vertically integrated competitors.[73] For example, the prohibition on affiliates obtaining operating, installation, or maintenance functions from the ILEC may force those affiliates to make massive investments to redevelop resources and expertise that the ILECs already have.[74] Some holding companies, including GTE Corporation, already have incurred significant expenses to establish separate affiliates to provide competitive services. Instituting restrictions on the ILECs' ability to provide operating, maintenance and installation to the advanced services affiliate would undermine efforts already taken that were based on existing regulation. Furthermore, any operating, maintenance, and installation services are provided to affiliates pursuant to interconnection agreements or other written agreements on an arms-length basis GTE therefore urges the Commission not to restrict or prohibit the ability of an ILEC to provide operating, maintenance, and installation services to an affiliate.[75]

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[73] The corporate parent also would have to incur the expense of establishing a separate affiliate and obtaining state certifications, which can be a resource- and time-intensive process. If GTECC's state certification experience is at all instructive – and it is – state commissions likely will attempt to attach conditions upon such certifications, and a few may deny certification outright. In either case, § 253 preemption is appropriate. *See* Section II.F, *infra*.

[74] As noted above, however, even the Commission's restrictive proposal would apply only to "facilities that the . . . affiliate owns or leases from a provider other than the [ILEC] with which it is affiliated." *Non-Accounting Safeguards Order*, ¶ 158 (cited in NPRM, ¶ 96, which sets forth the Commission's proposed new limitation).

[75] Similarly, the requirement that affiliates not share employees with the ILEC will result in substantial expenditures on personnel that could otherwise be avoided, and will place affiliates at a significant competitive disadvantage. Notably, their competitors (including giant cable MSOs and telecommunications titans such as AT&T/TCG/TCI, MCI/WorldCom/Brooks/MFS/UUNET, and Sprint/Deutsche Telekom/France Telecom are free to re-deploy employees (or shift their primary job responsibilities) as necessary to address changing customer demands in the rapidly evolving market for advanced

(Continued...)

Under the proposed rules, therefore, an ILEC's corporate parent faces an unsavory choice in determining whether and how to offer advanced services. On the one hand, it could establish a hyper-separated affiliate that may not be able to price-compete in the market because of substantial cost burdens not faced by any of its rivals. On the other hand, it could offer such services through the ILEC – but only if it is willing to afford those same competitors artificially discounted access to equipment that is readily available in the marketplace. Under this second option, no matter how efficient an ILEC becomes, it could never under-price competitors, and it would be subject to tariffing and rate regulation that conveniently signal its every competitive initiative to all of its rivals well before those initiatives can be implemented.

Plainly, neither option is consistent with either the letter or the spirit of the 1996 Act. Congress intended for the FCC to step aside, to the greatest extent possible, and permit the competitive marketplace to bring advanced capabilities and services to the public unfettered by burdensome government intervention. The proposed rules perversely place a competitive straight-jacket on the very companies that may be best able to deploy these new services as broadly and efficiently as possible, even though the advanced services market is already competitive and the leading providers are cable companies not ILECs.

(...Continued)
telecommunications services. The proposed rules would deny that needed flexibility to ILEC affiliates alone.

C. At A Minimum, The Commission's Proposed Separation Requirements Should Be Modified To Avoid Creating Massive, Unnecessary Inefficiencies. (¶¶ 97-98)

As set forth above, the structural separation rules and other safeguards already in place in the context of independent telephone companies' interLATA affiliates provide adequate safeguards against ILEC discrimination in favor of affiliates. Should the Commission adopt some form of the proposed rules, however, GTE requests implementation of the following modifications to allow affiliates a reasonable chance to compete in deploying advanced telecommunications technologies, as envisioned by the 1996 Act:

1) The Commission should eliminate the proposed bar on ILECs performing operating, installation, or maintenance functions for their advanced services affiliates that obtain facilities on their own or from other parties, as long as the costs meet the affiliate pricing rules and the service is made available to other requesting entities.

2) The Commission may impose the requirement of separate officers, directors, and employees as long as the two entities can interact via established wholesale channels like any other unaffiliated carrier.

3) The Commission should replace the proposed requirement that transactions be reduced to writing and posted on the Internet with an obligation to make contracts available upon request.

