Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of	)	
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
and	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98

I. INTRODUCTION

By their attorneys and pursuant to the *Second Further Notice of Proposed Rulemaking* in CC Docket No. 98-147, and the *Fifth Further Notice of Proposed Rulemaking* in CC Docket No. 96-98[1] Arbros Communications, Inc., the Association for Local Telecommunications Services ("ALTS"), the Competitive Telecommunications Association ("CompTel"), e.spire Communications, Inc., FairPoint Communications Solutions, Inc., Intermedia Communications Inc., Jato Communications Corp., Metromedia Fiber Network, Inc., KMC Telecom, Inc., NewSouth Communications, Inc., and Pathnet Communications (hereinafter the "Joint Commenters") hereby respectfully submit these comments. The Joint Commenters represent the interests of a wide range of CLEC deployment strategies, and include "fiber based" CLECs, data CLECs, wholesale CLECs, a competitive provider of interoffice

[1] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket 98-147, Order on Reconsideration ("*Order*") and Second Further Notice of Proposed Rulemaking ("*Second Further Notice*"), *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Fifth Further Notice of Proposed Rulemaking ("*Fifth FNPRM*") (rel. Aug. 10, 2000).

transport, as well as the two leading trade associations representing the CLEC industry. ALTS is a leading national trade association representing over 200 facilities-based competitive local exchange carriers ("CLECs"). CompTel is a leading industry association over 350 competitive telecommunications companies and their suppliers providing local, long distance, international, and enhanced services nationwide.

The ground-breaking rules adopted by the Commission in its *Advanced Services First Report and Order*[2] have, since their adoption in March 1999, spurred the development of competition in the advanced services market. Indeed, the Commission's most recent report regarding the deployment of advanced services indicated that at the end of 1999 the deployment of advanced services to residential end-users had increased by three-fold over the year before.[3] There than be little doubt that the massive rollout of advanced services to American consumers cited by the Commission in the *Advanced Telecommunications Capability Second Report* is due in large part to the rules promulgated by the Commission in the *Advanced Services First Report and Order*. There, the Commission took dramatic and essential steps to address anti-competitive incumbent local exchange carrier ("ILEC") behavior, which included delaying collocation, larding the collocation process with unnecessary costs, and imposing unreasonable space

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2 *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 4761 (1999) ("*Advanced Services First Report and Order*"), *aff'd in part and remanded in part sub nom. GTE Service Corp. v. FCC*, 205 F. 3d 416 (D.C. Cir. 2000) (*GTE v. FCC*).

3 *See In the Matter of 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 Section 706 of the Telecommunications Act of 1996*, CC Docket 98-146, Second Report, ¶ 8 (rel. Aug. 21, 2000) ("*Advanced Telecommunications Capability Second Report*").

restrictions upon competitors.[4] The rules promulgated by the Commission in the *Advanced Services First Report and Order*, consistent with Section 251(c)(6)[5] of the Communications Act of 1934, as amended (the "Act") by the Telecommunications Act of 1996 (the "1996 Act"),[6] imposed, among other things, a statutory duty on ILECs to allow the physical collocation of multifunctional equipment, and allowed CLECs to interconnect their equipment with other collocated carriers through cross-connections. These rules were necessary to achieve the pro-competitive goals of the Act, in fact, were cited by the Commission in the *Advanced Telecommunications Capability Second Report* as one of the "*significant actions*" taken by the Commission to open "bottlenecks in the market" and "encourage the deployment of [advanced] service[s] to underserved areas."[7]

The significance, indeed, the fundamental necessity, of the collocation rules promulgated by the Commission in the *Advanced Services First Report and Order* cannot be overstated. Accordingly, for consumers to continue to realize the maximum potential benefit associated with advanced services deployment, the Commission should revisit and modify the collocation rules established in the *Advanced Services First Report and Order* as proposed herein. The Commission should also adopt new collocation and unbundling rules or clarify existing rules in order to remove as-yet-unaddressed barriers to entry and further level the competitive playing field. Modification of the rules, as detailed in these Comments, would serve to reduce drastically the type of unnecessary litigation that has hampered the development of local competition over

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4 *Second Further Notice*, ¶ 2.

