facility that competitors need access to. On the contrary, it is equipment that is being deployed now for the first time, and that competitors themselves can obtain from the same sources as the incumbent and deploy on the same basis. Indeed, the Commission itself has implicitly recognized as much, since it has concluded that competitors do not need access to this equipment when it is deployed in a separate affiliate.

Likewise, Section 251(c)(4) creates a duty only to not impose "unreasonable" conditions or limitations on the resale of telecommunications services, and assigns the Commission a role in determining what is and is not reasonable. But this duty must be balanced against the Congressional directive to promote deployment of advanced services. And given this mandate, it is certainly "reasonable" to restrict the availability of these services to competitors at a wholesale discount -- precisely because subjecting these services to that obligation would interfere with the fulfillment of another express Congressional directive.

Finally, the Commission should make clear, once and for all, that Internet-bound calls delivered over these advanced services are not subject to the payment of so-called "reciprocal compensation." As one analyst has explained, payment of reciprocal compensation on this traffic actually deters investment in competing facilities because it has the "perverse effect of turning customers from assets to liabilities." *See* S. Cleland, "Reciprocal Comp For Internet Traffic—Gravy train Running Out of Track," Legg Mason Research Technology Team (June 24, 1998). Moreover, as the Chairman of Covad, a competing provider of advanced services recently explained, the effect of the reciprocal compensation "boondogle" is to "slow down the deployment of a high-speed packet-based network." *See* Transcript, Economic Stategy

Institute Forum on Section 706 (Sept. 16, 1998); Comm. Daily, Sept. 17, 1998 at 4. This is yet another reason why the Commission needs to resolve this issue quickly and reaffirm that Internet traffic isn't eligible for reciprocal compensation.

B. In Contrast, Adopting A Separate Subsidiary Proposal Will Increase Costs and Delay Wide Scale Deployment To The Mass Market.

As history conclusively shows, imposing a separate affiliate structure as the price to deploy new services free of existing regulatory constraints merely substitutes a whole new set of regulatory barriers that will increase costs and delay deployment to the mass market. Nothing has changed to make separate subsidiaries any more economically rational for regulating the emerging advanced services of today. To the contrary, the experience of enhanced services counsels that consumer welfare is enhanced by integrated telephone company provision of new services.

First, separate subsidiary requirements are economically inefficient. The Commission itself has noted in other contexts that structure separation requirements "can . . . decrease efficiency . . ." *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations*, 98 F.C.C.2d 1191, 1198 (1984). Eminent economist Robert Crandall has written that separate subsidiary "requirements discourage the most efficient use of facilities, resulting in higher costs and, therefore, higher prices." Affidavit of Robert W. Crandall, Comments of Bell Atlantic, CC Docket 96-21, at 9 (March 13, 1996) ("Crandall Affidavit"). These requirements can increase service costs up to 30%. Affidavit of Robert W. Crandall, Bell Atlantic Reply Comments, CC Docket No. 96-61 at ¶7 (May 3, 1996) (citing 1995 study by Professors Hausman and Tardiff).

The Commission's experience with separate subsidiaries for voice messaging services shows the costs to be staggering. Dr. Jerry A. Hausman has calculated that the requirement delayed the introduction of network-based voice messaging services by five to seven years and caused a public welfare loss of $1.27 billion. Bell Atlantic Comments, CC Docket No. 95-20, Attachment A (filed April 7, 1995). In addition, Bell Atlantic demonstrated that imposing a separate subsidiary requirement on its voice messaging service would cost at least $100 million. Bell Atlantic Comments, CC Docket No. 95-20 and 98-10 at 8 (filed March 27, 1998). Similarly, US West estimated the cost of structural separation for voice mail to be between $59 million and $91 million. US West Comments, CC Docket Nos. 95-20 and 98-10, attached economic study at 3 (April 4, 1998).

Second, and more importantly, separate subsidiary obligations are actually anticompetitive and hurt consumers by artificially imposing unnecessary costs on one of the competitors. Unlike competing carriers that offer all traditional telephone services and advanced services on an integrated basis through a single company, incumbent carriers would have to operate two separate companies to accomplish the same result. A competing carrier can use the same technician, the same ordering and billing systems, and the same facilities to provide its both its traditional and advanced services. Bell Atlantic, on the other hand, would have to have two of everything, at a prohibitive cost penalty.