Implementing the Commission's proposals without these modifications would dramatically increase the cost and slow the deployment of advanced telecommunications technology. In addition, the separation requirements should sunset in 36 months in order to restore effective competition to the market.

These proposed modifications raise no risk of competitive harm.[76] First, with regard to ILECs performing operating, installation. or maintenance functions for an affiliate, the Commission's current affiliate transaction rules impose accounting requirements and mandate that any telecommunications service provided by an ILEC to the affiliate must be made available to all competitors at the same rate.[77] Affiliates therefore will derive no competitive advantage if ILECs perform these services, but such arrangements will save affiliates the needless expense of duplicating resources that the ILEC already has developed. Because the affiliate could derive no competitive advantage from utilizing ILEC employees under these circumstances, an absolute ban is unnecessary.

Finally, the FCC's proposed requirement that transactions be reduced to writing and posted on the Internet is unnecessary. As explained in Section I.D above, a less burdensome but equally effective alternative would be simply to require ILECs upon request of regulators to disclose contracts between themselves and advanced services affiliates.

In sum, by enabling separate affiliates to compete on a more equal basis with non-affiliated CLECs, GTE's approach would have a more positive effect on the overall market for advanced telecommunications than the Commission's rigid restrictions. Consequently, if the Commission decides that additional safeguards are necessary, the proposed requirements should, at a minimum. be modified as urged by GTE.

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[76] See *NPRM*, ¶ 97.

[77] *See* 47 C.F.R. § 32.27(c).

D. The Commission's Proposed Restrictions On Sharing Of Resources By ILECs, Their Parent Companies, And Affiliates Offering Advanced Services Are Unduly Restrictive, And Antithetical To Fair Competition. (¶¶ 105-114)

In addition to the structural separations requirements proposed in the *NPRM*, the Commission also seeks comment on additional limitations on the ability of an advanced services affiliate to draw on the resources and expertise of the ILEC or their common corporate parent. As noted above, specific issues on which the Commission seeks comment include:

1) Whether transfers by an ILEC to an affiliate of DSLAMs and packet switches (including equipment that has already been purchased by the ILECs), or of local loops, should render the affiliate an "assign" for purposes of the Act.[78]

2) Whether transfers of assets other than network elements from ILECs to affiliates – including customer accounts, employees, brand names, and funds from the ILEC's corporate parent – should result in imposition of the § 251(c) requirements and dominant carrier regulation.[79]

3) Whether to impose limitations on an affiliates' ability to use CPNI gathered by the incumbent LEC.[80]

Thus, the Commission appears to propose treating affiliates as "successors" or "assigns" and subjecting them to regulation as ILECs, even if the structural safeguards are satisfied, whenever certain resources are shared among an ILEC, an affiliate, and their common parent company. GTE urges the Commission not to adopt these

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[78] *NPRM*, ¶¶ 106-07.

[79] *Id.*, ¶ 113.

[80] *Id.*

additional restrictions. Only the transfer of bottleneck facilities could result in an ILEC's affiliate becoming an assign. The *NPRM*'s proposals go well beyond this bright-line test and are, in addition, contrary to equitable competition.

1. Transfer from an ILEC to an affiliate of DSLAMs, packet switches, and other equipment available in the competitive marketplace should not render an affiliate an "assign." (¶¶ 105-106)

GTE does not agree with the Commission that transfers of equipment other than local loops, such as DSLAMs and packet switches, should result in regulation of an affiliate as an incumbent LEC.[81] DSLAMs, packet switches, and other equipment used in the provision of advanced services are not bottleneck facilities. They are as readily available to ILEC competitors as to the ILECs and their affiliates.[82] In such circumstances, where ILECs and their affiliates, on the one hand, and their competitors, on the other, are on an equal footing in a competitive marketplace, there is simply no need for intrusive regulation.

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[81] In general, GTE agrees with the Commission's conclusion that transfers of local loops from an ILEC to an affiliate currently should render the affiliate an "assign," but only in areas where the loop truly is a bottleneck. As competitive loop choices continue to grow, the transfer of loops should no longer be sufficient to subject ILEC affiliates to the requirements of § 251(c).

[82] An extensive list of ADSL equipment manufacturers and suppliers is provided by the ADSL Forum. *See* ADSL Forum, ADSL Vendors (last modified Sept. 2, 1998), <http://adsl.com/adsl_vendors.html>.

