

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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In the Matter of
Deployment of Wireline Services Offering
Advanced Telecommunications Capability

CC Docket No. 98-147

**REPLY COMMENTS OF
SBC COMMUNICATIONS INC.**

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EXECUTIVE SUMMARY

SBC urges the Commission to exercise its authority to forbear from imposing section 251(c)'s requirements on an incumbent's provision of advanced services. As SBC showed in its opening comments, the Commission's proposed regulation of advanced services will not further section 706's goal of rapidly deploying advanced services to all Americans. Only if incumbents are able to provide advanced services on an integrated basis, free from section 251(c)'s requirements, will the market for advanced services flourish.

I. Provision of advanced services through a separate affiliate

(1) If the Commission nevertheless decides to establish requirements for the provision of advanced services by separate affiliates, it should not pattern its rules on section 272 of the 1996 Act. Rather, it should apply separation rules similar to the ones it adopted in section 20.20 of its rules, which are far better suited to the emerging advanced services market. *See* 47 C.F.R. § 20.20.

(2) In no case should the Commission adopt the radical position that the Act does not permit incumbents to provide advanced services through separate affiliates. Although the Commission's separate affiliate proposal will not promote the rapid deployment of advanced services, nothing in the Act *prohibits* incumbents from establishing affiliates to provide advanced services. The separate affiliate is not the incumbent's "successor or assign," and the Commission is not improperly "forbearing" from the Act's requirements by not subjecting the affiliate to section 251(c)'s requirements.

(3) Nor should the Commission adopt any of the additional, even more onerous, separate affiliate restrictions proposed by some commenters. These commenters try to justify imposing

such hardships on incumbents with the vague allegation that an incumbent otherwise will have an incentive unfairly to favor its affiliate. But such restrictions are completely unnecessary; the detailed safeguards set forth in the Communications Act, the Commission's regulations, and the general antitrust laws are more than adequate to prevent discriminatory conduct by an incumbent carrier.

(4) Finally, the Commission should reject the proposals of some Internet service providers to impose the *Computer III/ONA* requirements on an incumbent's advanced services affiliate.

II. Measures to promote competition

The Commission's proposed measures to promote competition in the advanced services market are, in certain respects, unlawful. They are also largely unnecessary.

(1) With respect to collocation, the Commission has no authority to require incumbents to permit competitors to collocate equipment used for switching functionality. Switching is not "necessary" for "interconnection or access to unbundled network elements."

47 U.S.C. § 251(c)(6). The Commission's proposed understanding of section 251(c)(6) is particularly inappropriate in view of the profound constitutional takings concerns raised by that theory.

In addition, the Commission should not institute national rules requiring incumbent carriers to offer so-called "alternative collocation arrangements." There is no need for such rules. As the commenting interexchange carriers and CLECs themselves recognize, many incumbents and CLECs have fashioned "alternative collocation arrangements" to fit their specific needs in the course of negotiating interconnection agreements, just as the 1996 Act contemplated, and

many others are in the process of working out innovative arrangements. And a nationwide rule requiring “cageless” collocation would do immense harm, by creating enormous potential for accidental or deliberate damage to the incumbent’s central office equipment. Even under interconnection agreements that do not permit cageless collocation, breaches of SBC’s network security have occurred. Network security would be compromised still further should the Commission implement its proposed directive regarding cageless collocation.

(2) With respect to local loop requirements, SBC acknowledges that an incumbent must provide competitors that want to use the incumbent’s network to provide advanced services with unbundled access to those local loops that are capable of providing advanced services. And SBC understands that, in order to market and sell their services, competing carriers will need certain information about those loops, which SBC will make available.

But any rules the Commission adopts must also reflect the Eighth Circuit’s holding that an incumbent has no obligation provide a competitors with “superior access” to unbundled network elements. *Iowa Utils. Bd v. FCC*, 120 F.3d 753, 812-813 (8th Cir. 1997), *cert. granted in irrelevant part*, 118 S.Ct. 879 (1998). The Commission’s suggestions that an incumbent must condition its loops to meet competitors’ specifications and assemble loop information that it does not already gather to support its own retail services fly in the face of this principle. In addition, an incumbent must be able to manage its network in a way that protects the network’s integrity and ensures that a competitor’s new service or technology does not interfere with existing services offered over other loops.

Finally, the Commission should not require incumbents to unbundle the spectrum on their loops. Spectrum unbundling will not advance competition, as the Commission has previously recognized in an analogous context.

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REPLY COMMENTS OF SBC COMMUNICATIONS INC.

SBC Communications Inc. (“SBC”) demonstrated in its opening comments that the Commission’s proposed separate affiliate requirements will keep incumbent local exchange carriers from competing fully in the emerging market for advanced services. It also showed that the Commission’s proposed amendments to its rules regarding collocation and loop requirements were, in certain respects, unlawful and in any event, mostly unnecessary. The comments before the Commission only reinforce SBC’s original conclusions.

I. PROVISION OF ADVANCED SERVICES THROUGH A DATA AFFILIATE

A. The Commission’s Proposed Separate Affiliate Rules Are Inappropriate

As SBC demonstrated in its opening comments, competition in the market for advanced services will flourish only if incumbents are allowed to provide advanced services on an integrated basis, free from section 251(c)’s requirements. Requiring incumbents to choose between providing advanced services through a separate affiliate or providing such services subject to section 251(c)’s obligations will needlessly impede the entry of incumbents into this developing market and will hinder, rather than advance, section 706’s goal of making advanced telecommunications services available to all Americans. SBC urges the Commission to exercise

its authority to forbear from imposing section 251(c)'s requirements on an incumbent's provision of advanced services.

If the Commission nevertheless decides to establish requirements for the provision of advanced services by separate affiliates, it should not pattern its rules on section 272 of the 1996 Act. Congress developed this provision to govern the entry of Bell operating companies into the established market for long-distance services. Application of these rules to the offering of advanced services by incumbents will place their separate affiliates at a severe and unjustifiable disadvantage in a rapidly developing market in which they hold no competitive edge or market power.

Instead, the Commission should apply separation rules similar to the ones it adopted in section 20.20 of its rules. This framework, which was developed for the entry of Bell companies into the then-emerging market of cellular service, is far better suited to the similarly emerging advanced services market. Under these rules, the separate affiliate would be required to maintain separate books. *See* 47 C.F.R. § 20.20(a)(1). In addition, the incumbent would be required to deal with its affiliate on a compensatory, arm's-length basis. *Id.* § 20.20(a)(3). Incumbent LECs would be able, however, jointly to own some facilities and jointly to use some employees and support systems. *Id.* § 20.20(a)(2) and (b).

B. The Commission Should Reject the Argument that Incumbents May Not Provide Advanced Services Through Separate Affiliates, and It Should Decline To Impose Additional Requirements on Incumbents and their Affiliates

Many commenting interexchange carriers, competing local exchange carriers, and Internet service providers ("ISPs") think that the Commission's proposal does not go far enough.

Some of these commenters take the radical position that the 1996 Act does not permit incumbents to provide advanced services through separate affiliates. Others assert that the Commission should impose additional, even more onerous, restrictions on the relationship between the incumbent and its affiliate. And some commenting Internet service providers argue that the Commission should impose additional regulations — targeted to advance ISP interests — on an incumbent’s advanced services affiliate. As demonstrated below, these arguments are simply counterproductive attempts to keep incumbents from competing in the advanced services market. The Commission’s adoption of these proposals would certainly serve the commenters’ parochial business interests, but it would also end up depriving consumers of the benefits of rapid deployment of advanced services at competitive prices.

1. The Commission must reject the theory that the 1996 Act does not permit an incumbent to offer advanced services through an affiliate not subject to section 251(c)’s requirements

A number of commenters, primarily interexchange carriers and competing LECs, contend that the Commission is prohibited altogether from allowing incumbent carriers to provide advanced services through a separate affiliate. Although they raise various arguments, their theories converge on a single theme: the incumbent’s separate affiliate is somehow “escaping” section 251(c)’s requirements. The Commission must reject this extreme position. Although, as SBC and other parties have shown, the Commission’s separate affiliate proposal will not promote the rapid deployment of advanced services, nothing in the Act *prohibits* incumbents from establishing affiliates to provide advanced services.