Third, a separate affiliate requirement not only imposes additional costs, but it also delays deployment of advanced services to the mass market – depriving consumers of the advanced services they want. A separate affiliate would have to start from scratch, hiring its own construction force, marketing organization, billing systems and the like. All of this takes time, especially for any broad scale deployment of advanced services. Voice messaging services are a prime example. It was only after the Commission lifted its structural separation requirements that these services became available to the mass market. Crandall Affidavit at 8.

Fourth, the Commission has found that non-structural safeguards are effective in any event. Actual market experience proves the point. Since divestiture, Bell companies have been permitted to offer a variety of services and products that interconnect with the local network – ranging from enhanced services and customer premises equipment to corridor interLATA services – through the telephone companies rather than separate subsidiaries. In every case, the result has been an increase in overall output and lower prices, with no harm to competition. In fact, the enhanced (information) services and CPE markets are highly competitive.

Corridor InterLATA Service. Bell Atlantic routinely has provided interLATA services in the northern New Jersey-New York and southern New Jersey-Philadelphia corridors for over ten years without structurally separating its retail and wholesale operations and without anticompetitive consequences. *See United States v. Western Elec. Co.*, 569 F. Supp. 990, 1018-19, 1023 (D.D.C. 1983). According to AT&T's own estimate, Bell Atlantic's prices are up to one-third lower than those of the Big Three interexchange carriers. AT&T Corp.'s Petition for Waiver and Request for Expedited Consideration, *AT&T Petition for Waiver of Section 64.1701 of the Commission's Rules,* CCB/CPD Docket No. 96-26 Attachment A (Oct. 23, 1996) ("AT&T Waiver Petition"). Yet, after twelve years, Bell Atlantic has not dominated the market — it has less than 20 percent of the corridor market.

See Declaration of Robert W. Crandall, ¶ 10, attached to Bell Atlantic Petition ("Petition"), DA 95-1666 (filed July 7, 1995); *see also*, Declaration of Robin A. Lewis-Ivy attached to Petition. When AT&T asked for permission to lower its own rates in the corridors, AT&T did not allege that Bell Atlantic has been leveraging its "bottleneck" over carrier access; rather, it complained that Bell Atlantic was undercutting AT&T's prices and that AT&T needed the ability to deaverage its rates to respond to the additional competition. AT&T Waiver Petition at 4-5. Similarly, other large incumbent local exchange carriers such as Rochester Telephone (now Frontier) have offered interLATA services for years without apparent anticompetitive effect.

Information Services. Bell Atlantic and other incumbent local exchange carriers have long been allowed to provide information services without structurally separating their retail and wholesale operations, and the evidence shows that competition in these markets has been enhanced. If the Bell Operating Companies were able to inhibit competition in these markets, output would have dropped and prices would have risen. But, in fact, just the opposite has occurred. Since incumbent local exchange carriers began offering voice messaging services, the market has grown in size and prices have fallen. From 1990 to 1995, the incumbent local exchange carriers' participation in this market increased from zero to over six million subscribers, but their subscriber base collectively accounts for just over 15 percent of voice messaging service revenues nationally. *See* Comments of Bell Atlantic, CC Docket No. 95-20 at 8-9 (filed April 7, 1995); *see also* Jerry A. Hausman and Timothy Tardiff, *Benefits and Costs of Vertical Integration of Basic and Enhanced Telecommunications Services*, at 5 (April 6, 1995), attached to Comments of Bell Atlantic.

At the same time, the monthly retail charge for voice messaging service dropped from $30 in 1990 to $5-$15 in 1995. *Id.*

Customer Premises Equipment. Since 1984, the Bell Operating Companies have been permitted to distribute customer premises equipment ("CPE") without separating their retail and wholesale operations but have not impeded competition. In the intervening 14 years, output has steadily grown and prices have fallen, and the Bell companies are dwarfed by major vendors such as Lucent, Nortel, and Siemens. *See* MMTA, 1998 MultiMedia Telecommunications Market Review and Forecast, 85-87 (detailing demand growth and price decreases for CPE markets); *id.* at 96, 102-104, 108 (listing leading suppliers in CPE submarkets). In fact, the U.S. Court of Appeals observed that the customer premises equipment market "has supported competition even though the BOCs" theoretically "possess[] an incentive to discriminate in interconnection." *U.S. v. Western Electric Co.*, 900 F.2d 283, 303 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 911 (1990).