2. Affiliate use of other resources obtained from the ILEC or its parent company – including customer accounts, employees, brand names, CPNI, and funds – does not confer "assign" status. (¶ 113)

It is clear that the potential "transfers" of "assets other than network elements" upon which the Commission seeks comment do not rise to the level of "assignments."[83] Indeed, most of the transactions cited in the *NPRM* do not represent "transfers" at all, but rather reflect the kind of sharing of resources common among affiliated entities. The Commission thus has no statutory authority to impose ILEC status on affiliates offering advanced services on the basis of such sharing of resources.

Even if the Commission had authority to treat affiliates as "assigns" on the basis of resource-sharing – and it does not -- doing so would not be in the public interest. Resource-sharing raises no concerns involving discrimination toward non-affiliated competitors. In fact, prohibiting such conduct would represent affirmative discrimination against the affiliates themselves, and would adversely affect their ability to compete with entities not burdened by such arbitrary conditions.

In particular, requiring that affiliates obtain all funds for their operation totally independent from the LEC and its parent company – presumably by acquiring funds through debentures or other financing mechanisms – would be an extremely burdensome and unreasonable requirement. Most of GTE's affiliates are not subsidiaries of the ILEC, and are dependent, from a cash-flow standpoint, on the parent company, GTE Corporation. Through its treasury operations, GTE Corporation

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[83] *NPRM*, ¶ 113.

administers funding for GTE affiliates, including the ILEC entities, as it has for decades. The Commission should clarify that such a corporate arrangement remains permissible.

Just as GTE Corporation is the source of funding for both ILEC and other affiliates, GTE Corporation is also the owner of the GTE brand name. A competitive affiliate's use of that brand name thus has little to do with the ILEC, and certainly can not be considered a "transfer" from the ILEC to the affiliate.[84] Notably, in the context of the provision of bundled services, preventing advanced services affiliates from employing the brand name of the parent company would lead to unnecessary customer confusion and place the affiliate at a competitive disadvantage. A large part of the attraction of bundled services is that such offerings limit the number of providers with which the customer must deal. Requiring an affiliate to provide different services under completely different brand names would jeopardize that appeal, by conveying the false impression that different companies are responsible for individual parts of the bundle. Customers seeking one-stop shopping might therefore look elsewhere to obtain bundled services.

Moreover, GTE Corporation already has established competitive affiliates that make use of the GTE brand name, in reliance on the Commission's own determination that the separation rules currently in place "do not preclude an independent LEC from taking advantage of its good will by providing interexchange services under the same or

[84] Of course, GTE ILECs have their own brand names too (*e.g.*, "GTE California"), but a GTE advanced services affiliate would employ the brand name of the parent company ("GTE"), not that of the ILEC.

a similar name."[85] A rule limiting "transfers" of brand names from ILECs to separate affiliates would therefore be both misplaced, because no such "transfers" take place, and inconsistent with Commission precedent.

Imposing additional conditions on affiliates' use of CPNI gathered by the ILECs would also be inconsistent with Commission precedent. In the *Telecommunications Carriers' Use of CPNI* proceeding, several commenters argued that sharing of CPNI between BOCs and their affiliates should be subject to the strict § 272 requirements.[86] The Commission rejected that argument, finding that "imposing section 272's nondiscrimination obligations when BOCs share CPNI with their section 272 affiliates would not further the principles of customer convenience and control embodied in section 222."[87] The same is true here. Subjecting LEC advanced services affiliates to heightened restrictions on the use of CPNI would impose a significant burden on them, with no corresponding benefit to their customers.[88]

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[85] *Regulatory Treatment Order*, ¶ 183.

[86] *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, 13 FCC Rcd. 8061 (1998), ¶ 157.

[87] *Id.*, ¶ 160.

[88] Imposing additional conditions on affiliates' use of CPNI already obtained by the ILECs with their customers' consent would not only be contrary to the statute and the Commission's own CPNI rules, but clearly antithetical to the interest of consumers. The purpose of CPNI rules is to protect the privacy of those customers who do not want their proprietary information to be used to market them additional services. Once a customer has granted consent, additional rules limiting the use of CPNI only interfere with the customer's expressed desire for targeted services.