The most common version of these commenters’ argument is that an advanced services affiliate is necessarily the incumbent’s “successor or assign” under section 251(h) and is

therefore subject to all the requirements imposed on the incumbent. Their assertions largely rehash comments submitted in response to a petition filed by CompTel earlier this year. See Public Notice, *Commission Seeks Comment on Petition Regarding Regulatory Treatment of Affiliates of ILECs*, 13 FCC Rcd 6669 (1998). Like CompTel in that proceeding, commenters here urge the Commission to expand the definition of an “incumbent” carrier so that, in essence, any affiliate of an incumbent carrier that offers advanced services in the incumbent’s region would be subject to all the requirements imposed on the incumbent itself.

As SBC and others demonstrated in response to CompTel’s petition, such a proposal directly conflicts with the interpretation of “successor or assign” that the Commission has already adopted. In the *Non-Accounting Safeguards Order*,¹ the Commission emphasized that an affiliate does not become a “successor or assign” or a “comparable” carrier merely because it provides a local exchange service that could also be provided by the incumbent. 11 FCC Rcd at 22055-56 [¶ 312]. Moreover, the standard that these commenters endorse is so broad that it would completely obliterate the distinction between “affiliate” and “successor or assign.” The word “affiliate” is a defined term in the Communications Act. See 47 U.S.C. § 153(1) (affiliate “means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person”). Elsewhere in the 1996 Act — including in section 251 itself — Congress repeatedly refers to “affiliates” of “local exchange

¹First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications of 1934, as amended*, 11 FCC Rcd 21905 (1996) (“*Non-Accounting Safeguards Order*”).

carriers.”² If Congress had intended to include all “affiliates” within the definition of an ILEC, it would have done so in section 251(h). The fact that it did not significantly undercuts the plausibility of these commenters’ argument.³

MCI and Sprint speculate that regulation of the affiliate as an incumbent is necessary because the incumbent might choose to withdraw from the advanced services business and transfer those operations to an affiliate not subject to the obligations imposed on incumbents. See MCI Comments at 7; Sprint Comments at 4-5. Again, the Commission has previously addressed this issue. In the *Local Competition Order*,⁴ it refused to impose limitations on the ability of any incumbent LEC to withdraw retail services. “[W]e conclude that our general presumption that incumbent LEC restrictions on resale are unreasonable does not apply to incumbent LEC withdrawal of service. States must ensure that procedural mechanisms exist for processing complaints regarding incumbent LEC withdrawals of services.” *Local Competition Order*, 11 FCC Rcd at 15977-78 [¶ 968]. The Commission has therefore already explained that

²See, e.g., 47 U.S.C. § 251(c)(2)(C) (discussing the duty to provide interconnection at a level “at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection”); *id.* § 153(15) (defining “dialing parity” as a situation where “a person that is not an affiliate of a local exchange carrier” is able to provide service in a certain manner); *id.* § 543(l)(1)(D) (addressing the situation where “a local exchange carrier or its affiliate . . . offers video programming services”).

³See *Energy Research Found. v. Defense Nuclear Facilities Safety Bd.*, 917 F.2d 581, 583 (D.C. Cir. 1990) (“when [Congress] employs different words, it usually means different things”) (internal quotation marks omitted).

⁴First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) (“*Local Competition Order*”), modified on reconsideration, 11 FCC Rcd 13042 (1996), vacated in part, *Iowa Utils. Bd. V. FCC*, 120 F.3d 753 (8th Cir. 1997), cert. granted sub nom., *AT&T v. Iowa Utils. Bd.*, 118 S. Ct. 879 (1998).

whether an incumbent LEC may withdraw from the business of providing retail local exchange services is a matter best left to State commissions to resolve.

A number of commenters also assert that the transfer of facilities or equipment used to provide advanced services necessarily renders the affiliate a “successor or assign” of the incumbent. For example, AT&T contends that the Commission previously has ruled that “*all* such transfers, without exception, will cause the affiliate to be deemed an assign.” AT&T Comments at 33 (emphasis added). These commenters refer to the *Non-Accounting Safeguards Order*, which stated that if a Bell operating company “transfers to an affiliated entity ownership of any network elements that must be provided on an unbundled basis pursuant to section 251(c)(3),” the affiliate would be that Bell company’s “successor or assign.” 11 FCC Rcd at 22054 [¶ 309].

The *Non-Accounting Safeguards Order* should not be read to apply to transfers of the nonbottleneck facilities used specifically to provide advanced services. When the Commission issued that order, the “network elements” to which it referred were the seven core components of the old, conventional voice network that was built up during the era of exclusive franchise. See *Local Competition Order*, 11 FCC Rcd at 15683-775 [¶¶ 366-541]. At that point, the Commission had not considered whether any of the facilities specifically used to provide advanced services even qualified as network elements, still less the implications of an incumbent’s transfer of such facilities to an affiliate. Simply because the Commission has subsequently decided that some of these facilities may be network elements, it should not reflexively presume that an incumbent’s transfer of such facilities to an affiliate makes the affiliate a “successor or assign.” Indeed, it recognized as much in the *Non-Accounting*

Safeguards Order, where it declined “to adopt an absolute prohibition on a BOC’s ability to transfer local exchange and exchange access facilities and capabilities to an affiliate,” concluding that such a restriction would be “overly broad and exceed the requirements of the Act.” 11 FCC Rcd at 22054 [¶ 310].

If one considers the rationale for the Commission’s conclusion in the *Non-Accounting Safeguards Order*, it is clear that only a transfer of key bottleneck local exchange facilities could render an affiliate a successor or assign. These facilities are remnants of the incumbent’s former exclusive network and in some cases may not be readily available from sources other than an incumbent carrier. Arguably, the transfer of such equipment places the affiliate in the unique position, previously occupied by the incumbent, of controlling bottleneck facilities. By contrast, an incumbent has *no* similar control over the facilities used to provide advanced services. Outside vendors sell, at market prices, *all* of the advanced data equipment used to provide advanced services, and such facilities are equally available both to incumbents and to their competitors. Incumbents are only now beginning to deploy this technology and have no edge over their competitors. There is thus no reason to deem an affiliate to which these nonbottleneck facilities are transferred a “successor or assign” — acquiring these facilities gives the affiliate none of the characteristics of the incumbent.

Nor is there anything to MCI’s argument that, by permitting incumbents to establish separate affiliates not subject to section 251(c)’s unbundling and resale requirements, the Commission is improperly “forbearing” from imposing those requirements on incumbents. *See* MCI Comments at 5-6. The 1996 Act authorizes the Commission to impose section 251(c)’s requirement *only* on incumbent LECs, as that term is defined in section 251(h). The Commission

simply has no power to regulate an advanced services affiliate under section 251(c), unless the affiliate also qualifies as an incumbent LEC. As discussed above, an incumbent's advanced services affiliate is not an incumbent carrier. *See Advanced Services NPRM*⁵ ¶ 94 (“[T]o the extent that an entity is not an ‘incumbent LEC’ within the meaning of section 251(h), that entity will not be subject to the obligations, under section 251(c), to unbundle and to offer resale at wholesale rates.”). Thus, by not imposing section 251(c)'s constraints on the incumbent's affiliate, the Commission is hardly “forbearing” from applying section 251(c)'s requirements — the Act would permit no other outcome. Certainly, the Commission has made quite clear (erroneously, in SBC's view) that an *incumbent's* provision of advanced services comes within section 251(c)'s purview and that such services are subject to that section's unbundling and resale requirements. *See Advanced Services NPRM* ¶¶ 52-58.

In sum, the notion that an incumbent is somehow evading section 251(c)'s requirements if it chooses to provide advanced services through a separate affiliate is without basis in the statute. Section 251(c)'s unbundling and resale requirements apply *only* to incumbent carriers and do not extend to incumbents' separate affiliates. Although SBC continues to believe that an incumbent should be permitted to provide advanced services on an integrated basis, free from section 251(c)'s unbundling and resale requirements, it is clear that nothing in the Act *prohibits* an incumbent from offering advanced services through a separate business entity, should it so choose.

⁵Memorandum Opinion and Order and Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147 and consolidated cases, FCC 98-188 (rel. Aug. 7, 1998) (“*Advanced Services NPRM*”).

