In California, NorthPoint and other facilities-based CLECs filed a motion demanding floor plans for 59 offices that Pacific asserted were out of space. Shortly thereafter, amid increasing scrutiny by CLECs and state regulators, Pacific found additional space in two-thirds of the 59 offices that it had declared to be closed. Thus, even the threat of third-party scrutiny can force an ILEC to be more conscientious in identifying available space. Floor plans also allow for independent verification that an ILEC's claims of lack of space are reasonable. NorthPoint also supports collocation reports of the type proposed by the Commission (¶148) that would provide CLECs with an opportunity to review the status of collocation in any office at any time.[4]

Warehousing. (¶ 149) First, the Commission should begin by admonishing the ILECs to obey the existing anti-warehousing rules. These are being given lip service at best. Second, the ILECs should be prohibited from warehousing unlimited space for potential future needs. In California, for instance, Pacific Bell recently announced it would be deploying its own retail ADSL service in several COs which it had declared closed to CLECs. Yet at the time it was informing CLECs that no physical collocation space was available, Pacific clearly had reserved sufficient space in those same COs for its own ADSL service. By contrast, ILECs impose on CLECs specific "anti-warehousing" rules whereby CLECs lose their collocation space if they do not utilize it in a certain period of time, generally around six months. Parity requires that first-come first-serve rules apply equally to all carriers and that all carriers be barred from warehousing.

[4] In areas where the ILEC can legitimately demonstrate that no physical collocation is available, the Commission should require the ILECs to provide an effective virtual collocation alternative.

II. NATIONAL LOOP STANDARDS ARE NECESSARY TO PROMOTE DEPLOYMENT OF ADVANCED SERVICES

A. Incumbent LECs Should Be Required to Fulfill Their Existing Loop Unbundling Obligations

As the Commission has made clear, the ILECs should be required to fulfill their existing obligations to provide unbundled xDSL Compatible Loops. Section 706 Order ¶ 61. To date, few ILECs have been willing to provide unbundled xDSL loops. The ILECs do not advance any technical justification for this refusal – instead, they proclaim that such loops will not be made available until the ILEC itself begins offering ADSL service. Nor could there be any technical justification, since there is simply no reason that BellSouth can provide an unbundled xDSL compatible loop while U S WEST, for instance, can not. Accordingly, this Commission should reaffirm that ILECs are required to condition loops to CLECs' specifications subject only to concerns of technical feasibility.[5] Nor should the Commission give any credence to claims that this would require the ILECs to improve existing networks, since the ILECs currently undertake this very loop conditioning process for their HDSL T-1 offerings.

B. CLECs Should be Provided Access to Loop-Conditioning Databases

CLECs ability to provide xDSL service is significantly hampered by their inability to verify whether customer premises can be served. NorthPoint thus supports the Commission's tentative conclusion that CLECs should be provided with access to a database that contains information on "whether loops pass through remote concentration devises, electronics attached to loops, condition and length of loops, loop length and the

[5] In addition, the Commission should make clear that loop conditioning charges must be reasonable.

electrical parameters that determine the suitability of loops for various xDSL technologies." NPRM at ¶ 157. NorthPoint also supports the Commission's tentative conclusion (id.) that, pursuant to the existing nondiscrimination requirements, CLECs should have access to the same loop interfaces providing loop information as the ILECs. (NorthPoint urges this Commission to require true parity in access; to date, NorthPoint has been unable to access the only operative loop qualification database, that of Bell Atlantic.) And as new information becomes available, ILECs must share such information immediately. Id. ¶ 158.

C. All Market Participants Should be Subject to the Same Spectrum Management Requirements

NorthPoint supports the use of national industry standards for spectrum management, as does Ameritech. Appendix at 5. Currently, NorthPoint is concerned that spectrum management issues will allow the ILECs to stifle broadband alternatives. In fact, it appears that the ILECs already are using spectrum management as a means to exclude competitors. Southwestern Bell, for instance, recently informed NorthPoint that it will not be permitted to provide service greater than 784 Kbps over Southwestern Bell unbundled loops. SWBT has stated that its tests have indicated that any greater speed will create interference in the binder groups.

But SWBT also has refused to provide NorthPoint with the model that SWBT is using to gauge interference. This study was apparently prepared by an SBC consulting subsidiary using a proprietary Alcatel study, and does not agree with other studies conducted by more impartial entities such as Bellcore and the chip manufacturer Rockwell. Nonetheless, SWBT apparently is requiring every provider to conform to this

unilaterally imposed standard. National standards will preclude ILECs from using arbitrary spectrum management policies as an anticompetitive tool, and this Commission should specifically prohibit ILECs like SWBT from unilaterally imposing policies before appropriate industry standards are in place.