Nor should the Commission in any way limit the ability of an affiliate to market to customers of the ILEC, just as any other advanced service provider is able to do. Such marketing is plainly pro-competitive and certainly is not a "transfer" of customer accounts.[89] If a customer voluntarily chooses to shift its business to the affiliate, that is a sign of a properly functioning competitive marketplace. In contrast, the transfer of a customer to another service provider without consent is slamming, which is expressly prohibited by the Act.[90]

Finally, "transfer" of employees from ILECs to affiliates is not a realistic concern. In the case of GTE, it is, of course, possible that employees of its ILEC may be hired away by its competitive affiliate as well as by various other CLECs. All employees hired away from GTE's ILECs are treated the same, regardless of the nature of their future employment. Departing employees are subject to strict requirements designed to prevent the loss of proprietary information, and are not allowed to copy or remove sensitive documents.[91] In light of these facts, there is no basis for any special rule governing "transfers" of ILEC employees to affiliates.

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[89] *Cf. NPRM*, ¶ 113.

[90] *See* 47 U.S.C. § 258.

[91] For example, GTE's policy requires that all "GTE Network Services [ILEC] employees that are hired by GTE Communications Corporation [a competitive affiliate] cannot take with them any GTE Network Services information or material of any kind."

3. If the Commission imposes new restrictions on sharing of resources between ILECs and affiliates, the Commission should permit a grace period during which transfers of equipment and sharing of other assets will not be subject to any new rules. (¶¶ 105-112, 114)

As set forth above, GTE urges the Commission not to adopt new restrictions on ILEC transfers of equipment to (and sharing of other resources with) affiliates. If the Commission does change course in mid-stream, however, and decides to promulgate such rules, GTE asks that the Commission adopt an initial grace period during which the new rules will not apply.

GTE Corporation, its ILEC and CLEC subsidiaries, as well as other ILECs and their corporate parents and affiliates, already have made strategic decisions regarding investment in network equipment, allocation of personnel resources, and other core business issues relating to advanced telecommunications services on the good faith belief that competitive affiliates would be at liberty to offer such services unencumbered by the whole panoply of new rules proposed in this *NPRM*. Therefore, if the Commission now shifts gears, it should allow a reasonable grace period during which the new rules will not apply, so that corporate parents may shift and re-shift resources in the manner that they would have chosen had they known of the unexpected rule changes ahead.[92]

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[92] Such a grace period would not, of course, permit ILECs to transfer local loop elements to affiliates, because that has been clearly prohibited since the *Non-Accounting Safeguards Order*.

Without such a grace period, GTE and each RBOC – companies that already have developed integrated ADSL deployment plans – would be effectively precluded from providing this service through an affiliate on a non-dominant basis. Any transfer of equipment or facilities from the ILEC to the affiliate would, under the Commission's proposal, convert that affiliate into an ILEC. Indeed, if this modification to the Commission's proposals is not adopted, the Commission's advanced services affiliate "pathway" would be no more than window dressing for those companies that have already deployed xDSL service, since duplicative investment would be required to establish the advanced services affiliate and the establishment of such an affiliate still would not relieve the ILEC of obligations to provide the service and unbundle its components. Quite simply, the Commission's proposal would be meaningless.

During this grace period, the Commission should hold that transfers do not make the affiliate an "assign" and should not apply the non-discrimination requirement to the extent that it would compel the ILEC to offer equipment used to provide advanced services to all entities on a nondiscriminatory basis. Thus, an ILEC should be able to transfer equipment that it purchased, but that would instead have been purchased by an affiliate under the new regulatory regime, without having to continue provision of the ILEC service or offer such equipment to competitors on a nondiscriminatory basis.

Specifically, ILECs should have at least 12 months to effect exempt transfers of equipment to their affiliates. Such transfers should be made at net book value, which would place no subsidy burden on the ILEC's customers.[93] During this period, the

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[93] In addition, equipment should not have to be moved to a separate collocation area. (Continued...)

Commission should also forbear from applying any prohibition on affiliates obtaining operating, installation, or maintenance functions from the ILEC, since effecting transfers of equipment is likely to require the participation of the ILEC in all of these areas. Finally, corporate parents should also be permitted during this period to re-allocate personnel and other resources as they would have been allocated had they known of the new affiliate rules when their ILEC subsidiaries first began offering advanced services.

