is, by definition, an entity that has substantially *replaced* a predecessor, there is no basis upon which the Commission could conclude that *any* resource transfer by an ILEC to an in-region affiliate renders that affiliate an assign of the ILEC. To the extent that the ILEC continues to operate, and, in particular, to the extent it retains ownership of

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[17] DPUC Investigation of the Southern New England Telephone Company Affiliate Matters Associated with the Implementation of Public Act 94-83, Docket No. 94-10-05 (Conn. Dept. Pub. Util. Con. June 25, 1997) at 45-49 (citations omitted).

[18] Response of the United States in Opposition to AirTouch's Motion for Declaratory Ruling that it is Not Subject to the Decree, Civil Action No. 82-0192, March 13, 1995 at 16.

[19] The MFJ Court did not rule on this issue.

so-called bottleneck network assets, it could not possibly be hypothesized that the affiliate has "substantially replaced" the ILEC.

Citing three labor relations cases, CompTel nevertheless represents that in other fields of law it has been held that "[a] corporate affiliate that is under common ownership and/or control of a company, using the same base of employees and/or other resources, and providing the same services in the same geographic area as that company, will be treated as a 'successor' or 'assign' to that company, and subject to certain of the company's legal obligations."[20] The cases cited by CompTel, however, do not support this proposition. In each case, the company that was deemed a "successor" had acquired virtually all of the assets of the predecessor, and in each case, the predecessor had ceased to exist. For example, *Golden State Bottling Co. Inc. v. National Labor Relations Board* involved a company that had acquired an entire business and "continued after the acquisition to carry on the business without interruption or substantial changes in method of operation, employee complement, or supervisory personnel."[21] Likewise, *Fall River Dyeing & Finishing Corp v. National Labor Relations Board*, involved a company that that acquired the "plant, real property, and equipment" of a predecessor that had declared bankruptcy and ceased operating. The successor also acquired some of the predecessor's remaining inventory, and operated out of the predecessor's former facilities. In addition,

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[20] Petition at 9-10.

the majority of its employees were employees of the predecessor.[22] Finally, in *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board, Hotel & Restaurant Employers & Bartenders International Union, AFL-CIO*, the so-called successor had purchased an ongoing business in tact, including all of its assets, except its real property, which it leased. Moreover, while the Court referred loosely to the new owner as the "successor" in the sense that it succeeded to the operation of the business, it did not use that term in a legal sense, and actually held that the new owner did not inherent from the former owner the particular legal obligation at issue because it had not hired a majority of its predecessor's employees.[23] Thus, these cases in no way suggest that an ILEC affiliate providing in-region local service with employees "<u>and/or other resources</u>" of the ILEC will be treated as a successor or assign of the ILEC, and they should not have been cited for that proposition.

What these cases do recognize is that whether or not an entity should be deemed to have substantially replaced another entity, and should therefore be held to certain obligations of that other entity, depends upon the nature of those obligations. As stated in *Howard Johnson*:

> [T]he real question in each of these 'successorship' cases is, on the particular facts, what are the legal obligations of the new employer to the employees of the former owner or their

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[21] *Golden State Bottling Co., Inc. v. National Labor Relations Board*, 414 U.S. 168 (1873).

[22] *Fall River Dyeing & Finishing Corp. v. National Labor Relations Board*, 482 U.S. 27 (1987).

[23] *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board, Hotel & Restaurant Employers & Bartenders International Union, AFL-CIO*, 417 U.S. 249, 264 (1974).

> representative? The answer to this inquiry requires analysis of the interests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue, whether it be the duty to recognize and bargain with the union, the duty to remedy unfair labor practices, the duty to arbitrate, etc. There is, and can be, no single definition of "successor" which is applicable in every legal context.[24]

Thus, whether or not an ILEC affiliate is an ILEC assign is a determination that must be made with reference to the specific purposes of section 251(c).

It is beyond dispute that the overarching purpose of section 251(c) is to ensure competitive access to so-called "bottleneck" local exchange facilities. Congress recognized that it would be extraordinarily burdensome and expensive for new entrants to duplicate an ILEC's embedded network from scratch, particularly in the short-term. To permit the expeditious development of local competition, it, therefore, required ILECs to allow new entrants to use embedded ILEC facilities for their own offerings. This requirement is reflected in the resale and unbundled network element provisions of section 251(c). In addition, to ensure that the customers of new entrants could communicate with ILEC customers and vice versa, section 251(c) imposes interconnection obligations on ILECs.[25]

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[24] *Id.* at note 9. *See also Golden State Bottling Co.* at 177.