The Commission's separate subsidiary focus, then, is misguided. It imposes significant costs that ultimately must be borne by consumers, yet will not produce any discernible benefit. If the Commission expects its separate subsidiary proposal to reduce the number of complaints filed by competitors, it is mistaken. Competitors will still have incentives to game the regulatory process no matter how equally they are treated. If the Commission expects separate affiliates will provide some gauge to resolve those complaints, again it is mistaken. As proposed, there is absolutely no incentive to even use separate affiliates – especially for mass market deployment. And the kinds of performance reports that Bell Atlantic produces for the Commission and the states already provide a basis to monitor and evaluate complaints.

C. The Separate Subsidiary Requirements Proposed By The Commission Are Particularly Problematic.

Even aside from the general problem with any form of structural separation requirements, the Commission's proposal here is particularly problematic. Moreover, the key concern that underlies the proposal – that the separate affiliate not qualify as a "successor or assign" of the local exchange carrier – does not require the burdensome and costly structural separation requirements proposed here.

As a general matter, the courts have found that an entity becomes a successor or assign of another only upon "a completed transfer of the entire interest of the assignor in the particular subject of assignment, whereby the assignor is divested of all control over the thing assigned." *Miller v. Wells Fargo Bank Int'l Corp.*, 540 F.2d 548, 558 (2d Cir. 1976). The assignor must "cease its ordinary business operations" and the assignee must "continu[e] ... the enterprise of the seller corporation." *Neagos and Neagos v. Valmet-Appleton*, 791 F.Supp. 682, 689 (E.D. Mich. 1992).

Contrary to the Commission's assumption, however, simply transferring customer lists, giving customers the option of switching to a new provider, or agreeing to fill unfilled orders is not sufficient to make the assignee a successor or assign. *See Neagos*, 791 F. Supp. at 692. Nor does "a corporation which merely purchases the assets of another corporation, without more," become a successor or assign. *Unifirst Corp. v. Ford*, 1993 Ohio App. LEXIS 143, *9 (1993). *See, also, Safer v. Perper*, 569 F.2d 87, 95 (D.C. Cir. 1977), citing

Wawak Co. v. Kaiser, 90 F.2d 694, 697 (7th Cir. 1937) (A successor "takes the place that another has left, and sustains the like part or character."); Black's Law Dictionary (5 Ed. Rev. 1979) 1228 (a successor is generally "another corporation which, through amalgamation, consolidation, or other legal succession, becomes invested with rights and assumes burdens of [the] first corporation").[18]

1. There is no reason to restrict the transfer of equipment from an incumbent carrier to an affiliated separate subsidiary.

The Commission is correct in concluding that incumbent carriers must be able to transfer advanced services equipment to their affiliate. This should include all equipment except that used solely to provide non-advanced services. There is no need for incumbent carriers to first offer this equipment to third parties. Competing carriers can buy advanced services equipment from the same vendors used by the incumbent carrier. Such a requirement would only serve as a means for competing carriers to meddle in equipment transfers as a way to delay the affiliate's roll-out of advanced services. Existing affiliate transaction rules and accounting safeguards will ensure that the incumbent carrier does not subsidize the advanced services affiliate by transferring equipment below cost.

[18] Nor can an affiliate become a successor or assign of a Bell operating company "merely because it is engaged in local exchange activities." *Non-Accounting Safeguards Order* at ¶ 312. Instead, the Commission will consider an affiliate to be a success or assign only where it "transfers network elements to the affiliate." *Id.* at ¶ 311. Here, however, the Bell company would continue to provide its existing local telecommunications services, including local loops as unbundled network elements. And, for the reasons outlined above, the Commission should make clear that the equipment deployed to offer advanced services over these loops do not qualify as network elements that must be unbundled under the standards of Section 251(d)(2).

There is also no reason for the Commission to impose a time limitation on transfers of equipment. It is unrealistic to believe that the change in an incumbent carrier's corporate structure contemplated and the deployment of new services in an affiliate as in the Commission's proposed rules could be accomplished in six months, or even a year. For example, Bell Atlantic estimates that deployment of DSL in a separate affiliate would delay its deployment by at least one year and reduce the number of homes passed by 30 percent or more. *See* Wegleitner Decl. at ¶ 4. And to the extent the Commission's rules make it infeasible to roll out advanced services to the mass market through a separate subsidiary, all that a time limitation on transfers would do is ensure that they would never move to such a structure.

2. There is no reason to restrict the transfer of information from an incumbent carrier to an affiliated separate subsidiary.