2. The additional separation requirements proposed by commenters are unnecessary and inappropriate

As SBC explained in its opening comments, the structural separation requirements that the Commission proposed in its *Advanced Services NPRM* will unnecessarily impede competition. They will diminish incumbents' incentive to enter the emerging market for advanced services and will discourage competitors from undertaking their own efforts to experiment and innovate with advanced services technology. But many commenters, mostly interexchange carriers and competing local exchange carriers, urge the Commission to handicap incumbents even more greatly. According to these parties, the Commission should, among other things, (1) restrict an incumbent from transferring assets to its affiliate; (2) prohibit joint marketing by the incumbent and its affiliate; (3) require partial outside ownership of the affiliate; (4) institute a cumbersome "pre-approval" review process of the separate affiliate's structure; and (5) prohibit the affiliate from reselling the incumbent's services.

As part of their effort to justify imposing such hardships on incumbents, these commenters return repeatedly to the vague theme that an incumbent otherwise will have an incentive unfairly to favor its affiliate. But they make no effort whatever to explain why such restrictions are necessary in view of the detailed safeguards set forth in the Communications Act, the Commission's regulations, and the general antitrust laws, all of which are designed to proscribe discriminatory conduct by an incumbent carrier. "[I]mproper 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." *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22057-58 [¶ 315].

Under existing law, an incumbent carrier may not favor an affiliated entity that offers advanced services over unaffiliated local exchange carriers. The affiliate must obtain access to the incumbent's facilities, if necessary, in precisely the same way that other competitive local carriers do — by entering into interconnection agreements that contain nondiscriminatory terms, which are subject to approval by the State commission and review in federal district court. *See* 47 U.S.C. § 252(e). Indeed, the 1996 Act specifically requires an incumbent to make its facilities available to other carriers on the same terms and conditions that it offers to its affiliates, *id.* § 252(i), and, before a State commission may approve an agreement between an incumbent and its affiliate, the commission must determine that the agreement does not discriminate against other carriers and that it is consistent with the public interest, *id.* § 252(e)(2). There is thus no need for the Commission to paint yet another coat of regulation onto these existing obligations. Commenters' arguments to the contrary are simply transparent attempts to keep incumbents from competing in the advanced services business.

(1) Transfer of assets: A number of parties assert that an incumbent should be prohibited from transferring any facilities used to provide advanced services to its affiliate. *See, e.g.,* AT&T Comments at 33; Comptel Comments at 33; Commercial Internet Exchange Association Comments at 22; e.spire Comments at 19; Qwest Comments at 48. One of their chief allegations is that such a transfer necessarily renders the affiliate a successor or assign, a contention disposed of in the previous section (pp. 3-7). Should the Commission rule against SBC on this issue, however, it urges the Commission to adopt its proposed “*de minimis* exception” to the facilities transfer rule. Under this exception, the incumbent would be permitted to transfer, for a fixed period of time, previously purchased network elements specifically used to provide advanced

services. These transfers would be exempt from the requirement that the incumbent offer such equipment on a nondiscriminatory basis to all entities. *See Advanced Services NPRM* ¶ 108-111. SBC believes that an appropriate grace period for effecting these *de minimis* transfers is one year after the relevant State commission has approved the proposed transfer under state law. *See also* ISP Coalition Comments at 13-15.

Opposing commenters raise no legitimate argument against the proposed *de minimis* exception. CompTel speculates, for example, that the proposal will “freeze” the existing network and lead to a “relic POTS network.” CompTel Comments at 34. CompTel’s assertion reflects a fundamental misapprehension of the 1996 Act and the requirements of sections 251 and 252. Congress designed these provisions to give competitors access to the *existing* local exchange networks so that they could engage in their *own* efforts to use the existing networks to provide new services. It did not intend for competitors to free ride on all subsequently implemented innovations added to this network by incumbents, nor did it require incumbents to upgrade their networks for the benefit of their competitors.

(2) Joint marketing: The Commission’s *Advanced Services NPRM* did not discuss whether its separate affiliate proposal would allow incumbents and their affiliates jointly to market their services. Doubtless the Commission assumed that joint marketing would be permissible, since an advanced services affiliate would be utterly worthless if this were not the case. In any event, as SBC has made clear elsewhere, the Commission must not constrain such joint-marketing efforts.⁶ Joint-marketing restrictions would all but ensure that incumbents would

⁶See Comments of SBC Communications Inc. at 21-23, *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20 (Mar. 27, 1998).

not be significant players in the market for advanced services. They would preclude a carrier from providing consumers with one-stop shopping for all of their telecommunications needs. Such restrictions also are inefficient and raise the costs, and hence the prices, of an incumbent's services.

For these reasons, the 1996 Act explicitly authorizes joint-marketing efforts. For example, in the related context of a Bell company and its interLATA separate affiliate, section 272 permits joint marketing after the Bell company has received approval under section 271. 47 U.S.C. § 272(g). As the Commission recognized: “[W]e conclude that a BOC and its section 272 affiliate may provide marketing services for each other. . . . Moreover, the parent of a BOC and its section 272 affiliate or another BOC affiliate may perform marketing functions for both entities.” *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21993 [¶ 183]; *see also* Pub. L. 104-104, Title VI, § 601(d), 110 Stat. 143, 47 U.S.C. § 152 note (authorizing joint marketing between a Bell operating and its cellular affiliate).

In other proceedings, the Commission and its Chairman, as well as competing local exchange carriers, have recognized the tremendous efficiencies in the provision and marketing of bundled telecommunications services that new technology now makes possible. In passing the 1996 Act, Congress intended to permit consumers to “deal with one phone company, one phone bill, and one customer service representative — all priced competitively.”⁷ Consequently, “as competition increases and more telecommunications carriers enter each other’s markets, carriers

⁷Statement of William E. Kennard, Chairman, FCC, on The Telecommunications Act of 1996, Moving Toward Competition Under Section 271, Before the Subcommittee on Communications on Antitrust, Business Rights, and Competition Committee on the Judiciary, United States Senate, March 4, 1998 (“*Kennard Statement Before the Subcommittee on Communications on Antitrust, Business Rights, and Competition Committee on the Judiciary*”).

are increasingly bundling packages of telecommunications services.”⁸ Consumers, who “value the simplicity of one-stop shopping,”⁹ are coming “to expect and demand bundled product offerings.”¹⁰ The Commission recognizes that “bundled” telecommunications services, “may, in the future, become a distinct and relevant product market.”¹¹ The emergence of this new market for bundled services was “[p]art of Congress’s vision” in passing the 1996 Act.¹² The Commission should not now ignore these guiding principles and restrict incumbents and their separate affiliates from taking advantage of these efficiencies.

(3) Outside ownership of affiliate: Several commenters ask the Commission to mandate some “quantum of outside ownership” of the affiliate. *See, e.g.*, AT& T Comments at 20-21; Commercial Internet Exchange Association Comments at 18; ICG Telecom Group, Inc. Comments at 10; Qwest Comments at 44. Otherwise, their argument goes, the incumbent could coordinate its actions with its affiliate to charge “monopoly prices” for unbundled network

⁸Memorandum Opinion and Order, *Application of Motorola, Inc. and American Mobile Satellite Corporation, For Consent to Transfer Control of Ardis Company*, Memorandum Opinion And Order, 13 FCC Rcd 5182, 5192 [¶ 17] (1998) (“*Motorola Order*”).

⁹*See Kennard Statement Before the Subcommittee on Communications on Antitrust, Business Rights, and Competition Committee on the Judiciary.*

¹⁰*Motorola Order*, 13 FCC Rcd at 5192 [¶ 17].

¹¹Memorandum Opinion and Order, *Application of WorldCom, Inc. and MCI Communications, Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, CC Docket No. 97-211, FCC 98-225 [¶ 22 n.60] (rel. Sept. 14, 1998); *see also* Memorandum Opinion and Order, *Applications of NYNEX Corporation and Bell Atlantic Corporation for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, 12 FCC Rcd 19985, 20015-16 [¶ 52] (1997).