NorthPoint agrees with the Commission's proposal (at ¶ 161) to apply the same spectrum management rules to both ILECs and new entrants. NorthPoint does not, however, suggest that a "riparian rights" would be appropriate. Since some interference from new technology is inevitable, such a rule would effectively prohibit new carriers from deploying any equipment that interferes in any way with that already in place. This would impede competitors' ability to deploy innovative competition and thus slow the deployment of broadband services to consumers.

D. Unbundling Loops that Pass Through Remote Terminals

Another crucial issue identified by the Commission is the necessity of promoting broadband deployment to the 20% of end-users that are served by digital loop carriers ("DLCs"). Since xDSL service is incompatible with fiber, the Commission should adopt minimum national standards to allow CLECs to provide broadband alternatives to these end-users. The simplest of these standards is to require the ILECs to determine whether alternate copper loops are available whenever the customer is served by a DLC or remote switching module. In many cases, the ILECs installed DLCs but left the existing copper in place, and the ILECs should be required to verify whether alternate copper is available whenever a CLEC requests a loop to a customer served by fiber. This process may not turn up a loop in very case. Accordingly, the ILEC also should be required to cut existing customers served over copper loops to the DLC, thereby freeing up the copper loop for

xDSL service. This two-step process, in fact, is currently used by Pacific Bell. As a consequence, NorthPoint has not lost a single end-user to fiber in Pacific's territory. By contrast, in Massachusetts, where Bell Atlantic apparently follows neither of these steps, NorthPoint has lost a significant percentage of customers to fiber. National standards requiring that ILECs look for alternate copper – and vigorous policing of those standards -- will facilitate entry and promote deployment. (NorthPoint also agrees that the Commission's tentative conclusion that the states should be allowed to set more stringent standards than the national "floor." NPRM ¶ 155.)

NorthPoint also supports the FCC's tentative conclusion that CLEC may request any technically feasible method of unbundling the DLC-delivered loop. Where an ILEC shows one method is infeasible, CLEC should be allowed to request another unbundling method. If none is feasible, the ILEC should be required to suggest a method that provides the loop closest in quality and functionality to that the CLEC has requested. (¶ 171). NorthPoint also agrees that where the ILEC should make available to CLECs all types of loops it makes available to its affiliate. (¶¶ 168, 172).

NorthPoint also agrees with the FCC's tentative conclusion that ILECs must provide sub-loop unbundling and permit CLECs to collocate at remote terminals. (¶ 174). Failure to do so would stymie competitive entry to serve consumers on DLCs. NorthPoint supports this Commission's decision to conduct a workshop on this issue, and suggests that the line cards on a DLC be allocated on a first-come, first-served basis.[6] If sub-loop unbundling is technically infeasible or if there is no space at the RDT (or if the

[6] NorthPoint suspects that placement of a contiguous CLEC DLC would be both economically and administratively infeasible.

FCC does not mandate sub-loop unbundling), the ILEC should be required to provide a loop of the same quality and functionality at no greater cost.[7]

III. SEPARATE AFFILIATE REQUIREMENTS

NorthPoint supports the FCC's proposed separate affiliate requirements, which would ameliorate many of the concerns that might otherwise exist with respect to the possibility of discrimination and cross-subsidization by the ILEC. NorthPoint accordingly urges the Commission to adopt the level of separation outlined in its NPRM, which, with the small modifications discussed below, will ensure parity between CLECs and ILECs' advanced services affiliates.

A. General Requirements for Advanced Services Affiliates

1. Jointly Owned Switching Facilities, Land, Buildings. The Commission suggests that the incumbent and its advanced services affiliate may not "jointly own switching facilities or the land and buildings on which such facilities are located." (NPRM, ¶ 96) NorthPoint supports this proposed rule. The objective of the advanced services affiliate rules is to create affiliates that are truly separate from ILECs so that transactions between them can be conducted at arm's length and so that ILEC incentives to favor their affiliates can be minimized. Joint ownership of such vitally important assets as switching facilities blurs the lines of separation between ILECs and advanced services affiliates, making truly independent operation and proper incentives impossible.

[7] NorthPoint agrees with the Commission's tentative conclusion that providing an unbundled xDSL-compatible loop should be presumed technically feasible if the ILEC is providing xDSL services over that loop. NPRM ¶ 167. NorthPoint agrees that the ILECs should have the burden of demonstrating that it is technically infeasible to provide requesting carriers with xDSL compatible loops (¶167), since the ILEC has all the relevant information within its possession and the CLECs have none.