The separate subsidiary requirements proposed by the Commission could, at the extreme, be construed to bar any information exchange between the incumbent carrier and the affiliate unless this information was made publicly available. This restriction would effectively foreclose any possibility of joint product planning, product development, sales or other joint marketing activities. Incumbent carriers would not have the opportunity to offer integrated packages of services customers demand, while competing carriers would be free to do so. In any event, the underlying concern here is information about the incumbent's network interfaces and that concern is already addressed through the Commission's network disclosure requirements.

3. There is no reason to prohibit an incumbent carrier from performing operations, installation and maintenance for an affiliated separate subsidiary.

The Commission proposes to bar local telephone company personnel from performing operations, installation or maintenance for the affiliate, even if they do so in compliance with the Commission's existing affiliate transaction rules and accounting safeguards. Currently, the same Bell Atlantic personnel perform these functions, using the same operations support systems, for both local voice and data services. To comply with such a requirement, the Bell Atlantic advanced services affiliate would need to hire and train duplicate personnel, and deploy duplicate systems capable of provisioning services such as DSL. This could increase Bell Atlantic's network operations workforce by 50 percent. *See* Wegleitner Decl. at ¶ 4. These staggering costs could not realistically be recovered through revenue from advanced services, such as DSL, particularly since other carriers would not be burdened with these costs. Without the ability to obtain operations, installation and maintenance from the incumbent carrier, the advanced services affiliate is not a viable option, particularly for broad scale deployment of advanced services to the mass market.

4. There is no reason to restrict the transfer of customers from an incumbent carrier to an affiliated separate subsidiary or to prohibit joint marketing.

There is no reason for the Commission to restrict incumbent carriers from transferring customer accounts to the advanced services affiliate or to prohibit them from joint marketing. Today, incumbent carriers are able to provide advanced services to customers on an integrated basis with voice and vertical services. For example, when a customer purchases DSL, it can be provisioned over the customer's existing loop, which is also used to provide voice and vertical services. The economy of this type of packaging is particularly important in making advanced services affordable to the mass market. Under the Commission's proposed structural separation, however, advanced services would essentially compete with the incumbent carrier in providing voice and vertical services. This would duplicate customer acquisition costs and cause customer confusion, as requiring duplication of local loop facilities. It makes no business sense to pursue such a strategy when none of these problems exist in the current structure. At the very least, if the advanced services affiliate acquires a customer, the incumbent carrier should be allowed to transfer the customer to the affiliate for any existing services provided by the incumbent carrier without a time limitation.

5. The Commission should continue to allow incumbent carriers to share CPNI with their affiliates.

There is no reason for the Commission to change its CPNI rules. Today, carriers may use, and share with their affiliates, CPNI from local services to market advanced services such as DSL -- they are both in the same local services bucket. To now prohibit the sharing of CPNI with an advanced services affiliate would be yet another reason not to deploy advanced services. Moreover, such an approach is contrary to the competitively neutral approach the Commission has followed thus far -- where all carriers, not just Bell companies or incumbent carriers, must live with the same restrictions.

6. There is no reason to prohibit an incumbent carrier and an affiliated separate subsidiary from using the same brand name and trademarks.

There is no reason to restrict the affiliate's ability to use the incumbent carrier's brand names. Incumbent carriers and their affiliates have been allowed to offer a wide variety of services under a single brand name, just as competitors can do, and this has not created any competitive problems. Moreover, barring affiliates from using an incumbent carrier's brand name would be flatly violative of the First Amendment.

7. There is no reason to prohibit a separate subsidiary from capital, personnel or services from the parent company.

There is no policy reason to preclude an advanced services affiliate's access to its parent's capital. Competing carriers, such as AT&T/TCG and MCI WorldCom/MFS, have unfettered access to the vast capital of their parent corporations. Denying an advanced services affiliate the same opportunity would only make it more expensive for them to compete with these monoliths. In addition, the Commission has never before imposed such a restriction as a condition of structural separation. Even section 272 affiliates, as saddled as they are with restrictions, can still acquire capital from a Bell company parent.

There is likewise no reason why the affiliate should not be able to obtain personnel from its parent or to obtain services from a shared services affiliate. These types of efficiencies are available to section 272 affiliates under the Commission's rules.

III. THERE IS NO NEED FOR THE COMMISSION TO REVISIT COLLOCATION ISSUES.

The Commission should not revise its collocation rules. Under the 1996 Act, states have been given responsibility to determine whether sufficient space is available for physical collocation, and the states alone should develop any new rules that are needed to implement this authority. In addition, the sole lawful basis for mandating collocation under the Act is for interconnection and access to unbundled network elements, which are also matters over which states are granted authority under the Act. And states are currently examining collocation rules and policies, so there is no reason for the Commission to step in.