¹²*See Kennard Statement Before the Subcommittee on Communications on Antitrust, Business Rights, and Competition Committee on the Judiciary.*

elements (“UNEs”), or the affiliate could “eschew UNEs altogether in favor of resale in order to avoid having to create usable operations support systems for ordering and combining unbundled elements.” AT&T Comments at 21.

Such scenarios are quite simply implausible. The 1996 Act gives competing carriers the ability to negotiate and arbitrate their own, entirely separate agreements with the incumbent. Contrary to AT&T’s intimations, the prices to which an incumbent and its affiliate agree do not become the prices that other carriers must accept (although the incumbent must make those prices available to other carriers, 47 U.S.C. § 252(i)), nor does the affiliate’s choosing to resell the incumbent’s services mean that unbundled network elements will not be available for competing carriers. Instead, all competing carriers are free to work out the terms of their own interconnection agreements, and State commissions are charged with overseeing these negotiations to ensure that they are fairly conducted. Moreover, incumbents and affiliates are not free to set monopoly prices for unbundled network elements or to settle on anticompetitive resale policies. Again, any agreement between an incumbent and its affiliate must be reviewed by a State commission charged with ensuring that its terms are consistent with sections 251 and 252. Moreover, a requesting carrier always has the ability to arbitrate a cost-based price under section 252.

(4) Pre-approval process: Several parties to this proceeding contend that the Commission must institute some sort of approval process for ensuring that incumbents and their affiliates comply with the separation requirements that the Commission ultimately adopts. *See, e.g.*, AT&T Comments at 18; Commercial Internet Exchange Association Comments at 5; Qwest Comments at 47. Yet again commenters ignore the provisions of the 1996 Act that make these

proposals utterly unnecessary. Before an advanced services affiliate may offer services to end users, it will have to enter into an interconnection agreement with the incumbent, and the State commission must approve that agreement under section 252(e)(2). In the course of reviewing this agreement, the commission can determine whether the affiliate has complied with the applicable federal and state requirements. No other approval process is needed.

AT&T contends that its proposed “pre-approval process” is necessary because Bell companies, including SBC, have thus far been “grossly and openly noncompliant with their § 272 obligations.” AT&T Comments at 18. This accusation is groundless. As the Commission is aware, the Bell companies are in the process of applying for approval to provide in-region, interexchange services under section 271. As part of its applications, SBC has submitted to the Commission and to State commissions material demonstrating that its provision of interexchange services “will be carried out in accordance with the requirements of section 272,” as required by section 271(d)(3)(B). To be sure, some disputes have arisen over the meaning of certain provisions.¹³ It is absurd, however, for AT&T to characterize this expected and ordinary process of fleshing out the requirements of section 272 as evidence of the Bell companies’ “noncompliance” with the 1996 Act.

(5) Affiliate’s ability to resell the incumbent’s services and purchase network elements:

SBC showed in its opening comments that there is no legitimate reason to limit an affiliate’s ability either to resell the incumbent’s services or to purchase unbundled network elements. The

¹³In California, for example, Pacific Bell believed that posting on the Internet a summary of the transactions between the Bell company and its section 272 affiliate satisfied section 272, whereas AT&T contended that Pacific Bell should post the full contract. In the end, Pacific Bell agreed to post the full contract, but its initial decision not to do so in no way violated section 272.

Advanced Services NPRM offers no theory to support placing such a disadvantage on advanced services affiliates. See *Advanced Services NPRM* ¶ 101. And, as GTE explains, handicapping an affiliate in this way would give its competitors an unfair advantage, in violation of the Eighth Circuit’s holding in *Iowa Utilities Board v. FCC*, 120 F.3d 753, 812 (8th Cir. 1997), *cert. granted sub nom., AT&T Copr. V. Iowa Utils. Bd.*, 118 S. Ct. 879 (1998). See GTE Comments at 51.

AT&T and others nevertheless contend that the Commission should prohibit an advanced services affiliate from reselling the incumbent’s services. See, e.g., CompTel Comments at 24; e.spire Comments at 18; ICG Telecom Group, Inc. Comments at 14; Internet Service Providers Coalition Comments at 5-6; Qwest Comments at 43. In support of their position, they resurrect an argument that they have raised in related contexts and that the Commission has previously rejected. If the affiliate can resell the incumbent’s services, they reason, it will be able to engage in a “price squeeze,” by pricing its retail services below the wholesale price it pays to the incumbent and forcing competitors to charge below-cost rates. AT&T Comments at 29.

The Commission has already considered and rejected this argument in analogous contexts. In the *Access Reform Order*,¹⁴ the Commission dealt with the contention that an incumbent’s interexchange affiliate could implement a price squeeze once the incumbent began offering in-region, interexchange toll services. 12 FCC Rcd at 16101 [¶ 277]. It correctly concluded that there was no basis for taking any additional steps to guard against this possibility. In the first place, it noted that it already had in place “adequate safeguards” — both structural and

¹⁴First Report and Order, *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, 12 FCC Rcd 15982 (1997).

non-structural — designed to detect and prevent any such anticompetitive conduct. *Id.* at 16101 [¶ 278]. And those safeguards — which supplement the potent remedies already provided by the antitrust laws (*id.* at 16103-04 [¶ 282]) — have proven themselves effective. Although no Bell operating company has yet been granted authority to provide long-distance service, other incumbent LECs have been providing long-distance service through separate affiliates for more than 10 years. During that period, there have been “no substantiated complaints of a price squeeze.” *Id.* at 16101 [¶ 279].¹⁵

The same considerations apply here. An affiliate could not surreptitiously price its retail services below cost — the detailed restrictions of sections 251 and 252, oversight by the State commission, and the antitrust laws stand in way of such anticompetitive conduct. There is thus no need to restrict an affiliate’s ability to resell the incumbent’s services.

3. No additional requirements should be imposed on the provision of advanced services by a separate affiliate

Several commenting Internet service providers contend that, in addition to the Commission’s proposed affiliate requirements, the Commission should stringently regulate a separate affiliate’s provision of advanced services. Specifically, they argue that advanced services affiliates should comply with the Commission’s *Computer III/ONA* safeguards.¹⁶ *See,*

¹⁵ *See also* Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area, Policy and Rules Concerning the Interstate Interexchange Marketplace*, 12 FCC Rcd 15756, 15830-32 [¶¶ 127-129] (1997) (rejecting price-squeeze theory).

¹⁶These commenters have made the same argument in response to the Commission’s recent Notice of Inquiry in this proceeding. *See, e.g.,* America Online, Inc. Comments, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to*

e.g., America Online, Inc. Comments at 7-9; Internet Service Providers' Consortium Comments at 8-14. Such regulation is completely unwarranted. The very purpose of the Commission's separate affiliate proposal was to put an incumbent's advanced services affiliate "on the same footing as any of their competitors." *Advanced Services NPRM* ¶ 86. Structurally separating the incumbent and its affiliate by definition places the affiliate in precisely the same position as other competitors — thereby eliminating any need for imposing additional regulatory safeguards on the affiliate.

Applying this logic, the Commission arrived at a similar conclusion in the *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21971-72 [¶ 136]. The Commission there ruled that a Bell company's interLATA separate affiliate could bundle information and telecommunications services without providing comparably efficient interconnection to the underlying telecommunications services. The Commission noted that "the market for information services is fully competitive," and that consequently there was "no basis for concern that a section 272 affiliate providing an information service bundled with an interLATA telecommunications service would be able to exercise market power." *Id.*

There is likewise no reason for concern that an advanced services affiliate would exercise market power. Like the market for information services, the market for advanced services is highly competitive. As the Association for Local Telecommunications Services ("ALTS," the CLEC trade association) has stated before the Commission, CLECs "were the first" to deploy high-speed data networks and they "continue to deploy such advanced technologies at a dramatic

Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146 (filed Sept. 14, 1998).

pace.”¹⁷ They are “aggressively providing digital services throughout the nation,” offering “advanced telecommunications capability to the public today,” after having deployed their advanced networks “in hundreds of markets in only a few years’ time.”¹⁸ Furthermore, cable companies and satellite carriers provide advanced services that compete directly with the advanced services that CLECs and incumbent LECs provide. This competition ensures that ISPs have numerous options for reaching end users other than by relying on incumbents’ networks.