E. The Commission Should Not Discriminate Against Affiliates Offering Advanced Services. (¶ 101)

The *NPRM* also seeks comment on whether two additional disabilities should be imposed on ILEC-affiliated CLECs offering advanced services: (1) limits on the ability of such affiliates to resell telecommunications services offered by the ILEC or to purchase UNEs from the ILEC;[94] and (2) constraints on the ability of such affiliates to market information services.[95] Restricting affiliates in either way would be inconsistent with the 1996 Act and the Eighth Circuit's decision in *Iowa Utilities Board v. F.C.C.*, and would not advance the public interest.

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Doing so would only impose unnecessary costs on the affiliate and its customers while doing nothing to promote competitive parity.

[94] *NPRM*, ¶ 101.

[95] *Id.*, ¶ 102.

1. ILEC affiliates should not be limited in their ability to resell telecommunications services offered by the ILEC or to purchase UNEs from the ILEC. (¶ 101)

Limiting the ability of separate affiliates to resell telecommunications services offered by the ILEC or to purchase UNEs from the ILEC would violate the fundamental principle of parity reflected in both the 1996 Act and in the *Iowa Utilities Board* decision. In passing the Act, Congress clearly intended to level the competitive playing field for all telecommunications carriers, not to place non-affiliated companies in a better competitive posture than ILECs and their affiliates. For example, as the Eighth Circuit held in *Iowa Utilities Board*, it is inconsistent with the Act to require ILECs to provide unbundled network elements to competitors at levels of quality superior to those at which they provide the services to themselves.[96] Such a requirement would give competing carriers an artificial competitive advantage over the ILECs and their affiliates. By the same token, in the present circumstances, requiring ILECs to provide services to competitors for resale but prohibiting them from offering those same services to affiliates, or prohibiting affiliates from purchasing UNEs from the ILEC, would also give competing carriers an arbitrary competitive advantage – nowhere countenanced by the Act – in the market for advanced telecommunications services. Such limitations would thus go beyond ensuring nondiscrimination to affirmatively discriminating against ILEC-affiliated companies, thereby violating the principle of parity underlying the 1996 Act.

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[96] 120 F.3d at 812.

In addition, the *Non-Accounting Safeguards Order* already properly rejected this discriminatory approach.[97] In that order, the Commission explained that the statute does not place any restrictions on the types of telecommunications carriers that may qualify as "requesting carriers."[98] The Commission also emphasized "as a matter of policy that regulations prohibiting BOC section 272 affiliates from offering local exchange service do not serve the public interest."[99] Rather, "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."[100] The same is true, of course, for affiliates offering advanced services.

Finally, the Commission's existing non-discrimination requirements ensure that ILECs cannot subsidize their affiliates or accord them preferential treatment in the resale of services or purchase of UNEs. As the Commission observed in connection with these issues in the *Non-Accounting Safeguards Order*:

> improper cost allocation and discrimination are prohibited by existing Commission rules and sections 251, 252, and 272 of the 1996 Act, and . . . predatory pricing is prohibited by the antitrust laws. . . . The rules in this *Order* and our rules in *our First Interconnection Order* and our *Second*

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[97] *Non-Accounting Safeguards Order*, ¶ 313.

[98] *Id.*

[99] *Id.*, ¶ 315.

[100] *Id.*

Interconnection Order ensure that BOCs may not favor their affiliates.[101]

Once again, the same holds true in the context of advanced services.

In sum, limiting the ability of separate affiliates to resell telecommunications services offered by the ILEC, or to purchase UNEs from the ILEC, would be inconsistent with the Act and with court and Commission precedent and is unnecessary in light of the existing panoply of non-discrimination rules. The Commission should adopt no new restrictions relating to these issues

2. The Commission should not impede the ability of ILEC-affiliated ISPs to compete with already-entrenched non-affiliated ISPs. (¶ 101)

The *NPRM* asks whether advanced services affiliates are likely to favor ILEC-affiliated information service providers ("ISPs"), and whether the affiliate and the incumbent LEC could act in concert to engage in a "price squeeze" on unaffiliated ISPs.[102] The Commission should not impose additional regulations governing ILEC affiliates that offer information services. First, there is no reason to believe that the existing panoply of regulations governing such interactions – including the *Computer III*, *ONA*, affiliate transaction, CPNI, and network disclosure rules – requires supplementation to be effective. In reality, additional regulation would only undermine the ability of new ISPs that share a corporate parent with an ILEC to compete with established, non-affiliated ISPs, and impede affiliated ISPs from offering creative

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[101] *Id.*

[102] *NPRM*, ¶ 49.

bundles of information and other services to meet public demand. Once again, the Commission would not be furthering the deregulatory purposes of the Act, but rather sanctioning affirmative discrimination.