In particular, the Commission should not require unsecured "cageless" collocation arrangements. The Commission has already decided that physical collocation space should be separated from the incumbent carrier's network for security reasons. There is no reason for the Commission to reverse this decision and expose the public switched network to damage and widespread service interruption. Moreover, Bell Atlantic has offered a secured "cageless" collocation arrangement in New York that is as cost effective and timely as the unsecured arrangements proposed by competing carriers.

In addition, the Commission should continue to allow states to manage the availability of collocation space in individual central offices. The states are in the best position to address these issues because they are closest to them, they have authority under the Act to resolve these issues, and they are already exercising that authority.

A. The Commission Should Not Require Unsecured "Cageless" Collocation Arrangements.

Since the advent of physical collocation, well before the 1996 Act, the Commission has allowed local exchange carriers to take reasonable security measures for to protect the public switched network against service interruption and degradation of service quality. It is for this reason the Commission has never questioned tariff provisions that specify that physically collocated equipment be placed inside a collocation cage in a secured area of the incumbent carrier's premises.

When the Commission implemented the collocation provisions of the 1996 Act, the Commission again recognized the importance of security arrangements. The Commission "continue[d] to permit LECs to require reasonable security arrangements to separate an entrant's collocation space from the incumbent LEC's facilities." *Implementation of the*

Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, ¶ 598 (1996). It found that these measures were needed to "protect both the LEC's and competitor's equipment from interference by unauthorized parties." *Id.*

The Commission's collocation rules therefore provide that "[a]n incumbent LEC is not required to permit collocating telecommunications carriers to place their own connecting transmission facilities within the incumbent LEC's premises outside of the actual physical collocation space." 47 C.F.R. § 51.323(h)(2). They also provide that "[a]n incumbent LEC may require reasonable security arrangements to separate a collocating telecommunications carrier's space from the incumbent LEC's facilities." 47 C.F.R. § 51.323(i). There is no basis for the Commission to reverse its findings or repeal the collocation rules it adopted just two years ago.

The states also have recognized the need for security arrangements with collocation. For example, when recently faced with allegations that security is not a concern in cageless collocation outside secured space, the Massachusetts Department of Public Utilities disagreed. It found that, with increasing local competition,

> [t]he number of CLEC personnel with access to Bell Atlantic's equipment would increase, with increased possibility of human error and damage to Bell Atlantic's central office facilities. <u>We view this escalation as potentially uncontrollable and therefore unacceptable</u>.

Petition of Covad Communications Company, Docket D.T.E. 98-21 slip op. at 11 (Mass. D.P.U. June 5, 1998) (emphasis supplied).

These security concerns are well founded. As Donald E. Albert points out in his attached Declaration,

> [e]ven if CLECs employ well-trained, conscientious technicians, human errors will happen. A commingled cageless environment is a ticking time bomb where a competitor's technician could mistakenly open the wrong equipment cabinet and begin to remove plug-ins, thereby adversely affecting Bell Atlantic's customer service. Or a competitor's technician could mistakenly open a Bell Atlantic cabinet on a type of equipment where the technician needs to be grounded with a grounding strap, and the resulting static discharge would affect Bell Atlantic equipment and service.

Declaration of Donald E. Albert at ¶ 5 ("Albert Decl."). *See* Attachment A at ¶ 5.

Moreover, the purported benefits of unsecured "cageless" collocation – reduced cost, less space and quicker installation – are all illusory. Bell Atlantic proposed initially in New York, and is willing to provide throughout its service area, a secured "cageless" collocation arrangement called Secured Collocation Open Physical Environment ("SCOPE"). With SCOPE, collocators may choose to place their equipment in a secure, environmentally-conditioned area of Bell Atlantic's central office without enclosing that equipment in a cage. In addition, SCOPE reduces the amount of floor space needed for collocation and therefore expands the number of carriers that can obtain physical collocation.

Ironically, any requirement to allow cageless arrangements that give access outside of the separate, secured area would mean that incumbents would be the <u>only</u> carriers that would not be permitted to secure their own equipment to prevent access by non-affiliated carriers. Their competitors, by contrast, could select, a their discretion, secured caged, cageless, or shared arrangements, or may choose to place equipment in their own secure building. Throughout their service area, it is the incumbent local exchange carriers, not the new entrants, that have a carrier of last resort obligation, and the inability to segregate and secure their equipment from authorized access could interfere with their ability to carry out that obligation.