II. MEASURES TO PROMOTE COMPETITION IN THE LOCAL MARKET

A. Collocation Requirements

SBC explained in its opening comments that the Commission’s proposal to alter its existing collocation rules is misguided. Inflexible nationwide collocation rules are simply not feasible. Consequently, sections 251 and 252 contemplate that an incumbent and a CLEC will reach agreement regarding the terms on which collocation will be permitted through private negotiations and arbitration overseen by a state regulatory commission, followed by review in the federal courts. State commissions are simply far better suited to resolving the highly fact-intensive disputes connected with collocation negotiations.

The comments submitted in response to the *Advanced Services NPRM* only reinforce the conclusion that the Commission must resist the temptation to micro-manage issues related to collocation. No commenter demonstrates that there is any need for the comprehensive rules the

¹⁷Petition of the Association for Local Telecommunications Services (ALTS) for a Declaratory Ruling Establishing Conditions Necessary to Promote Deployment of Advanced Telecommunications Capability Under Section 706 of the Telecommunications Act of 1996 at ii, CC Docket No. 98-78 (filed May 27, 1998).

¹⁸*Id.* at 4, 6, 9.

Commission proposes. To the contrary, the comments show that the negotiation/arbitration process set forth in sections 251 and 252 is working just as Congress intended. Many CLECs and incumbents have entered into agreements permitting collocation of CLEC equipment, and many others are in the process of working out arrangements suited to their particular circumstances. The Commission's interference in this process is not warranted.

In these reply comments, we underscore two particularly important points. First, the Commission's proposal to permit competing carriers to collocate equipment that includes switching functionality is unlawful. The 1996 Act explicitly prohibits the Commission from expanding the list of equipment that may be collocated beyond that which is "necessary" for interconnection or access to unbundled network elements. Second, the Commission should not promulgate national standards regarding so-called "alternative collocation arrangements."

1. The Commission may not require incumbents to allow competitors to collocate equipment that is used for switching functionality

The 1996 Act does not permit the Commission to direct incumbents to allow competitors to collocate equipment that performs switching functions. The statute authorizes the Commission to require collocation only of that equipment "*necessary* for interconnection or access to unbundled network elements." 47 U.S.C. § 251(c)(6) (emphasis added). The Commission has no discretion to ignore that plain statutory language. *See, e.g., Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992) ("courts must give effect to the clear meaning of statutes as written").

Switching equipment is simply not "necessary" for interconnection or access to unbundled elements. It is well established that interconnection and switching are different

functions. As the Commission has explained previously, “interconnection” refers to “the physical linking of two networks for the mutual exchange of traffic.” *Local Competition Order*, 11 FCC Rcd at 15590 [¶ 176] (1996). “Switching,” by contrast, is the function of routing telecommunications traffic so that it reaches the particular party someone wishes to call. *See Newton’s Telecom Dictionary* 578 (11th ed. 1996) (defining “switching” as “[c]onnecting the calling party to the called party”).

The 1996 Act distinguishes between these two functions. *See* 47 U.S.C. § 271(c)(2)(B)(i), (vi) (establishing separate requirements that Bell companies offer “interconnection” and “switching” in order to receive long-distance authority). Accordingly, in its *Local Competition Order*, the Commission recognized that “the only equipment used for interconnection or access to unbundled elements is the cross-connect equipment. *The switching equipment generally performs other functions.*” *Local Competition Order*, 11 FCC Rcd at 15795 [¶ 581 n.1417] (emphasis added). It therefore declined to require incumbents to collocate switching equipment, “since it does not appear that [such equipment] is used for the actual interconnection or access to unbundled network elements.” *Id.* at 15795 [¶ 581]. The Commission’s *Advanced Services NPRM* offers no explanation why it should depart from its previous ruling and now deem switching equipment “necessary” for interconnection or access to unbundled network elements.

Finally, if more were needed, a federal district court has only recently held that the statutory obligation to allow collocation for interconnection or access to network elements does not entail a duty to allow collocation for switching. The court specifically held that, under the plain terms of the 1996 Act, “*Bell Atlantic is under no statutory duty to allow MCI [to] use*

collocated RSMs for switching.” MCI Telecomms. Corp. v. Bell Atlantic-Virginia, Inc., No. 3:97CV629 slip op. at 19 (E.D. Va. July 1, 1998) (emphasis added) (citing 47 C.F.R. § 51.323(c)).

It is no answer to the clear statutory text to say, as many commenters do, that any equipment that is used to some degree for interconnection and access to network elements may be collocated, regardless of the additional functions it performs or the added space it takes up in order to perform those other functions. *See, e.g.*, AT&T Comments at 73-74; CompTel Comments at 39. This theory would allow CLECs to bootstrap their way into engaging in an unlimited range of activities on an incumbent’s property simply by using equipment that also permitted interconnection or access to unbundled elements. The use of equipment for interconnection or access would become an entering wedge that would allow competitors to intrude on an incumbent’s property to a significantly greater degree, and for materially different purposes, than Congress ever contemplated.

Congress made plain that collocated equipment may be installed on an incumbent LEC’s property only to the extent that it is necessary to perform one of two specific activities — “interconnection or access to unbundled network elements.” There is no reason to believe that Congress would so carefully specify that collocated equipment must be necessary for those two particular activities if it had actually intended to allow entrants to perform *any* functions they desired from within an incumbent’s offices (so long as, by happenstance, the relevant equipment could also provide one of the functions specified in the statute). On the contrary, if Congress *had* intended to authorize a competitor’s physical occupation of the incumbent’s private property for purposes of switching (or any other function), it would have said so directly. It would not have

created the absurd scheme hypothesized by some commenters — a scheme under which new entrants must engage in one of the two statutorily identified functions to some degree in order to use incumbents' property for other, wholly separate purposes that are nowhere mentioned in the 1996 Act's collocation provision.

Nor can these commenters overcome the lack of textual evidence showing that Congress intended to authorize collocation for switching by stressing that the word "necessary" may mean not only "indispensable," but also "used or useful." *See, e.g.*, AT&T Comments at 74. The issue here is not the *level* of necessity an entrant must demonstrate, but rather what *functions* the collocated equipment must be necessary to perform — "interconnection or access to unbundled network elements." *Id.* For the reasons explained above, no party has offered any plausible explanation for why Congress would have required equipment to be "necessary" for one of those two specific functions if it had actually intended that entrants would be free to engage in completely distinct functions such as switching.

Other parties vaguely assert that the rapid pace of technological development should prompt the Commission to require incumbents to collocate all types of equipment, CompTel Comments at 39; that it is too difficult to "draw lines" between different technologies, ALTS Comments at 43; AT&T Comments at 74; and that the inability to place switching equipment on an incumbent's property may result in added costs for competitors, MCI Comments at 53. Again, these considerations cannot justify ignoring section 251(c)(6)'s clear statutory mandate. The Commission may not permit CLECs to place their equipment on an incumbent's property unless there is a clear showing under the statute that the collocated equipment is "necessary" to interconnection or access to unbundled network elements.

The Commission's proposed relaxed understanding of the limitations that Congress placed on new entrants' ability to occupy incumbent carriers' property is particularly inappropriate in light of the significant constitutional takings concerns raised by that theory. It is well established that administrative agencies may not authorize physical occupations of private parties' property unless Congress has plainly authorized such a taking through a clear statement in the text of a statute. An administrative decision to permit an uninvited physical occupation of a regulated company's premises by a competitor must meet a "strict test of statutory authority" in which the agency's order will be construed, if possible, to "defeat administrative orders that raise substantial constitutional questions." *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1445, 1447 (D.C. Cir. 1994). So long as it is within the "bounds of fair interpretation" to read a statute *not* to authorize such a taking, that understanding must be adopted. *Id.* at 1445. *See generally United States v. Security Indus. Bank*, 459 U.S. 70, 78-80 (1982) (narrowing construction of statute applied to avoid taking).

It is, to say the least, within the "bounds of fair interpretation" to read the statute not to permit a competitor to occupy an incumbent's premises for the installation of equipment that performs switching functions — indeed, that is the plain import of the language Congress enacted into law.

Nor does the Commission's proposed expansion of its collocation rules make sense as a policy matter. As even AT&T recognizes, "physical collocation space" is finite. AT&T Comments at 75. For many incumbents, there is simply no space left to accommodate the collocation needs of competitors under the existing rules. Adding switching equipment to the list

will leave even less space available for those carriers that want to collocate equipment truly necessary for interconnection or access to unbundled network elements.