We note that with regard to section 272 affiliates, the Commission has recognized an exception to joint ownership prohibitions that permits Bell Operating Companies ("BOCs") that have purchased sophisticated equipment from related affiliates to obtain support services for the equipment from the affiliates on a "compensatory basis." *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended,* CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rule-Making, 11 FCC Rcd 21905, ¶ 164 (1996) ("Non-Accounting Safeguards Order"), Order on Reconsideration, 12 FCC Rcd 2297, *recon. pending, petition for summary review in part denied and motion for voluntary remand granted sub nom., Bell Atlantic v. FCC*, No. 97-1067 (D.C. Cir. Filed Mar. 31, 1997), Second Order on Reconsideration, 12 FCC Rcd 8653 (1997), *aff'd sub nom. Bell Atlantic Telephone Cos. v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997), Second Report and Order, 12 FCC Rcd 15756 (1997). True parity between affiliates and CLECs requires that if such an exception is to apply to advanced services affiliates, similar accommodations must be made for CLECs.

2. Arm's Length Transactions; Reduced to Writing; Available for Public Inspection. The Commission has suggested that all transactions between ILECs and advanced services affiliates must be conducted at arm's length, subject to affiliate transaction rules as modified in the *Accounting Safeguards* proceeding. (NPRM ¶ 96, citing, *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, 11 FCC Rcd 17539, 17593 (1996) ("Accounting Safeguards Order")). The accounting safeguards that the Commission proposes to apply to ILEC-affiliate transactions establish cost allocation rules

and provide guidance as to transaction valuation, with the goal of having transactions take place on market-driven terms. Pursuant to the rules proposed by the Commission, all ILEC-affiliate transactions must not only comply with the accounting safeguards, but also must be reduced to writing, and a written description of each transaction must be posted by the affiliate on the company's home page on the Internet within ten days of the transaction's completion. (NPRM ¶ 96).

We support these proposed rules, which we believe are among the most crucial in the NPRM. Without such rules, CLECs and the Commission will have no means of ensuring compliance and equality. Evidence of the details of transactions are essential to any meaningful analysis of the true relationship between ILECs and advanced services affiliates. This information will also provide CLECs with a critical, objective basis for comparison. Scrutiny of the terms of ILEC-affiliate transactions will permit both CLECs and the Commission to detect infractions of the rules adopted as a result of this NPRM.

3. Separate Books, Records, Accounts. The Commission has tentatively determined that an incumbent and its affiliate must maintain separate books, records and accounts. (NPRM, ¶ 96). NorthPoint supports this rule, which it believes is essential in order to keep incumbents and their affiliates truly separate. Without separate books and records, it would be easy for ILECs and their advanced services affiliates to obscure prohibited sharing of resources and expenses and to hide various other ILEC-to-affiliate subsidies. Such activities would obviously give the advanced services affiliates an unfair competitive advantage over CLECs and defeat the purpose of the separate affiliate rules.

4. Separate Officers, Directors, Employees. The Commission has suggested that an incumbent and its affiliate must have separate officers, directors and employees.

(NPRM, ¶ 96). Once again, we believe this rule is essential in order to keep ILECs and their advanced services affiliates truly separate. Officers, directors and employees of an ILEC who are also officers, directors or employees of an advanced services affiliate have a fiduciary responsibility to seek to promote the interests of the affiliate. ILECs and their officers, directors and employees cannot be permitted to favor advanced services affiliates over CLECs in such a manner if competitive equality is to be achieved or maintained. NorthPoint therefore supports this proposed rule.

5. No Recourse to Incumbent LEC on Loans to Affiliates. The Commission has suggested that affiliates ought to be prohibited from taking loans that permit creditors to have recourse to the assets of affiliated ILECs in the event of default. (NPRM, ¶ 96) NorthPoint supports this prohibition. Affiliates do not need such recourse, and, to the extent that they receive it, the advanced services affiliates would enjoy a distinct advantage over CLECs, as they would be permitted to obtain credit on terms based not upon their own financial states, but upon the financial state of the affiliated ILEC. Obviously, CLECs do not enjoy such a relationship and have to obtain credit based solely upon their own resources.

6. No Discrimination in Provision of Goods, Services, Facilities, Information or the Establishment of Standards. The Commission proposes that an ILEC, in dealing with its advanced services affiliate, may not "discriminate in favor of its affiliate in the provision of any goods, services, facilities or information or in the establishment of standards." NorthPoint strongly supports the proposed rule and urges that it be interpreted broadly and in accordance with the guidelines established for section 272 affiliates in the Non-Accounting Safeguards Order.