In addition, services offered by advanced services affiliates would not pose a "bottleneck" problem of the sort that could justify regulation. The recent *Internet over Cable* report details the tremendous technical capabilities and increasingly widespread deployment of cable modem service, which can transmit information at rates far greater than ADSL.[103] By the same token, a multitude of CLECs, in their oppositions to the various RBOC 706 petitions, trumpeted the capabilities and availability of their own xDSL offerings.[104] There are also a plethora of other sources for high-speed Internet access, including a variety of terrestrial wireless and satellite services.

Thus, ILEC affiliates do not have a chokehold on high-speed Internet access; they are, in fact, hard-pressed to compete with entrenched ISPs. These companies have been in the business of offering these services far longer than the ILEC's ISP affiliates, and have much broader customer bases Imposing additional restrictions will make it still harder for affiliates to make inroads into this market. In turn, this will severely limit future efforts by ILEC affiliates to make new, innovative information services available to the public.

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[103] *Internet Over Cable*, p. 18.

[104] *See, e.g.,* ALTS Petition at 4 ("CLECs ... are at the forefront in deploying new digital subscriber line ('xDSL') technologies"); *id.* at 9 ("CLECs are aggressively providing digital services throughout the nation using xDSL and other technologies.").

Finally, this issue is again only a minor variation on a question that the Commission itself has already decided. In the *Regulatory Treatment Order*, the Commission considered whether a LEC and its interLATA affiliate could potentially engage in a "price squeeze" if the LEC were to raise the price of access to all interexchange carriers, so that competing interLATA carriers would have to raise their retail rates or lose market share.[105] The Commission concluded that "price cap regulation of the [LECs'] access services sufficiently constrains a [LEC's] ability to raise access prices" so that this would not be an effective strategy.[106] The Commission explained that because a price squeeze strategy ultimately depends on driving competitors from the marketplace, so that prices may be raised, the existence of four nationwide facilities-based interLATA network facilities makes it unlikely that a predatory strategy could succeed.[107]

The same is true here. Any "price squeeze" by ILECs and affiliates in the ISP context would, as in the interLATA context, depend on the ability of the LEC to raise access charges or local service rates, which are limited by price cap or other forms of regulation. The existence of thousands of ISPs nationwide makes it extremely unlikely that a LEC-affiliated ISP could drive its competitors from the market. The Commission should therefore adhere to its earlier decision and reject any additional regulations on ISP affiliates of incumbent LECs.

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[105] *Regulatory Treatment Order*, ¶ 125.

[106] *Id.*, ¶¶ 126, 158.

[107] *Id.*, ¶ 129.

F. The Commission Should Exercise Its Authority Under Section 253 To Preempt Any State Regulation That Would Impose More Burdensome Requirements On ILEC Affiliates Than Those Adopted By The Commission. (¶¶ 116-117)

Finally, the Commission seeks comment on the question of state regulation of ILEC affiliates.[108] Any state activity limiting the ability of such affiliates to provide any service, including local exchange services and advanced services, would close the window of opportunity the Commission seeks to open in this docket and violate § 253 of the Act. Under the Commission's rules, the ILEC cannot directly offer interexchange or CMRS services, but a separate affiliate may do so Thus, to meet consumer demand for integrated packages of services, including advanced services, an ILEC's parent must provide advanced services through the separate affiliate as well. Consequently, state decisions prohibiting a separate, in-franchise affiliate of the ILEC from offering local exchange services effectively prevent competition by a vital participant in the bundled services market. As such, these state decisions impede the provision of competitive service, and therefore meet the statutory standard for preemption.[109]

The Commission should also preempt any state rules that are more burdensome than those adopted by the Commission. Most advanced services are likely to be predominantly interstate and not capable of being separated into jurisdictionally intrastate and interstate components.[110] In addition, however, some advanced services

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[108] *See NPRM,* ¶ 116.