2. The Commission should not adopt blanket rules requiring incumbent carriers to offer “alternative collocation arrangements”

Nor should the Commission institute national rules requiring incumbent carriers to offer so-called “alternative collocation arrangements.” Such questions must be resolved in light of the specific facts that surround a given competitor’s request to collocate given equipment in a given incumbent’s facility. This is an inquiry that only State commissions are in a position to undertake — there simply cannot be a single, one-size-fits-all rule for this extremely complicated issue.

Moreover, the comments make clear that there is no need for the inflexible national standards that the Commission proposes. As the interexchange carriers and CLECs themselves recognize, many incumbents and CLECs have fashioned “alternative collocation arrangements” to fit their specific needs in the course of negotiating interconnection agreements, just as the 1996 Act contemplated, and many others are in the process of working out innovative arrangements.¹⁹ SBC has been part of this process. For example, it has offered “common area”

¹⁹*See, e.g.*, ALTS Comments at 48-51 (setting forth proposals submitted to the New York commission by Intermedia Communications and Covad Communication); CompTel Comments Attach. B (white paper entitled “Uncaging Collocation”) at 28-29 (noting that Bell Atlantic recently proposed offering a “shared space” arrangement in New York and that U S WEST and BellSouth offer arrangements that allow CLECs to collocate equipment in a physically separate common area without cages); AT&T Comments at 85 & n.149 (reporting that AT&T has negotiated cageless collocation arrangements with U S WEST); Intermedia Communications, Inc. Comments at 23-31 (describing various innovative collocation rules developed by State commissions in New York, Texas, and Tennessee). *See also* Ameritech Comments at 37-39 (describing different collocation arrangements); Bell Atlantic Comments at 32 (same); GTE Comments at 59-60 (same); U S WEST Comments at 40-43 (same).

collocation subject to cost-recovery assurances, and it is willing to accommodate the requests of carriers that want less than 100 square feet of collocation space or irregularly shaped cages. SBC Comments at 21-22. It has also made available other creative means of accommodating a competitor's desire for physical collocation, such as permitting carriers to sublease collocation space from one another, or allowing a carrier to interconnect with a central office from a space contiguous to an exhausted central office. In short, the Commission proposes to fix something that isn't broken. In the words of one commenting CLEC, the "prodigious efforts" of the State commissions "have [resulted], or soon will[] result in the adoption of innovative collocation proposals," Intermedia Communication Comments at 23, and nationwide rules regarding "alternative collocation arrangements" would serve no purpose.

Not only is the Commission's proposal unnecessary, but also it would do immense damage. SBC cannot emphasize strongly enough how harmful a blanket federal requirement directing all incumbents to provide "cageless" collocation would be. This form of collocation would permit competitors to install their own equipment anywhere in a central office, making it impossible to isolate the CLECs' equipment from the incumbent's own and giving outside employees and subcontractors access to the incumbent's facilities. It may be true that U S WEST has been able to reach workable cageless collocation arrangements with some CLECs for some of its central offices. But it is preposterous to presume that these arrangements can — or should — be generally implemented.

Cageless collocation will create enormous potential for accidental or deliberate damage to the incumbent's central office equipment. SBC cannot ensure that CLEC employees are well-trained. Indeed, the competing carrier itself may have difficulty making sure its maintenance is

performed by competent personnel, since many CLECs choose to hire subcontractors to maintain their equipment. In any event, even well-trained employees will make mistakes. Simply by bumping into a switch, a technician can cause thousands of dollars in damage and interrupt service to wide areas. Security measures such as cameras, computerized tracking systems, or alarms will not prevent such incidents — they can only serve to identify the culprit after the disaster has happened. Nor is escorting employees while they are on an incumbent's premises a solution. The manpower needed to escort the employees or subcontractors of dozens of CLECs in the hundreds of central offices in SBC's territory would be immense. *See* AT&T Comments at 87 (“[e]scorted access roughly doubles the collocater's costs of operation”); GTE Comments at 69.

These risks are not imaginary. Even under interconnection agreements that do not permit cageless collocation, breaches of SBC's network security have occurred. SBC routinely experiences problems with CLECs' employees and contractors leaving doors propped open, deactivating security alarms, and permitting unauthorized personnel into secured areas.²⁰ Network security would be compromised still further should the Commission implement its proposed directive regarding cageless collocation.

The following recent examples, all of which involve outside employees servicing CLEC equipment interconnected with SBC's networks, illustrate the point. First, on September 19 and 20, 1998, subcontractors permitted children to accompany them while they worked in one of Southwestern Bell's Fort Worth central offices. The children roamed the office, and there was

²⁰Often, the unauthorized persons obtain access to the secured facilities by using a swipe card or entry code issued to someone else or by accompanying an authorized person.

evidence that they had been in several parts of the building where collocators, let alone unsupervised children, were not allowed. Also in Fort Worth, in the late spring of 1998, a subcontractor was discovered in a CLEC's collocation cage cutting steel with a bandsaw; the steel dust could have affected the working service of the competing carrier in the adjacent cage. Although the subcontractor was told his conduct was impermissible, he was found using a bandsaw in the same cage the next day.

In Dallas, in July 1998, a competing carrier's employees were repeatedly asked to remove trash that created a fire hazard from their cage. The trash was not removed until their supervisors had been informed. Another fire hazard was noted on October 8, 1998, when Pacific Bell employees discovered that a Pacific Bell fire extinguisher had been removed from its dedicated location and locked inside a CLEC's cage. And on September 2, 1998, in Anaheim, California, a CLEC technician working at a Pacific Bell central office inappropriately connected the CLEC's terminals on the POT bay in the collocation area to the Pacific Bell side of the POT bay. Apparently, he was trying to perform testing not allowed by the interconnection agreement between the parties (the CLEC has elected not to place test terminals in its own collocation cages). Pacific Bell technicians and supervisors discovered his activity, and the cross-over connection was removed. The next day, however, the Pacific Bell supervisor again observed the improper connection, apparently made by the same technician. If his conduct had gone undetected, it could have set off alarms, caused unnecessary dispatches, and most importantly, interfered with Pacific Bell's customers' services.

Competing local exchange carriers have been quick to acknowledge the risks of cageless collocation when the integrity of *their* equipment is on the line. In California, a number of

carriers rejected Pacific Bell's proposal that they collocate their equipment in a common, shared space, complaining that other carriers' technicians could damage their equipment. Another carrier that did elect to collocate its equipment in a shared space addressed these concerns by placing its equipment within a secured cabinet, thereby preventing other carriers from accessing its facilities. These actions reflect the CLECs' recognition that cageless collocation puts their equipment at an unacceptably high risk of damage.

Indeed, in its comments, MCI expressly recognizes the security risks presented by cageless collocation. The preventive measures that it suggests will solve these problems, however, address only the concerns of collocators. MCI Comments at 59. For example, MCI contends that "CLEC assets and equipment should be enclosed or secured in cabinets, including the operating racks, spares, power feeds, and cable conduits," in order to protect their equipment from other carriers. *Id.* Incumbents, of course, have no such luxury. Their central office equipment configurations, in which equipment and facilities are scattered (often over multi-story buildings), do not lend themselves to such security measures.

In its *Local Competition Order*, the Commission recognized that its rules regarding collocation must balance incumbent carriers' "legitimate security concerns about having competitors' personnel on their premises" against competing carriers' collocation needs. 11 FCC Rcd at 15803 [¶ 598]. The Commission should not now ignore this balancing approach. No party to this proceeding has shown that there is any need for a rule establishing inflexible national standards for "alternative collocation arrangements," including cageless collocation. Nor has any party established that, as a general matter, incumbents will be able to maintain the integrity of their networks under the proposed requirements. Finally, the statute contemplates

that, if physical collocation is not practical, then virtual collocation is the prescribed remedy. *See* 47 U.S.C. § 251(c)(6). In light of these considerations, the Commission should leave it to the State commissions to determine, on a case-by-case basis, the types of collocation arrangements that may be appropriate for a particular situation.