The Non-Accounting Safeguards Order clarifies that non-discrimination is a stringent standard that requires the incumbent to provide the same rates, terms and conditions to both affiliates and competitors (Non-Accounting Safeguards Order ¶ 178) with regard to any good, service, facility, information or standard. (Non-Accounting Safeguards Order ¶ 210) Unlike other provisions of the Act, the standard does not permit "reasonable discrimination." (Non-Accounting Safeguards Order ¶ 197, citing Section 202 of the Act). The provision covers initial installation requests, subsequent requests, upgrades, modifications, repairs and maintenance. (Non-Accounting Safeguards Order ¶ 239). Service intervals must be disclosed. (Non-Accounting Safeguards Order ¶ 115).

Under the non-discrimination provisions, adoption of any standard that favors a section 272 affiliate and disadvantages a non-affiliate constitutes a *prima facie* case of unlawful discrimination. (Non-Accounting Safeguards Order ¶ 227). A *prima facie* case of discrimination is also raised by any demonstration by a non-affiliate that it does not receive the same rates, terms and conditions as an affiliate.

These strict non-discrimination guidelines, developed for section 272 affiliates and established in the Non-Accounting Safeguards Order, must be fully imported to amplify the advanced services affiliate non-discrimination rules. Prohibitions on discrimination go to the heart of the purpose of the NPRM: comparable competitive conditions for advanced services affiliates and CLECs as a means of more rapidly achieving deployment of advanced telecommunications technologies. By definition, discrimination by ILECs in favor of affiliates contradicts this principle by interfering with competition. The clear, simple, strong guidelines articulated by the Non-Accounting Safeguards Order provide a roadmap for prevention of discrimination.

7. Arm's Length Incumbent-Affiliate Interconnection; Elements, Interfaces, Facilities and Systems Available to CLECs. The Commission proposes to require that advanced services affiliates interconnect with ILECs "pursuant to tariff or pursuant to an interconnection agreement." (NPRM, ¶ 96) Any network elements, facilities, interfaces and systems provided by the incumbent to the affiliate would have to be made available to CLECs as well. (NPRM, ¶ 96).

NorthPoint supports both of these proposed rules. The requirement that advanced services affiliates interconnect via tariffs or interconnection agreements, like the ILEC-affiliate transaction reporting requirements, ensures a record that can be used to analyze the ILEC-affiliate relationship. As discussed above, such records facilitate detection of anti-competitive activity. Prevention and enforcement are enhanced. Operating together with the obligations imposed by section 252(i) of the Act – which provides that ILECs must offer to CLECs all interconnection, services or network elements provided to affiliates on "the same terms and conditions" – this rule should help ensure that ILECs and their affiliates negotiate in good faith.

The requirement that ILECs provide to CLECs all network elements, facilities, interfaces and systems that are provided to advanced services affiliates reinforces the prohibition on discrimination that is at the heart of the NPRM. The theory that rapid deployment of new telecommunications technologies depends upon competition leads to the conclusion that barriers to CLEC competition with ILECs and/or their affiliates must be eradicated.

8. Reporting Requirements. The Commission asks for proposals for specific modifications to its proposed structural separation and non-discrimination requirements.

(NPRM, ¶ 97). In addition to the suggestions articulated above, NorthPoint believes that appropriate reporting requirements ought to be imposed. Reporting requirements are a highly effective means of identifying, and thus preventing, discrimination. Ameritech agrees that ILEC compliance with non-discrimination requirements with respect to collocation should be gauged through performance measurements. Appendix at 2.

The Non-Accounting Safeguards Order was accompanied by an NPRM that focused upon reporting requirements and contained a sample report as an appendix. A similar report, adapted to track issues related to advanced services rather than interLATA services, ought to be mandated in order to permit monitoring of anti-competitive behavior in the provision of advanced services. NorthPoint suggests that the Commission affirmatively decide in its Order to require reporting, but delegate to the Common Carrier Bureau responsibility for designing the proper reporting form. The Bureau should be directed to seek industry input in developing the form. NorthPoint believes that the report should include information on collocation and loops, and provide data regarding actual ordering, provisioning, and repair times.

All ILECs should be required to complete the report that is ultimately generated by the Common Carrier Bureau. It should be signed by a company vice president, filed with the FCC and posted on the home page of each ILEC. Penalties should be imposed for false reporting.

If the Commission and others are to ensure that CLECs and advanced services affiliates are being treated equally, information regarding how the affiliates are being treated compared to CLEC competitors is essential. The sample reports will provide it.

B. Miscellaneous Specific Proposals

1. Sunset Provisions. The Commission seeks comments as to whether "any separation and other safeguards should sunset after a certain period of time or change in conditions." (NPRM, ¶ 99). As explained below, a sunset for the separate affiliate rules for advanced services is not consistent with the policies of the Act.