In any event, the Commission does not have authority to require incumbent carriers to give competing carriers access to unsecured portions of the incumbent's premises. Section 251(c)(3) only requires that local exchange carriers provide "access" to network elements on an unbundled basis, and do so "in a manner that allows requesting carriers to combine such elements" themselves. The collocation arrangement described above – together with the other options that Bell Atlantic has made available[19] – does precisely this, and does it in the way contemplated by the Act itself. In fact, the collocation provision of the Act requires local exchange carriers to provide for collocation specifically to allow competing carriers to obtain "access to unbundled network elements at the premises of the local exchange carrier." 47 U.S.C. § 251(c)(6) (emphasis added).

Nor, contrary to the claims of some, are local exchange carriers required to give competing carriers free roaming access to their premises, including giving competitors direct

[19] For example, in New York, Bell Atlantic is offering smaller (25 square foot) physical collocation nodes that are suitable for use by competing carriers to combine individual network elements. These smaller nodes will be less expensive than standard (100 square foot) collocation nodes and will enable more competing carriers to establish physical collocation arrangements in New York central offices with limited space.

In addition, Bell Atlantic is offering virtual collocation nodes in all of its central offices, even though the Act only requires virtual collocation in central offices that lack space for physical collocation. Collocators are already providing DS1, DS3, ISDN, and other advanced services through their virtual collocation arrangements in the same way as they would if they had chosen physical collocation. In fact, virtual collocation has the additional advantage of on-site Bell Atlantic personnel in many offices who can maintain collocators' equipment more quickly than could the collocators themselves.

access to their frames with screwdrivers in hand. Rather, the Act only imposes a duty to permit collocation of equipment necessary to interconnect or obtain access to unbundled network elements, and, as the Commission's own collocation rules recognize, "[a]n incumbent LEC is not required to permit collocating telecommunications carriers to place their own connecting transmission facilities within the incumbent LEC's premises outside of the actual physical collocation space." 47 C.F.R. § 51.323(h)(2). Giving competing carriers direct access to a local exchange carrier's central office frames to hook up their own wires is way beyond the scope of the Act's requirement simply "to provide for" collocation.

Moreover, any requirement to allow competing carriers to enter an incumbent's premises outside of a collocation arrangement would violate the Fifth Amendment, because the Commission does not have such taking authority. Prior to the 1996 Act, the Commission did not have the statutory authority to require local exchange carriers to permit competing carriers to occupy their central offices at all, such as through physical collocation arrangements. As the Court of Appeals explained, "[t]he Commission's power to order 'physical connections,' undoubtedly of broad scope, does not supply a clear warrant to grant third parties a license to exclusive physical occupation of a section of the LECs' central offices." *Bell Atlantic v. FCC*, 24 F.3d 1441, 1446 (D.C. Cir. 1994). The 1996 Act cured this problem by imposing on local exchange carriers "[t]he duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier . . . " 47 U.S.C. § 251(c)(6).

Congress did not go further and give the Commission additional authority to require local exchange carriers to permit other kinds of occupations of their central offices. For example, simply attaching connections to the incumbent's frame would be a taking that could only be required pursuant to express statutory authority. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982) (cable installation on appellant's building constituted a taking under the traditional physical occupation test, since it involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building). Similarly, a transient right given to competing carriers to enter an incumbent's property to make connections would be a taking that requires statutory authority. *See, e.g., Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (a taking occurs where individuals are given a permanent and continuous right to pass to and fro, even though no particular individual is permitted to station himself permanently upon the premise). The Commission lacks the express and unambiguous statutory authority required to order such takings.

B. The Act Authorizes Carriers To Collocate Equipment Solely For Interconnection And Access To Unbundled Elements.

Congress did not establish a collocation requirement that opens the incumbent carriers' central offices to anyone who wants to locate any type of equipment in those offices. Instead, Congress prescribed collocation only for competing carriers and only for "equipment necessary for interconnection or access to unbundled network elements." 47 U.S.C. § 251(c)(6). Consequently, as the Commission itself previously recognized, it does not have authority to extend collocation arrangements to companies that are not carriers or equipment that is not used exclusively for interconnection or access to unbundled network elements. *See Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

In the *Local Competition Order*, the Commission found that "section 251(c) does not require collocation of equipment necessary to provide enhanced services." *Local Competition Order* ¶ 581. Similarly, the Commission declined "to 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." *Id.*