B. Local Loop Requirements

SBC recognizes that it must provide competitors that wish to provide advanced services using SBC's network with unbundled access to those local loops that are capable of providing advanced services. And it acknowledges that, in order to market and sell their services, competing carriers will need certain information about those loops, which SBC will make available. But other principles are equally clear. First, an incumbent has no obligation to condition its loops to meet competitors' specifications or to assemble loop information that it does not already gather to support its own retail services. Second, an incumbent must be able to manage its network in a way that protects the network's integrity and ensures that a competitor's new service or technology does not interfere with existing services offered over other loops. Finally, requiring incumbents to unbundle the spectrum on their loops will not advance competition, as the Commission has previously recognized in an analogous context. The Commission's rules regarding local loop requirements should reflect these considerations.

1. The Commission may not require incumbent carriers to condition loops, nor may it direct incumbents to assemble loop information that it does not already assemble to support its own retail services

The Commission's proposed requirements regarding the loop information that an incumbent must provide a requesting carrier rest on a faulty premise. In the *Advanced Services NPRM*, the Commission takes as given that "incumbent LECs must 'take affirmative steps to

condition existing loop facilities to enable requesting carriers to provide services not currently provided over such facilities.’” *Advanced Services NPRM* ¶ 152. In the Commission’s view, if a carrier wants an unbundled loop for the provision of ADSL service, “free of loading coils, bridged taps, and other electronic impedances, the incumbent must condition the loop to those specifications . . . [and] may not deny such a request on the ground that it does not itself offer advanced services over the loop.” *Id.*

To facilitate competitors’ ability to obtain conditioned loops, the Commission proposes that incumbents be required, upon demand, to collect and provide detailed information about their loops, even if they do not collect that information for themselves. *Id.* Commenters’ proposals go even further. AT&T, for example, asserts that the Commission should adopt definitions for basic loops, xDSL capable loops, and xDSL equipped loops. AT&T Comments at 45. It contends that these three definitions are “necessary to permit entrants to obtain the loops they need.” *Id.* at 48. “[I]f an ILEC has a basic loop, the entrant should be able to: (i) lease that loop in order to offer voice-grade service, or (ii) lease the loop and then have the ILEC condition it to support advanced services.” *Id.*; *see also* MCI Comments at 64 (recommending that the Commission order incumbents to complete a “comprehensive and detailed survey of existing loops for many years”).

The *Advanced Services NPRM*’s and commenters’ notion that incumbent carriers must “condition” loops for requesting carriers, and that incumbents must take steps to gather detailed technical information to satisfy this “obligation” is flat wrong. As SBC and Bell Atlantic have demonstrated in their Petitions for Reconsideration of the Commission’s recent *Advanced Services Order*, the order’s loop-conditioning requirement directly violates the Eighth Circuit’s

ruling that the Commission may not require incumbents to provide superior quality access to network elements upon demand and that section 251(c)(3) “requires unbundled access only to an incumbent LEC’s *existing* network.” *Iowa Utils. Bd.*, 120 F.3d at 812-813. The Commission is not free to ignore this holding. “After a court has spoken, the FCC is bound to follow that court’s mandate, because the FCC is not a court nor is it equal to [a] court in matters of statutory interpretation.” *Iowa Utils. Bd. v. FCC*, 135 F.3d 535, 540 (8th Cir. 1998) (internal quotation marks omitted), *petition for cert. pending*, No. 97-1519.

The Eighth Circuit’s decision means that the Commission may not require incumbents to supply CLECs with conditioned loops, nor may it require them to compile mountains of information about local loop conditions or the ability of a given loop to handle advanced services, if the incumbent does not presently collect such information for itself. Of course, SBC will provide requesting carriers with the information it collects for its own purposes. Moreover, upon request, SBC will investigate its network to determine whether a proposed technology would be compatible with existing loops serving a proposed location, and it will provide the results of that investigation to the requesting carrier.

Even if the Commission had the authority to require incumbents to condition their loops (which it does not), it is simply not possible, as a practical matter, for an incumbent to make available loops that meet the demands of all requesting carriers. Not every loop is capable of supporting all types of services, either because the proposed service would cause unacceptable interference with other services provided using the same binder group or because of the loop’s physical properties. It is possible that in some cases these physical limitations could be

remedied, but at an exorbitantly high cost. For spectral interference, the only solution may be installing new facilities or waiting until the incompatible services in the binder group have been disconnected.

Likewise, compiling the information required for detailed loop qualification and spectrum management would require extensive research of the loop and surrounding binder groups. Typically, this information is available for designed circuits and ISDN lines, but not for POTS or spare lines. Thus, even assuming that the Commission had the authority to order incumbents to compile information regarding local loop conditions or the ability of a given loop to handle advanced services, such an effort would be unreasonably time-consuming and costly to perform. Indeed, in past years, SBC has undertaken similar projects, but has been forced to drop them because of the necessary time and expense. SBC is currently investigating whether there are less costly methods of loop qualification.

2. The Commission should adopt a standards-driven approach to spectrum management rules that allows incumbents to protect the integrity of their networks and avoids disruption of existing services

Virtually all the commenters, including SBC, agree that the offering of advanced services over local loops makes proper spectrum management critical. When advanced services are provided over separate but adjacent loops within the same or adjacent binder group, the signals of two different services are susceptible to "crosstalk," which, as the Commission notes, "can limit service performance." *Advanced Services NPRM* ¶¶ 159-160. In order to ensure that a new service or technology does not interfere with services on other loops, there must be some process for determining whether the interference caused by that new service or technology falls within acceptable limits.

SBC also agrees with the Commission and most other commenters that industry standards provide an appropriate basis for national spectrum management requirements. The American National Standards Institute (“ANSI”), a neutral industry group, is in the course of developing such standards. SBC is designing power spectral density (“PSD”) masks that will constrain the crosstalk impact of non-standard equipment/technology to the confines of the technologies covered in the relevant ANSI standards or technical reports, thereby ensuring that the impact of these technologies can be managed. SBC believes that the ANSI standards will set appropriate guidelines for loop spectrum management.

The Commission must recognize, however, that advanced services technology is evolving so quickly that requirements promulgated by standards-setting bodies may not cover every new development. Consequently, any carrier that wishes to purchase an xDSL capable loop from an incumbent must identify the characteristics of the technology it intends to deploy, the type of loop over which it intends to use the technology (assuming there is an appropriate loop available), the power spectral density mask to which the technology must conform, and the data rate of the proposed service.

In addition, to make sure that new technology is compliant with the national standards and compatible with their networks, incumbents must have the ability themselves to perform any additional testing or require that testing be performed by an approved third-party laboratory. As the Commission recognized in its *Local Competition Order*, “[e]ach carrier must be able to retain responsibility for the management, control, and performance of its own network.” 11 FCC Rcd at 15605-06 [¶ 203]. Thus, an incumbent must be free to conduct, in advance, whatever testing is necessary to assure that the integrity of its network is not compromised. Remedying an

interference after it is discovered is not an acceptable solution since most testing to isolate and repair trouble from crosstalk or other interference is intrusive in nature. At the very least, such testing entails a temporary discontinuance of service on that loop and, in some cases, on other loops in the same and adjacent binder groups. The limitations of existing technology and test equipment means that these service interruptions could be frequent and prolonged, involving multiple dispatches. Moreover, service interruptions would not be limited to the incumbent's customers and services, but would affect all services provided over loops in the same and adjacent binder groups, even those offered by a CLEC. Of course, an incumbent must be free not only to conduct advance testing, but also to perform whatever testing is needed at any time it has reason to suspect a loop is harming its network.

AT&T proposes that, pending development of industry standards, the Commission impose three interim requirements on incumbent carriers. Specifically, AT&T would like incumbents (1) to publish "detailed" spectrum management policies, annotated with the sources of and justifications for those policies; (2) "to provide CLECs with detailed information about the advanced services that they offer, especially the loops, loop characteristics, equipment, and spectrum management standards applied"; and (3) "to disclose periodically, for each binder, every rejection of, or condition imposed on, an entrant's provision of data services, together with the reason for the rejection or condition, the number of loops in that binder that the incumbent or its affiliate use to provide data services, and the service initiation date for each such loop."

AT&T Comments at 61.