The purpose of the separate affiliate rules, like that of all the rules dealing with ILEC provision of advanced services, is to ensure that CLECs are given equal access to the loops and collocation necessary to provide advanced services so that they can compete with ILECs in providing these services. As discussed elsewhere in these comments, CLECs are utterly dependent upon access to these loops and collocation in order to provide advanced services. The need for access to these elements may never disappear, and is unlikely to occur in the foreseeable future. Thus, the Commission should not "sunset" or otherwise end the obligation of the ILECs to make loops and collocation available to the CLECs. To do so would thwart the ability of CLECs to provide advanced services and is inconsistent with the procompetitive purpose of the Act.[8]

2. Virtual Collocation Equality. The Commission seeks suggestions as to whether virtual collocation arrangements currently favor affiliates over CLECs, and, if so, how this can be rectified. (NPRM, ¶101). As discussed above, see pp. 9-10, existing virtual

[8] The separate affiliate requirements for RBOC interLATA affiliates, which sunset after three years of operation, are not analogous. Under section 271, BOCs are not permitted to offer interLATA services until the Commission determines that effective local competition exists or a fourteen-point checklist has been met. If this checklist is met but subsequently violated, the BOC's section 271 authority can be revoked. There is no comparable entry checklist for ILEC advanced services affiliates, and thus no threat that such affiliates will lose their authority to provide advanced services free of section 251(c)(4)'s resale and unbundling restrictions. Accordingly, a sunset provision is entirely inappropriate for an advanced services affiliate.

collocation arrangements discriminate against CLECs by prohibiting them from owning, installing and maintaining their own equipment. By contrast, ILECs currently are able to own, install, and maintain their own equipment. This discrepancy should be remedied and CLECs should be permitted to own, install and maintain their own equipment.

3. Remote Collocation Equity. In order to achieve collocation parity, the Commission must ensure that rules regarding equal access to collocation extend to govern provision of collocation at remote facilities. Therefore, the Commission should clarify that if an ILEC permits its affiliate to collocate in a remote switching center it must afford the same opportunity to CLECs.

C. Rules Regarding Transfers from Incumbent LECs to Affiliates

The general policy goal of transfer rules should be to ensure that the separate affiliate has access to everything to which a CLEC has access, but does not have access to anything to which a CLEC does not have access. With this parity principle in place, ILECs, in addressing the needs of their affiliates, will take actions that also address the needs of CLECs. This principle gives rise to a simple approach to prospective ILEC-to-affiliate transfers: NorthPoint encourages the Commission to design all transfer rules to ensure that ILEC separate affiliates receive everything that the CLECs can have, yet be given nothing that CLECs cannot have. This is a simple rule to enforce: ILECs should be permitted to transfer DSLAMs -- but not loops, collocation or transport -- to their advanced services affiliates.

1. Transfers of Loops to Affiliates; Other Affiliate Acquisition of Loops. The Commission suggests that if a BOC transfers ownership of any network element that must be unbundled pursuant to section 251(c)(3) of the Act to an affiliate, the affiliate will

automatically be deemed a section 3(4) "assign" of the BOC with respect to the transferred element. (NPRM ¶ 105). It tentatively concludes that any transfer of local loops from an incumbent to an affiliate – whether or not "*de minimis*" – would make the affiliate an "assign" of the incumbent subject to section 251(c) with respect to those loops. (NPRM ¶¶ 106, 108) It seeks comment as to whether an affiliate should be treated as an "assign" or not if it acquires loops (and other network elements) by means other than a transfer from a BOC. (NPRM ¶ 105).

NorthPoint believes that all loops should be subject to section 251(c) regulation. Loops are a monopoly network element. They are absolutely essential to permit CLECs to provide advanced services. The Act wisely provides for multiple approaches to competition, and CLECs are pursuing all these approaches. Any action that would exempt existing loops from section 251 application, leaving them unregulated in the hands of advanced services affiliates, would simultaneously (1) weaken the position of CLECs, further restricting their access to loops and their ability to provide services and to compete; and (2) provide an unfair advantage to advanced services affiliates, which would instantly enjoy ownership of their own loops, without being required to build them.

To prevent fundamental inequality between CLECs and ILEC affiliates, we believe that the advanced services affiliates – non-incumbent entities free from section 251 regulation – should not be permitted to own loops, but rather should be required to lease them. Under such a scheme, any affiliate that owned its own loops would be treated as an ILEC subject to section 251 regulation.

2. Transfers of Collocation Space. The same analysis that governs transfers of loops applies with equal force to transfers of collocation space. As with loops, ILEC

advanced services affiliates should be allowed to lease – but not own – collocation space. The ILECs, however, currently have equipment in collocation space. Since that collocation space may not be transferred, the ILEC's advanced services affiliate should be required to remove existing collocated equipment unless the ILEC makes identical collocation arrangements – on equal terms -- available to CLECs within three months. In the alternative, the ILEC advanced services affiliate should be required to remove existing collocated equipment and request collocation space like any other CLEC.