[25] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, Notice of Proposed Rulemaking, FCC 96-182, released April 19, 1996)at paras. 7-8: "Congress expressly recognized that 'it is unlikely that competitors will have a fully redundant network in place when they initially offer local service, because the investment necessary is so significant'. . . . By freeing new entrants from having to build facilities that totally duplicate the LECs' networks, the 1996 Act has dramatically increased the opportunities for

Given that the purpose and effect of section 251(c) is to ensure that "bottleneck" local exchange facilities are made available to new entrants, it necessarily follows that the defining characteristic of an ILEC is ownership of "bottleneck" facilities. This is, in fact, the basis of the Commission's holding in the *Non-Accounting Safeguards Order* that an ILEC affiliate that assumes ownership of an ILEC's network elements could itself be deemed an ILEC.

CompTel, however, ignores this essential link between ILEC status and ownership of "bottleneck" local exchange facilities, arguing that ILECs can evade their section 251(c) obligations simply by "transferring" customers to unregulated affiliates, even if those affiliates have no local facilities of their own. This claim is a red herring that cannot withstand the slightest scrutiny. First, ILECs may not "transfer" customers to an affiliate: that's called slamming. Second, ILECs cannot evade their section 251(c) obligations by providing service through an affiliate so long as the affiliate receives the same access to ILEC facilities and services as any other CLEC. Indeed, it is difficult to understand how an ILEC could possibly use an affiliate to evade its section 251(c) obligations since ILEC affiliates must rely on those provisions to provide local services.[26] It is also difficult to understand the logic in extending to an entity

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competitive entry and minimized the otherwise overwhelming competitive advantages of large established carriers." *See also Implementation of the Local Competition Provisions in the Telecommunications Act of* 1996, 11 FCC Rcd 15499 (1996) (*Local Competition Order*) at paras. 258-264..

[26] To the extent the affiliate is providing service through its own facilities, that would only demonstrate that others can do the same and need not rely on the ILEC for such facilities.

without network facilities of its own statutory provisions the purpose and effect of which is to ensure access to network facilities.

These matters are difficult to understand because, in fact, they make no sense. Stripped to its core, the petition is nothing more than a thinly disguised effort to abuse the regulatory process in pursuit of a competitive advantage.

Indeed, their usual sanctimonious rhetoric notwithstanding, it is petitioners that are pursuing the anticompetitive agenda here. It is they who effectively seek to deny RBOCs the ability to provide both interLATA and local services from the same entity. The Commission has already held, not only that RBOCs have a statutory right to do so, but that "as a matter of policy . . . regulations prohibiting BOC section 272 affiliates from offering local exchange service do not serve the public interest."[27] Indeed, the Commission noted that "the increased flexibility resulting from the ability to provide both interLATA and local services from the same entity serves the public interest, because such flexibility will encourage section 272 affiliates to provide innovative new services."[28] This is precisely what CompTel and its cohorts seek to prevent.

To be sure, CompTel does not ask for an outright ban on the in-region provision of local service by an ILEC affiliate; it instead serves up a "Trojan horse" in which it seeks to prevent that affiliate from obtaining any resources from its parent or availing itself of its parent's goodwill. Obviously, though, this

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[27] *Non-Accounting Safeguards Order* at para. 315.

[28] *Id.*

is a distinction without a difference since CompTel's proposed rule would effectively preclude an RBOC from establishing such affiliate.

3. CompTel's Alternative Request for Rulemaking is an Untimely Petition for Reconsideration of the Non-Accounting Safeguards Order

As an alternative to its procedurally flawed request for declaratory ruling, CompTel proffers a procedurally flawed request for rulemaking. In particular, it asks the Commission to adopt by rule a rebuttable presumption "that an ILEC-affiliated carrier will be treated as a "comparable" carrier if it provides local service in the same geographic area as the ILEC and if the ILEC has transferred anything of value, including brand names, financial resources, or human capital, to the affiliate."[29]

This request is procedurally improper since it is fundamentally an untimely petition for reconsideration of the *Non-Accounting Safeguards Order*. In that Order, the Commission held: "We find no basis in the record of this proceeding to find that a BOC affiliate must be classified as an incumbent LEC under section 251(h)(2) merely because it is engaged in local exchange activities."[30] While CompTel will undoubtedly argue that this decision is non-dispositive because the Commission did not explicitly address the status of an

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[29] Petition at 13.

[30] *Non-Accounting Safeguards Order* at para. 312.

affiliate that held itself out under the corporate brand, that argument would be disingenuous. The Commission knew at the time that BOC section 272 affiliates would do business using the RBOC brand. Indeed, Ameritech's section 272 affiliate - Ameritech Communications, Inc. - had already filed a number of comments at the FCC in which it identified itself as Ameritech's future in-region long-distance affiliate, and it had received section 214 authority to provide out-of-region long-distance service.[31] Thus, any suggestion that the *Non-Accounting Safeguards Order* did not address the issue CompTel now purports to raise through a new rulemaking would be facile.