[109] *See* 47 U.S.C. § 253(d).

[110] *See generally*, Direct Case of GTE, CC Docket No. 98-79 (filed Sept. 8, 1998),

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will be provided as elements of service bundles that are clearly interstate. The Commission thus has ample authority to preempt under Section 253 and longstanding precedent.[111]

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In making the final determination whether to impose the various strict new rules governing ILEC affiliates proposed in the *NPRM*, the Commission must bear firmly in mind that, in passing the 1996 Act, Congress intended that regulation should be kept to the minimum necessary to protect consumers during the transition to free competition. Competition in the market for advanced services is already thriving; a multitude of providers, using a broad diversity of delivery platforms, is bringing a wide array of advanced services to residential and business customers, in both rural and urban areas. Unfortunately, the Commission already subjects ILECs and their affiliates to highly burdensome and intrusive regulation, and now proposes still more restrictions and disabilities. Such new rules, far from fostering competition, will accomplish precisely the opposite. They will further distort incentives for both ILECs and their competitors, raise costs and deter investment (particularly in rural and other high-cost areas), and slow the deployment of advanced communications technologies.

The Commission should therefore avoid burdening ILEC advanced services affiliates with any additional regulation. Instead, it should ensure that no new

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Rebuttal of GTE, CC Docket No. 98-79 (filed Sept. 23, 1998).

[111] *See, e.g., Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 369, 375 n.4 (1986).

disabilities are placed on the ILECs and their affiliates as they struggle to compete against the huge AT&T, MCI/Worldcom, and Sprint combines, and the giant cable MSOs. And, as discussed in GTE's comments on the *Section 706 NOI*, it should promptly remove existing regulatory asymmetries.

III. THE COMMISSION NEED NOT BROADLY REVISE ITS EXISTING COLLOCATION REQUIREMENTS TO PROMOTE THE DEPLOYMENT OF ADVANCED SERVICES (¶¶ 118-150)

A. The Existing Collocation Rules Promote Facilities-Based Competition And Encourage The Deployment Of Advanced Services. (¶¶ 123-125)

In the *Expanded Interconnection* proceeding, the Commission established standards governing the collocation of equipment by competitive providers in ILEC central offices.[112] Subsequently, in its *Local Competition Order*, the Commission expanded these rules to implement the physical and virtual collocation requirements of § 251(c)(6).[113] As a result, there now is an extensive federal regulatory framework that addresses, among other things, the type of equipment that may be collocated, the allocation of ILEC collocation space, the procedures applicable to the use of virtual

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[112] *See Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd 7369 (1992), *recon.*, 8 FCC Rcd 127 (1993), *further recon.*, 8 FCC Rcd 7341, *vacated in part and remanded in* part, Bell *Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir.1994), 9 FCC Rcd 5154 (1994), *remanded, Pacific Bell v. FCC*, 81 F.3d 1147 (D.C. Cir. 1996), *further reconsideration pending* (collectively referred to as "*Expanded Interconnection*").

[113] *See Local Competition Order*, ¶¶ 555-617.

collocation, and the circumstances of space exhaustion.[114] Under § 252, individual states are also required to ensure that collocation arrangements meet the reasonable and non-discrimination requirements of the Act.

The Commission's collocation rules have been developed with the benefit of an extensive record in both the *Expanded Interconnection* and *Local Competition* proceedings. In these dockets, the Commission exhaustively reviewed and addressed many of the issues – such as the determination that § 251(c)(6) does not compel the collocation of switching equipment, the important interest that ILECs and CLECs have in maintaining network security and integrity, and the role of the states in addressing collocation issues – raised anew in the *NPRM*.[115] The Commission's conclusions on these matters should not be lightly dismissed.

Most importantly, the Commission should consider the ample evidence that its collocation rules both encourage the provision of advanced services and foster the type of facilities-based competition envisioned by Congress. Indeed, GTE has reached 110 collocation agreements with 24 carriers in 16 different states through the second quarter of 1998. These agreements apply not only to the collocation of traditional equipment such as cross-connects used in the transmission of special access and switched transport services, but also to equipment used to provide data-related services. For example, GTE permits carriers to collocate equipment necessary to

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[114] *See* 47 C.F.R. §§ 51.321-323.