5 47 U.S.C. § 251(c)(6).

6 Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* ("1996 Act").

7 *Advanced Telecommunications Capability Second Report*, ¶ 251 (emphasis added).

the last four years and allow the deployment of advanced services to continue unimpeded. At bottom, the Commission should approach this remand proceeding as a means of building upon the solid foundation it already has established.

II. BACKGROUND

A. THE COMMISSION'S COLLOCATION RULES

In 1993 the Commission first required certain LECs to provide physical collocation in its *Expanded Interconnection* proceeding.[8] On review, the D.C. Circuit in 1994 found that the Commission lacked the necessary statutory authority under Section 201(a)[9] of the Act to order physical collocation.[10] As the court in *GTE v. FCC* summarized, "absent a more definite congressional authorization, the court was unwilling to defer to the Commission's unduly broad reading of § 201(a)."[11] The court remanded the Commission's *Expanded Interconnection* decision to the Commission.[12]

On remand, the Commission adopted rules designed "to ensure local telephone companies offer expanded interconnection for both special access and switched transport

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8 *Expanded Interconnection with Local Telephone Company Facilities, First Report and Order*, 7 FCC Rcd 7369 (1992)(*Special Access Order*), *vacated in part and remanded, Bell Atlantic*, 24 F. 3d 1441 (1994); *First Reconsideration*, 8 FCC Rcd 127 (1993); *vacated in part and remanded, Bell Atlantic*, 24 F. 3d 1441; *Second Reconsideration*, 8 FCC Rcd 7341 (1993); *Second Report and Order*, 8 FCC Rcd 7374 (1993) (*Switched Transport Order*), *vacated in part and remanded, Bell Atlantic Telephone Cos., v. FCC*, 24 F. 3d 1441; *Remand Order*, 9 FCC Rcd 5154 (1994) (*Virtual Collocation Order*), *remanded for consideration of 1996 Act, Pacific Bell, et al. v. FCC*, 81 F. 3d 1147 (1996) (collectively referred to as *Expanded Interconnection*).

9 *See* 47 U.S.C. § 201(a).

10 *Bell Atlantic Telephone Companies v. F.C.C.*, 24 F. 3d 1441, 1445-46 (D.C. Cir. 1994) (*BA v. FCC*).

11 *GTE Service Corp. v. FCC*, 205 F. 3d 416, 419 (D.C. Cir. 2000)(*GTE v. FCC*).

12 *BA v. FCC*, 24 F. 3d at 1445-46.

through . . . virtual collocation."[13] The *Remand Order* also was challenged. But, while the challenge was pending, the 1996 Act was enacted. The 1996 Act included a provision, Section 251(c)(6), that in combination with the Commission's general rulemaking authority, provided the Commission with the specific statutory authority to require physical collocation that was lacking in Section 201(a). Rather than rule on the Commission's old rules, the D.C. Circuit sent the *Remand Order* to the Commission so it could consider the impact of the recently-enacted 1996 Act.[14]

As part of its watershed *Local Competition First Report and Order*, the Commission established the groundwork for competition by establishing rules for obtaining interconnection to ILEC networks and access to UNEs, thereby promoting the objectives of the ILEC obligations under Sections 251(c)(2) (interconnection) and 251(c)(3) (access to unbundled network elements).[15] In the *Local Competition First Report and Order*, the Commission recognized that the 1996 Act allowed several forms of interconnection and access, of which physical collocation was only one.[16] The Commission found that in order for the procompetitive purposes of the Act to be fulfilled, carriers must be able to, at their option, take advantage of *each* of them:

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13 *Remand Order*, 9 FCC Rcd at 5156, ¶ 3.