Because the *Non-Accounting Safeguards Order* is contrary to the rule CompTel now proposes, CompTel's request for a rulemaking is untimely. While the Commission is normally free to initiate a rulemaking proceeding to revisit its rules, it would be inappropriate for the Commission to do so here since reconsideration petitions of the *Non-Accounting Safeguards Order* remain outstanding. Indeed, to initiate a new reulemaking at this time - before reconsideration has even been completed - would make a mockery of the reconsideration process.

CompTel's rulemaking request is also without substantive merit. Section 251(h)(2) provides that the Commission may treat a LEC as an ILEC if, among other things, "such carrier occupies a position in the market for telephone

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[31] *See, e.g.* Petition by Ameritech Communications, Inc. for Declaration of Nondominant Status, filed July 21, 1995; *Overseas Common Carrier Section 214 Application Actions Taken*, Report No. I-8202, 11 FCC Rcd 11306 (1996)..

exchange service within an area that is comparable to the position occupied by [the ILEC and] such carrier has substantially replaced an incumbent local exchange carrier." The Commission has stated that "we will not impose incumbent LEC obligations [under section 251(h)(2)] on non-incumbent LECs absent a clear and convincing showing" that this test has been met.[32]

It does not take a brain surgeon to recognize that CompTel's proposed rule does not remotely reflect the three statutory requirements of section 251(h)(2), much less establish the basis for a clear and convincing showing. Its suggestion, for example, that an ILEC affiliate occupies a position in the market that is "comparable" to the position occupied by the ILEC simply because both use the corporate parent's brand is specious. This suggestion also completely ignores the Commission's analysis of the meaning of "comparable carrier" in the *Guam NPRM*.[33] In that Notice, the Commission tentatively concluded that the Guam Telephone Authority was a "comparable carrier" because it was dominant in the provision of local exchange services in Guam. The Commission noted, in particular, that ILECs "typically occupy a dominant position in the market for telephone exchange service in their respective operating areas, and possess economies of density, connectivity, and scale that make efficient competitive

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[32] *Local Competition Order* at para. 1248.

[33] *Guam Public Utilities Commission Petition for Declaratory Ruling concerning Sections 3(37) and 251(h) of the Communications Act; Treatment of the Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers under Section 251(h)(2) of the Communications Act*, Declaratory Ruling and Notice of Proposed Rulemaking, 12 FCC Rcd 6925 (1997)..

entry quite difficult, if not impossible, absent compliance with the obligations of section 251(c)."[34] An ILEC affiliate offering local service does not necessarily possess any of these characteristics.

Even more outlandish is CompTel's claim that an affiliate providing local service under the company brand should be presumed to have "substantially replaced" the ILEC. As the Commission recognized in the *Guam NPRM*, on its face, the term "substantially replaced" means supplant.[35] An ILEC affiliate that resells ILEC services or purchases unbundled network elements from the ILEC can hardly be said to have supplanted that ILEC.

CompTel attempts to squirm out of this box by asserting that the affiliate has substantially replaced the ILEC *"with respect to the customers it serves."*[36] Section 251(h)(2) does not, however, contain the qualifying language that

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[34] *Id.* at paras. 25-27.

[35] *Id.* at para. 28. The Commission stated in the *Guam NPRM* that a literal construction of "substantially replaced" would, in the case of GTA, lead to absurd results that Congress could not have intended. In particular, noting that GTA, the monopoly provider of telephone exchange service in Guam, was nevertheless not an ILEC because it was not a NECA member at the time of enactment of the 1996 Act, and noting, further, that GTA could not be deemed to have "supplanted" an ILEC, the Commission tentatively concluded that GTA nevertheless should be deemed to have "substantially replaced" an ILEC because it provided local exchange service to all or virtually all of the subscribers in an area that did not receive telephone exchange service from a NECA member as of the date of enactment of the 1996 Act. *Id.*at paras. 28-31.

This tentative conclusion is of no help to CompTel because an ILEC affiliate providing in-region local service using the brand of its corporate parent is not at all similar to GTA. Indeed, the Commission noted that "GTA appears to possess all of the advantages of incumbency characteristic of the incumbent LECs described in section 251(h)(1), . . . [including] substantial financial resources, significant economies of density, connectivity, and scale, and most importantly, control of the bottleneck local exchange network in Guam." *Id.* at para. 33. These characteristics stand in stark contrast to the characteristics of the ILEC affiliates to which CompTel's petition is directed.

[36] Petition at 14.

CompTel takes the liberty of adding. Indeed, under CompTel's reading, every LEC that wins a customer could be deemed to have substantially replaced the ILEC, since it would have replaced the ILEC with respect to that customer. Obviously, this is an absurd reading of section 251(h)(2) that warrants no further consideration.

III. CONCLUSION

CompTel's petition is procedurally and substantively flawed. It must be rejected.

Respectfully Submitted,

Gary L. Phillips
Counsel for Ameritech
1401 H Street, N.W. Suite 1020
Washington, D.C. 20005
(202) 326-3817

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