For the same reason, the Commission should adopt its tentative conclusion and continue its present policy of prohibiting collocation of equipment used for enhanced services. Only telecommunications carriers, not enhanced service providers, are covered by the provisions of the Act governing interconnection and access to unbundled elements. *See, e.g.*, 47 U.S.C. §251(c)(2) (incumbent local exchange carriers have a duty to provide interconnection "for the facilities and equipment of any requesting <u>telecommunications carrier</u>") (emphasis added); § 251(c)(3) (incumbent local exchange carriers have a duty to provide access to network elements "to any requesting <u>telecommunications carrier</u>") (emphasis added). Therefore, enhanced service providers, that have no right of interconnection or access to network elements under Sections 251 and 252, have no statutory right to collocate equipment in incumbent exchange carriers' central offices.

Even if the Commission had the authority to expand the permissible uses of collocation – which it does not – it should not attempt to do so. Expanding the type of equipment that may be collocated would quickly deplete the available space in many offices and deprive potential competitors of the ability to collocate their legitimate network equipment. And existing rules allowing enhanced service providers to connect have proven adequate.

C. Incumbent carriers should be able to require that collocated equipment meet industry standards on a non-discriminatory basis (e.g., NEBS safety standards and performance standards that limit service interference).

The Commission should allow incumbent carriers to impose equipment safety standards on a non-discriminatory basis. For example, collocated equipment should comply with the Network Equipment and Building Specifications ("NEBS") requirements that relate to safety risks or network hazards.[20] Safety standards are needed to protect the integrity of the central office and personnel working in that office, as well as Bell Atlantic's equipment and telecommunications network.[21] *See* Albert Decl. at ¶ 4.

For example, one carrier collocated (but had not activated) equipment before it had been NEBS tested, claiming that it met the NEBS standards. However, during the NEBS testing of that equipment, it failed fire-retardant tests and needed to be substantially redesigned before it could be used. *See id.* at ¶ 7. In another instance, a collocator installed equipment without authorization before it had been NEBS tested and refused to disconnect it when challenged. When the equipment was finally tested, it failed to meet NEBS emissions standards and the collocator was required to take the equipment out of service and replace it to avoid potential network harm. *See id.* at ¶ 8. In both instances, the failure of the

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[20] These hazards include, but are not limited, to heat, fire, electrical, size and weight, inability to withstand earthquakes, excessive electromagnetic emissions, and noise emissions.

[21] If an incumbent currently uses equipment that does not comply with NEBS safety provisions, collocators should be able to install the same type of equipment. *See Notice* at ¶ 134. This will generally consist of equipment that pre-dated a current NEBS standard. Bell Atlantic provides on request a list of the equipment that is widely used in its central offices to assist collocators when selecting their own equipment.

equipment to meet NEBS safety and hazard specifications could have impaired service to customers and, in one case, could have harmed Bell Atlantic's personnel.

Although the performance of another carrier's network should remain the responsibility of that carrier, collocated equipment should also comply with performance standards that prevent interference to other services. *See* Notice at ¶ 135. Absent such a requirement, all customers could be exposed to service interruptions caused by interference from collocated equipment.

The Commission should not, however, adopt its tentative conclusion that incumbent exchange carriers must provide a list to each requesting carrier of all approved equipment and all equipment they use. *See id.* at ¶ 147. Creating and updating such a list would be nearly impossible. Many items of "approved" equipment are available with a large number of varying and constantly-changing capabilities and options, and each of those many varying capabilities would need to be identified as either "approved" or "not approved."

D. The States Have Jurisdiction Over The Availability Of Collocation Space And Are Exercising That Authority.

The Act gives state commissions exclusive authority to administer the availability of physical collocation space by providing that a local exchange carrier may offer virtual collocation in lieu of physical if it "demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations." 47 U.S.C. § 251(c)(6) (emphasis added). This delegation of authority makes sense because the states are closest to and in the best position to resolve these local issues.

In exercising their authority, a large number of states, including those in Bell Atlantic's service area, have reviewed showings that specific offices cannot support physical collocation or are conducting proceedings to derive standards for such determinations, examining the same issues that the Commission seeks to address here. For example, in Case 98-C-0690, the New York Public Service Commission is reviewing proposals to reduce the size of cages for physical collocation, allow sharing of cages, modify rules for virtual collocation, and to allow some form of "cageless" collocation. Similarly, the Massachusetts Department of Public Utilities recently arbitrated "cageless" collocation proposals, examining cost, delay, security, and other factors. Settlements reached in arbitrations in Virginia, Pennsylvania, New Hampshire, New Jersey, Maryland, and the District of Columbia all involve interconnection agreements with a competing carrier and address cageless collocation, minimum cage size, sharing of cages, and other matters addressed in this Notice. Maine is reviewing similar issues in response to an arbitration petition by another carrier.