3. Transfers from Incumbents to Affiliates of Existing Facilities used to Provide Advanced Services; *De Minimis* Exception. As the Commission notes, some ILECs have already purchased facilities used to provide advanced services, including, but not limited to, DSLAMs and packet switches. (NPRM ¶ 106). NorthPoint supports the Commission's tentative conclusion that wholesale transfer of such facilities to an affiliate makes the affiliate an "assign" of the incumbent. (NPRM ¶ 106).

The Commission asks for comments as to whether a *de minimis* exception should exist "under which a limited transfer of equipment would not make an advanced services affiliate an assign of the incumbent LEC." (NPRM ¶ 108). The Commission suggests that such an exception would apply "only to transfers of facilities used specifically to provide advanced services such as DSLAMs, packet switches and transport facilities, and not to other network elements, such as loops." (NPRM ¶ 108).

NorthPoint supports the development of a workable separate affiliate and supports the removal of obstacles to ILEC use of appropriately structured advanced services affiliates. Hence, NorthPoint supports the creation of a waiver process whereby ILECs would be permitted to apply for a waiver from a general prohibition on transfers to

advanced services affiliates. We believe that the waiver process should apply only to proposed transfers of DSLAMs. While waiver applications ought to be acted upon expeditiously, they should be granted only upon a showing of limited anti-competitive impact made after opportunity for public comment and thorough review by the Commission.

4. Time Limitation on Transfers Pursuant to Possible *De Minimis* Exception. The Commission asks whether, if it recognizes a *de minimis* exception, it ought to impose a time limitation on transfers made pursuant to that exception. (NPRM, ¶ 109).

As discussed above, NorthPoint supports a waiver process whereby ILECs would obtain preapproval to transfer DSLAMs to their advanced services affiliates. NorthPoint believes that waivers should be granted only for equipment purchased prior to the release date of the NPRM. Transfers of equipment purchased subsequent to that date are suspect as potential attempts to "grandfather" transactions that ILECs anticipated would be forbidden under the rules adopted pursuant to the NPRM process. Such behavior should not be rewarded, and the burden should be put upon ILECs to demonstrate – through the waiver process -- that any post-release purchase was not made for such purpose.

5. Transfer of Assets Other than Network Elements. The Commission recognizes that in addition to network elements, ILECs may wish to transfer other assets to advanced services affiliates and asks what other assets, if any, are appropriate for such transfer. (NPRM, ¶ 113).

The principle described above applies here as well: transfers to affiliates should not occur unless CLECs have the same ability to be the transferees. Therefore, no transfer of customer accounts or customer proprietary information without prior authorization

should be permitted if the affiliate is to retain non-incumbent status. This information would provide advanced services affiliates with a decided competitive advantage over CLECs. With respect to CPNI, in particular, the Commission should clarify that advanced services provided by affiliates are not "local services" for purposes of determining permissible sharing of CPNI between ILEC and affiliate. The Commission's rules must ensure that the ILEC and the affiliate cannot share CPNI unless the customer is taking local service from the ILEC and DSL service from the affiliate. Otherwise, the affiliate will be given a significant and unwarranted competitive advantage. *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket Nos. 96-115, 96-149, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061, 8102-07, ¶¶ 55-59, at n. 209 (1998), *recon. pending; clarified*, Order, DA 98-971 (Com. Car. Bur. Rel. May 21, 1998.

6. Network Disclosure Rules. Section 251(c)(5) of the Act imposes network disclosure requirements upon ILECs. The Commission seeks guidance as to whether these requirements are sufficient to notify CLECs "who might be using, or planning to use, facilities of the incumbent LEC that those facilities are being transferred to an advanced services affiliate." (NPRM, ¶ 115). The Commission should clarify that ILECs are required to disclose network information to CLECs at the same time ILECs disclose the information to their advanced services affiliates.

D. Enforcement

As important as properly defined separate affiliate rules are, the rules will do no good unless they are enforced.

The NPRM speaks little of enforcement of its prospective rules. NorthPoint encourages the Commission to give significant thought to enforcement mechanisms before authorizing advanced services affiliates that are not subject to incumbent regulations. Relief from the burdens of ILEC regulation is justified if and only if structural separation and non-discrimination requirements are not only constructed but enforced so that the advanced services affiliates are actually made more or less competitively equal to CLECs.