SBC does not object to the substance of these recommendations. SBC will publish spectrum management policies, which will be based on national standards where available. If

national standards are unavailable for a given technology, SBC will define interim requirements through its technical publications, and it will notify the appropriate ANSI standards-setting body of the need for consideration of this technology. Once this technology is included in the standards, SBC will bring its policies into compliance, if necessary. In addition, SBC will disclose materials connected with its network operations procedures and will provide flow charts of the system that it uses or will use to perform loop qualification.

As for AT&T's second recommendation, information regarding an incumbent's advanced services is already available in the incumbent's tariffs, as well as in its interconnection agreements. Competing carriers also have access to advanced designs through SBC's "bona fide request" and "individual case basis" processes, with which they should be familiar. Finally, with respect to AT&T's third proposal, all information that SBC uses to qualify loops and manage its spectrum for retail services will be available to competing carriers. At some point in the future, additional information and tracking data may become available, as operating systems to support loop qualification and spectrum management are developed.

In short, SBC recognizes that competing carriers will need loop information in order to market and sell their services, and it will give CLECs access to such information. In addition, however, an incumbent has a responsibility to protect its network and its resident users, and it must be able to implement a process of ensuring that a new service or technology does not interfere with services on other loops. The Commission's rules must balance these competing concerns.

3. The Commission's spectrum unbundling proposal is economically inefficient and impractical

In its *Advanced Services NPRM*, the Commission asked for comments on a range of new unbundling requirements, including whether it should require incumbent carriers to unbundle the "spectrum" within existing local loops. *Advanced Services NPRM* ¶ 162. Spectrum unbundling would permit competitors to buy different transmission capacities, or "channels," within existing loops. For example, a competitor might choose to use the loop only to provide advanced data services, leaving it to the incumbent to continue providing basic voice service over the same loop. The transmission capacity of a single telephone wire pair could thus end up occupied by two or more providers of service to the same home. The Commission should not require incumbents to unbundle a loop's spectrum. The proposal will not further competition; nor, as a practical matter, is it feasible.

Incumbent carriers are already required to provide competitors with access to the same loops used by the incumbents themselves. With assured rights to unbundled loops, and the right to connect their own electronics to these loops, competitors will have precisely the same ability as incumbents to provide high-speed digital services over existing loops.

Going still further and demanding that incumbents unbundle the spectrum on their loops will not enhance competition. Indeed, the Commission has previously drawn this conclusion in a directly analogous context. In 1996, some parties to the *Local Competition* proceeding urged the Commission to subdivide a loop's spectrum on a call-by-call basis, depending on whether the loop was used for interexchange or local service, so that a loop element could be "purchase[d] . . . solely for purposes of providing interexchange service." *Local Competition Order*, 11 FCC Rcd

at 15693 [¶ 385]. The Commission declined to require unbundling at that level. A loop element should be defined "in terms of the facility itself," rather than by functionality. *Id.* By giving "exclusive control over network facilities dedicated to particular end users," local competitors would retain "maximum flexibility to offer new services." *Id.*²¹

The Commission's policy is grounded in sound economic logic. The local loop is a fixed-cost asset. This type of asset is used most efficiently when it is used to the maximum extent possible, which maximizes profits. Thus, just as an airline seeks to price its tickets so that its planes fly with the fewest possible empty seats, so too will a carrier try to price its services so that its loops' transmission capacity does not lie idle. But this pricing process can take place only if the fixed-cost asset remains within the economic control of a single entity. An airline will not operate most efficiently if it is required to sell some number of seats on each flight to resellers, at federally prescribed prices. In just the same way, a directive that the owner of a loop subdivide that loop's capacity among multiple providers will inevitably undermine market forces.

In addition, spectrum unbundling presents difficulties that are insurmountable, given the current state of technology. For example, SBC has at present no idea how properly to provision equipment compatible with all existing equipment on a spectrally unbundled line, how to time the installation of different services on the loop, or how to handle the problem of multiple

²¹The Commission and state regulators have similarly refused to extend unbundling mandates into the domain of inside wiring or customer premises equipment. Neither CPE nor inside wiring is categorized as an unbundled network element by either state or federal regulators. To the contrary, the Commission affirmatively prohibits LECs from tariffing CPE and "complex" inside wiring at the federal or state level. *See* Memorandum Opinion and Order, *Detariffing the Installation and Maintenance of Inside Wiring*, 1 FCC Rcd 1190 (1986); Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 388 (1980).

customers receiving different services on the same loop. Certainly, SBC's existing systems are not adequate to such tasks. In addition, maintaining one service offered over a spectrally unbundled loop will be next to impossible without interrupting other services offered over that same loop, especially during installation or maintenance problems. Billing is still another unanswered question.

In addition, the technical and administrative costs of managing loop spectrum, to prevent "crosstalk" and guard against other harms to the network, will increase exponentially if different service providers end up occupying different virtual channels on the same loop. As discussed above, the Commission has already recognized that the unbundling of loops in itself creates the potential for interference disputes among wireline competitors. *See* pp. 34-37. Interference problems within a single, multi-tenant loop are certain to be far more common and intractable. The costs of resolving these issues will rise sharply, as will the time it takes to do so. *See* SBC Comments at 39-41.

The CLECs that support spectrum unbundling address none of these issues in their comments. ICG, for example, states simply that it "supports the right of two different service providers to offer services over the same loop," ICG Comments at 30, and Covad Communications endorses spectrum unbundling based solely on the outlandish claim that the Act "requires that CLECs be given the opportunity to use all of the features, functions and capabilities of the existing network infrastructure in any manner to provide any service," Covad Comments at 50. Notably, the interexchange carriers and CLECs that have given any thought to the matter have reached the same conclusion as SBC — spectrum unbundling is not consistent with the procompetitive policies of the 1996 Act. *See, e.g.,* AT&T Comments at 63-64.

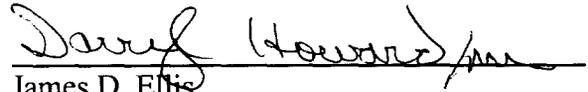
CONCLUSION

SBC urges the Commission to reconsider its regulatory approach to an incumbent's provision of advanced services. Incumbents hold no competitive edge in the market for advanced services. Consequently, instead of requiring them to set up separate affiliates to offer such services, the Commission should leave incumbents free to provide advanced services on an integrated basis, free from section 251(c)'s constraints. If the Commission nevertheless decides to establish requirements for the provision of advanced services by separate affiliates, it should significantly relax the scheme set forth in its *Advanced Services NPRM*. In no event should the Commission adopt the additional, even more burdensome, restrictions on the relationship between the incumbent and its affiliate recommended by the incumbents' competitors, which are merely counterproductive attempts to keep incumbents out of the advanced services business. Their proposals serve only these commenters' narrow business interests and are utterly inconsistent with section 706's goal of making advanced services available to all Americans.

The Commission should not modify its collocation rules. Its proposal to permit competing carriers to collocate equipment that includes switching functionality directly conflicts with the 1996 Act, which permits collocation only of that equipment that is "necessary" for "interconnection or access to unbundled network elements." 47 U.S.C. § 251(c)(6). In addition, it should not promulgate national standards regarding so-called "alternative collocation arrangements." No commenter has demonstrated a need for such sweeping modifications to the existing rules, and the Commission's proposal that all incumbents provide "cageless" collocation would unjustifiably jeopardize the integrity of their networks.

Finally, any rules the Commission adopts regarding loop requirements should reflect the principles that the Commission may not direct incumbents to condition their loops to meet competitors' specifications or to assemble loop information that they do not already gather to support their own retail services and that an incumbent must be able to manage its network in a way that protects the network's integrity and ensures that competitors' new services or technologies do not interfere with existing services offered over other loops. The Commission should also recognize that spectrum unbundling requirements will not advance competition.

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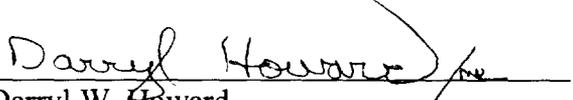
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October 16, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of October, 1998, I caused a copy of the Reply Comments in Response to the Notice of Proposed Rulemaking of SBC Communications Inc., Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell, to be served on the individuals on the attached service list by first-class mail.


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