14 *Pacific Bell v. FCC*, 81 F. 3d 1147; *Implementation of the Local Telecommunications Provisions in the 1996 Act,* CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15784 ¶ 1359 (1996) (*"Local Competition First Report and Order"*).

15 *Local Competition First Report and Order*, 11 FCC Rcd at 15776-811, ¶¶ 542-617.

16 *Local Competition First Report and Order*, 11 FCC Rcd at 15779-81, ¶ 549-53. The Commission rejected the ILEC suggested notion that section 251(c)(6) should limit interconnection to points where only collocation is possible. *Id.* at 15779, ¶ 550.

> under Sections 251(c)(2) and 251(c)(3), any requesting carrier may choose *any* method of technically feasible interconnection or access to unbundled elements at a particular point.[17]

The Commission also found that the new legislation shored up the deficiencies that the D.C. Circuit previously had found existed in the Act with respect to its authority to order collocation: "Section 251(c)(6) provides the Commission with explicit authority to mandate physical collocation as a method of providing interconnection or access to unbundled elements."[18] The Commission concluded that "in enacting Section 251(c)(6), Congress intended to expand the interconnection choices available to requesting carriers, not to restrict them."[19] Moreover, the Commission found that the 1996 Act "specifically directed incumbent LECs to provide physical collocation for interconnection and access to unbundled network elements, absent technical or space constraints pursuant to Section 251(c)(6) of the Communications Act."[20]

In the *Local Competition First Report and Order* the Commission addressed for the first time the issue of what equipment competitors must be allowed to collocate in an ILEC office pursuant to the 1996 Act. The Commission concluded that Section 251(c)(6) obligated ILECs to allow physical collocation of:

> equipment used for the purpose of interconnection or access to unbundled network elements. . . . A strict reading of the term "necessary" in these circumstances could allow LECs to avoid

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17 *Id.* at 15779, ¶ 549.

18 *Id.* at 15779, ¶ 551. The D.C. Circuit affirmed this conclusion by finding that "[t]he 1996 Act completely revamped the statutory landscape by providing explicit congressional authorization for physical collocation." *GTE v. FCC* 205 F. 3d at 419.

19 *Local Competition First Report and Order*, 11 FCC Rcd at 15779, ¶¶ 550-51.

20 *Id.*, at 15785-86, ¶ 561 (citing 47 U.S.C. 251(c)(6)).

> collocating the equipment of the interconnectors' choosing, thus undermining the pro-competitive purposes of the 1996 Act.[21]

It is interesting to note that none of the ILECs challenged the Commission's decisions regarding collocation when they appealed the *Local Competition First Report and Order*.

Unfortunately, the ILECs continued to forestall the development of meaningful competition by making it difficult for competitors to obtain physical collocation. Nevertheless, through dogged effort and the realization of end users that competitors could provide valuable services, competition has made initial inroads in a number of markets. As a result, competitors have begun to offer new and innovative services previously not offered by the ILECs. To counter this development, the ILECs instituted additional roadblocks to prevent the proliferation of new, innovative telecommunications including those known as advanced services.

In its March 31, 1999, *Advanced Services First Report and Order* the Commission realized that it was "critical that the marketplace for [advanced] services be conducive to investment, innovation, and meeting the needs of consumers."[22] The Commission committed itself to "removing barriers to competition" so that competitors could effectively compete with the ILECs.[23] To that end, the Commission adopted several measures designed to enforce its earlier rules and promote competition in the advanced services market.[24] The goal was to "create incentives for providers of advanced services to innovate and to develop and

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21 *Local Competition First Report and Order*, at 15794 ¶ 579 (citing *National Railroad Passenger Corporation v. Boston and Maine Corp.*, 503 U.S. 407, 417 (1992)).

22 *Advanced Services First Report and Order*, ¶ 2.

23 *Id.* at 4763, ¶ 3.