NorthPoint believes the Commission should look to the Non-Accounting Safeguards Order for important rules of enforcement procedure. Particularly, the Commission should apply to the advanced services affiliate rules the provision of the Non-Accounting Safeguards Order that places the burden of production on the incumbent every time a *prima facie* case of violation is shown. (*See* Non-Accounting Safeguards Order, ¶ 345). As noted in the Non-Accounting Safeguards Order, this rule of procedure accelerates access to information and thus resolution of disputes and imposition of any necessary policing. Additional streamlined dispute procedures, including use of the rocket docket, are desirable. These mechanisms will permit CLECs to protect themselves against violations as well as stonewalling and delay.

CLECs also require that the Commission pay vigilant attention to developments relating to the creation and operation of advanced services affiliates. The requirements that ILECs and affiliates post information on their web pages will only be fully effective as a tool for fighting abuse if the Commission reviews these web pages to monitor ILEC-

affiliate transactions. The Commission must be proactive in other ways as well. It must allocate staff to follow events in the market, and it must give market participants – CLECs, ILECs and advanced services affiliates – frequent opportunities to communicate directly with the Commission.

IV. THIS COMMISSION MUST ENSURE PRICING EQUITY IN ORDER TO PROMOTE BROADBAND DEPLOYMENT

The NPRM focused on the possibility of regulatory relief for the ILECs as well as specific remedies that would strengthen CLECs' ability to obtain loops and collocation. Recent events, however, indicate that for purposes of promoting broadband deployment, the most crucial sections of the NPRM are those dealing with pricing of advanced services. Since comments were filed on the ILECs' petitions for relief under section 706, several ILECs (Bell Atlantic, BellSouth, GTE and Pacific Bell) have tariffed ADSL service. Not one of these tariffs reflects any of the loop and collocation costs necessary to provide xDSL service, and which the ILECs impose on xDSL CLECs. This has created a "price squeeze" under which ILECs' charges to competing CLECs for the unbundled network elements necessary to provide competitive DSL service are more than the full retail charge of the ILECs' service. NorthPoint thus proposes four remedies that will make such price squeezes easier to detect while simultaneously promoting the deployment of broadband services by giving ILECs an incentive to reduce the costs of loops and collocation necessary to provide xDSL service.

A. Incumbent LECs Providing Advanced Services on an Integrated Basis Should Impute the Costs of the Monopoly Inputs Necessary to Provide Such Service

Imputation is the most pressing issue currently facing the Commission. Unless ILECs that refuse to adopt a separate subsidiary arrangement are required to reflect the true costs of providing their ADSL service in their rates for that service, they will – and in fact already do – exert a price squeeze that makes entry by other carriers economically infeasible.

A price squeeze exists whenever a competitor that is equally efficient at providing the competitive portions of a service cannot, without losing money, meet the incumbent's retail price given the price(s) that it must pay to the incumbent for any bottleneck input(s) available only from the incumbent. A price squeeze can be the result of the markup over direct economic cost that the incumbent imposes for bottleneck inputs that both it and the competitor use or the incumbent's imposition of costs on the competitor that the incumbent does not bear at all. To avoid a price squeeze, the incumbent's retail price must equal or exceed the sum of the price that it charges to competitors for the bottleneck input(s) plus the total service long-run incremental cost of the competitively provided portions of the service.

Today, the ILECs proposed ADSL tariffs – which are being investigated by this Commission -- would exert just such a price squeeze. GTE, for instance, provides its ADSL service for as little as $29 per month. By contrast, in California, CLECs must pay GTE almost $19 for an unbundled digital loop necessary to compete, as well as an average of almost $50,000 for collocation in each central office. Similarly, BellSouth is providing

ADSL service for as little as $45 per month in Florida, even though it charges competing CLECs like NorthPoint $41.50 per month for an unbundled digital loop. Thus, a CLEC's costs for loops and collocation alone exceed the ILEC's retail price for ADSL service, before the CLEC recovers costs of equipment and overhead. Obviously, facilities-based competition cannot exist where it costs CLECs more for a piece of an ILEC's DSL service than it costs retail customers for the entire service.

Accordingly, to ensure the ILEC reflects the costs of necessary inputs, this Commission must require the ILEC to "impute" the price(s) of the bottleneck input(s) into the price of its competing retail service. Ameritech agrees that an imputation requirement should apply to ILECs that do not establish separate data affiliates. Appendix at 3. In particular, the ILEC should be required to impute virtual collocation at the same rates it charges CLECs for comparable arrangements. So doing will benefit consumers by encouraging vigorous competition among all advanced services providers.