States, therefore, are already exercising their statutory authority over collocation. Separate consideration here of the same issues would not only be redundant but could result in "national standards" that are inconsistent with the findings of individual states and with provisions of interconnection agreements. Such inconsistent standards could impede, rather than facilitate, competition.

The Commission should not interfere with these state efforts by requiring incumbent local exchange carriers to permit "any competing provider that is seeking physical collocation at the LEC's premises to tour the premises." Notice at ¶ 146. Such a requirement is unwise for several reasons.

First, as discussed above, Congress gave state commissions the exclusive right to resolve disputes regarding space availability. 47 U.S.C. § 251(c)(6). It should be up to each state, not the Commission, to decide how best to gather information that will enable it to exercise that authority.

Second, allowing each potential collocator to tour each central office would put the incumbent exchange carrier into the role of a tour operator, fielding constant and repeated requests by a multitude of companies to tour its offices. Many carriers will likely want to tour central offices to obtain competitive information about their competitors and determine whether they are warehousing collocation space. This constant tourist traffic is certain to disrupt the normal office operations and impose unnecessary administrative costs that would be passed through to the collocators. It will also spawn endless complaints, as each competitor develops its own floor plan to remodel the incumbent's central office by eliminating or relocating needed office space, employee lounges, bathrooms, and other facilities. Rather than facilitating state decisions, such a rule could bog the process down into numerous competing space proposals.

Even if the Commission had authority to regulate the details of how each central office is being used, which under the Act it does not, it should not attempt to micromanage what equipment an incumbent carrier places in its own central office, what staff offices are appropriate to remain in central office space, or the amount of space that should be held for future use, including space needed to meet an incumbent's carrier of last resort obligations. *See* Notice at ¶ 142.

For example, the Commission should not attempt to define what constitutes "obsolete" equipment and require incumbent carriers to remove it from their central offices. Some "obsolete" equipment may still be used to provide service to customers, and replacement equipment may not be available to continue service. Similarly, the incumbent may need to place equipment in a central office prior to activation to allow for testing and changeover without service interruption, or allow it to remain in place temporarily pending disposal to avoid unnecessary warehousing expense.

Finally, the Commission should not require even more detailed reports about each collocation office than are now provided, as it proposes. *See id.* at ¶ 147. Bell Atlantic currently provides reports on an Internet Website of all offices in New York in which collocation has been requested, including the available types of collocation and those types that are currently in place. A carrier that wishes more information about a particular office may contact Bell Atlantic. Bell Atlantic is already working to provide these reports for other jurisdictions.

E. It Would Be Unreasonable To Require Standard Rates For Collocation But <u>Still Allow Collocators To Demand Custom-Designed Arrangements</u>.

Since nearly all competing carriers request custom-designed physical collocation arrangements, the Commission should not attempt to specify nationwide standard space preparation intervals or standard charges for space preparation. *See id.* at ¶ 144. A number of factors may affect those intervals, including the amount of work the collocator requests and subsequent changes to the initial order, the number of offices being prepared at the time in the immediate area, the availability of contractors, the pre-existing condition of the central office space, zoning requirements, equipment availability and other local factors. Similarly, charges for this work may vary widely, as a result of variation in local wage rates, cost of living, filing fees, and other local factors outside of the incumbent's control. So long as the Commission allows collocators to demand custom-designed arrangements, it should not attempt to adopt a nationwide "cookie-cutter" approach to either charges or space-preparation time. Instead, it should leave these matters to state commissions which are closer to these local issues.

IV. THERE IS NO REASON FOR THE COMMISSION TO ADOPT NEW LOOP UNBUNDLING RULES

A. The Commission's Existing Unbundling Rules Are Adequate.

The Notice asks whether the Commission's unbundling rules should be revised in light of the availability of advanced service offerings. The simple answer is no. The Commission's unbundling rules are adequate for competing carriers that want to offer advanced services.

The Commission's rules require incumbent carriers to unbundle loops, which they define as "a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and an end user customer premises." 47 C.F.R. § 51.319(a). This definition is already broad enough to include "two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide services such as ISDN, ADSL, HSDL, and DS-1 level signals." *Local Competition Order*, ¶ 380.