[115] *See Local Competition Order,* ¶¶ 565-607.

provide ADSL services, including many types of DSLAMs.[116] In addition, GTE has begun negotiating with carriers to allow "shared" collocation, whereby CLECs are free to lease space in a common collocation area (either in a secured or "cageless" environment) that is physically separate from its own equipment areas. The record developed in response to the many petitions filed regarding advanced services also highlights the numerous efforts being explored by incumbents and competitive providers alike to reach innovative collocation solutions in the context of voluntary negotiations.[117]

Further, the Commission's existing collocation standards recognize the important role that states have in ensuring that the Act's reasonable and non-discriminatory collocation requirements are met. States are most familiar with local conditions, ILECs' capabilities, the demand for collocation, CLECs' needs, and other local factors that may affect the extent to which additional collocation standards are required. Flexibility to adapt collocation rules to particular jurisdictions is critical to ensuring that local factors are taken into account and to maintaining the balance of existing privately negotiated agreements.

In short, there is no reason to conclude that a broad revision to the Commission's collocation regulations is needed to accomplish the goals of § 706. Moreover, as discussed below, the Commission's specific proposals raise serious legal

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[116] *See* Reply Comments of GTE, CC Docket No 98-78, at 3-4 (filed June 25, 1998).

[117] *See, e.g.,* Comments of Bell Atlantic, CC Docket No. 98-78, at 11 (filed June 18, 1998); Comments of U S WEST, CC Docket No. 98-78, at 32-33 (filed June 18, 1998).

and technical concerns in several respects. GTE therefore supports the modifications proposed in the NASP, which give CLECs additional flexibility while permitting ILECs to retain control over the security of their facilities and maintain the integrity of their networks.

B. Mandatory Collocation Of Switching And Other Equipment Is Inconsistent With Section 251(c)(6). (¶¶ 129-132)

The *NPRM* seeks comment on whether the Commission should expand its collocation rules to "require incumbent LECs to allow new entrants to collocate equipment that is used for interconnection and access to unbundled network elements *even if* such equipment also includes switching functionality."[118] As a statutory matter, the Commission may mandate collocation only of equipment "*necessary* for interconnection or access to unbundled network elements."[119] In the *Local Competition Order*, the Commission properly held that switching equipment does not fall within the statute's scope: "we do not impose a general requirement that switching equipment be collocated since it does not appear that it is used for the actual interconnection or access to unbundled network elements."[120] As the Commission aptly explained, "generally the only equipment used for interconnection or access to unbundled

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[118] *NPRM*, ¶ 129 (emphasis added).

[119] 47 U.S.C. §251(c)(6) (emphasis added). It seems that Congress intended to require ILECs to collocate competing providers' transmission equipment, such as optical terminating equipment and multiplexers.

[120] *Local Competition Order*, ¶ 581.

elements is the cross connect equipment. The switching equipment generally performs other functions."[121]

Moreover, switching equipment is not made "necessary" just because it is part of equipment "used for interconnection and access to unbundled network elements."[122] The Commission must be extremely cautious in considering this "piggyback" approach. Despite its facial appeal, such an approach could lead CLECs to attempt to collocate equipment, such as end office switches, access tandem switches or a PBX, that is clearly outside the statutory mandate simply by incorporating some transport function in order to "qualify" as necessary. The Commission properly has declined to expand the scope of the collocation requirement through such "hubbing" techniques.[123]

Further, the Commission must be wary of expanding the scope of the collocation requirement because such a policy would raise serious constitutional issues under the Takings Clause. A physical taking occurs when regulations "compel the property owner to suffer a physical 'invasion' of his property" through regulatory policies such as collocation.[124] "When faced with a constitutional challenge to a permanent physical

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[121] *Id.*, ¶ 581 n.1417. This explanation should also make clear the misguided nature of the claim that switching equipment performs a transport function. It is only the cross-connect equipment that performs this function and thus satisfies the statutory standard.

[122] *NPRM*, ¶ 129.

[123] "Hubbing" is permitting new entrants to "connect additional equipment of their own to their collocated equipment in the collocated space." *Local Competition Order*, n. 1418.

[124] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).