B. Incumbent LECs Should be Required to File Resale Tariffs Within Thirty Days or Before Originating Service

NorthPoint supports this Commission's tentative conclusion that advanced services such as ADSL fall within the class of resale services offered to retail customers and are thus subject to resale. Section 706 Order ¶ 65. A clear mandate to that effect is required, however, in order to ward off gamesmanship by the ILECs. NorthPoint notes, for instance, that the Minnesota Attorney General recently filed a complaint with the Minnesota PUC alleging that U S WEST had improperly failed to file a tariff for its ADSL service at wholesale prices. Pacific Bell also recently argued to the California Public Utility Commission that Pacific's ADSL service was an exchange access service not

subject to a wholesale discount. Pacific's argument was based on the fact that its ADSL service resembles private line service. The California PUC, citing this Commission's conclusion in the Local Interconnection Order, concluded that since private line services are generally offered to telecommunications carriers and not retail consumers, no resale discount is applicable. This Commission should nip these practices in the bud by making clear that those ILECs that offer advanced services to non-carrier customers on an integrated basis (i.e., not through a separate subsidiary) must file wholesale tariffs for those services at an appropriate discount within 30 days of the Commission's Order in this proceeding or before originating service. A clear mandate from this Commission would ensure that the ILECs meet the resale and unbundling obligations of the section 706 Order.

C. Incumbent LECs Should be Required to Accept Split-off Voice Traffic from CLECs at the Same Prices They Charge Themselves

Broadband deployment will also be slowed if the Commission does not require arrangements that would allow two different service providers to offer services over the same loop, with each provider utilizing different frequencies to transport voice or data over that loop. This is especially true with respect to price-sensitive residential customers. As this Commission noted in the NPRM, xDSL technology can be used to separate a single loop into a POTS channel and a data channel, and can carry both POTS and data traffic over the loop simultaneously. Currently, the ILECs are using this approach to offer both voice service and xDSL service over a single copper loop.[9] CLECs, by contrast, are

[9] Where an ILEC operating on an integrated basis provides both data and voice service over a single loop, the ILEC should be required to impute the entire cost of the loop. In the alternative, if the ILEC does not impute any loop costs, it should be required to sell comparable unbundled loops to CLECs at a price of $0.

using a dedicated copper pair for their xDSL services, since the ILECs have indicated they will not accept split-off voice traffic from the CLECs. This is manifestly inefficient.

The Commission thus should make clear where CLECs use a single loop to provide both data and voice service, ILECs should be required to accept the split-off traffic from the CLEC. In particular, the ILEC should be required to allow the CLEC to tap onto loops at the MDF, where the ILEC would filter the voice traffic from the data traffic. The CLEC would then be able to use the loop both for its broadband service and for reselling the ILEC voice service.[10]

D. A Joint State-Federal Board Should be Convened

Finally, NorthPoint proposes that this Commission convene a joint state-federal advisory Board to investigate the issue of UNE pricing. Since true competition will not emerge until the prices of UNEs drop from their current inflated levels, such a Board would be well-positioned to share insights into current UNE pricing levels.

V. LIMITED INTERLATA RELIEF

The Commission seeks comment on limited interLATA relief for the purpose of furthering the provision of advanced services by the BOCs. As described in the Appendix, NorthPoint agrees that limited interLATA relief for advanced services is appropriate if the BOC can show that it: (1) provides advanced data services through a separate affiliate that satisfies the separation framework adopted by the Commission; (2) complies with all state and federal rules, as well as the terms of applicable tariffs and interconnection agreements,

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[10] NorthPoint also agrees with the Commission's tentative conclusion that the Act's nondiscrimination requirement implies that any voice product that an incumbent LEC provides to its advanced services affiliate would have to be made available to CLECs on the same terms and conditions. For example, if the advanced services affiliate leases the loop and resells the incumbent's voice service, the competitive LEC must be allowed to do likewise.

regarding collocation; and (3) complies with all state and federal rules, as well as the terms of applicable tariffs and interconnection agreements, relating to the availability of ADSL, HDSL, and ISDN compatible loops.

Upon a showing that these conditions have been met, the Commission should provide limited interLATA relief to permit the BOC: (1) to provide interLATA transport within a state for data services provided to customers with multiple locations in that state; (2) to access an ATM switch within the state; and (3) to provide transport from the ATM switch to the closest Network Access Point (NAP) outside the LATA in which the switch is located, regardless of whether that NAP is located with the state.

Conclusion

As set forth above, NorthPoint respectfully requests that the Commission affirm its proposed separate affiliate requirements and the proposed loop and collocation remedies. In addition, the Commission should require that ILECs that do not provide their advanced services through a separate subsidiary must impute the loop, collocation, and operations support systems costs they charge their competitors into their ADSL tariffs, and tariff the ADSL service for resale within thirty days. The Commission also should require that the ILECs accept split-off voice traffic from CLECs at the same prices they charge themselves, in order to make "one-loop" offerings possible. Finally, this Commission should convene a state-federal advisory board in order to reduce the costs of UNEs. Together, these steps will promote the widespread deployment of broadband alternatives, to the benefit of all Americans.