24 *Id.* at 4763, ¶ 4. It is important to note that the Commission concluded "that the pro-competitive provisions of the 1996 Act are technology-neutral and thus apply equally to advanced services and to circuit-switched voice services." *Id.* at 4769 ¶ 15. Therefore although the *Advanced Services First Report and Order* might appear to only deal with (continued...)

deploy new technologies and services on a more expeditious basis,"[25] by reducing the costs and delays associated with collocating in an ILEC's central office thereby promoting lower prices and increased choices for consumers of advanced services. [26]

In order to accomplish these goals, the Commission took several steps. The Commission removed the ability of ILECs to create artificial space limitations by expanding the types of physical collocation competitors could obtain from ILECs, requiring ILECs to offer shared caged and cageless collocation.[27] The Commission expanded the space for collocation by requiring ILECs to offer collocation in any unused space as well as in adjacent controlled environmental vaults or similar structures.[28] The Commission closed some of the loopholes ILECs were using to thwart collocation, *e.g.*, security issues, safety requirements.[29] The Commission also clarified that its rules require ILECs "to permit collocation of all equipment that is necessary for interconnection or access to unbundled network elements, regardless of whether such equipment includes a switching functionality, provides enhanced services capabilities, or offers other functionalities."[30]

(...continued)
advanced services, the requirements of the Commission's order apply to the facilities used and not the services being offered.

25 *Id.*

26 *Id.* at 4764, ¶ 6, 4770 ¶ 18. The Commission steps, among other things, included requiring ILECs to: make shared and cageless collocation available; permit collocation in CEVs or similar structures when collocation is exhausted at a particular LEC location; adopt reasonable security measures; apply nondiscriminatory safety requirements on CLEC equipment; allow collocation of CLEC necessary for interconnection and access to UNEs; permit CLEC tours of the entire ILEC office when the CLEC has been denied collocation space; and, remove old, obsolete equipment from their offices.

27 *Id.* at 4784, ¶ 41 (shared collocation cages), 4784-4785 ¶ 42 (cageless collocation).

28 *Id.* at 4788-4789, ¶ 49.

29 *Id.* at 4786-4789, ¶ 45-49 (security), 4780-4782 ¶ 34-36 (safety requirements).

30 *Id.* at 4776-4777 ¶ 28.

In strengthening the collocation requirements first established in the *Local Competition First Report and Order*, the Commission furthered the statutory objectives of Sections 251(c)(2) and 251(c)(3) of the Act. The Commission recognized that:

> At the core of the Act's market-opening provisions is Section 251. In Section 251, Congress sought to open local telecommunications markets to competition by, among other things, reducing economic and operational advantages possessed by incumbents.[31]

Section 251 sets out the three methods Congress envisioned to initiate and promote competition: interconnection, access to UNEs, and resale. Not failing to take an opportunity to delay competition, several ILECs challenged aspects of the Commission's decision strengthening the collocation rules.

1. THE D.C. CIRCUIT'S DECISION

The D.C. Circuit issued its opinion reversing the *Advanced Services First Report and Order* in *GTE v. FCC* on March 19, 2000.[32] The court affirmed the Commission's decisions requiring ILECs to provide shared and cageless collocation, and make available adjacent property for collocation.[33] The court found that cageless collocation was "reasonable and consistent *with the statutory purpose of promoting competition*, without raising the threat of unnecessary takings of LEC property."[34] The Court concluded that it was "hardly surprising that the Commission opted to prohibit LECs from forcing competitors to build cages, particularly

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31 *Id.* at 4768 ¶ 13 (citing Joint State of Managers, S. Conf. Rep. No. 104-230, 104th Cong. 2d (1996)).

32 *GTE v. FCC*, 205 F. 3d 416.

33 *Id.* at 424-25.

34 *Id.* (emphasis added). Specifically, the court found the Commission's decision to require cageless collocation reasonably interpreted section 251(c)(6) because it saved space, reduced costs, recognized that security concerns could be resolved without the necessity of cages, and, in general, promoted competition. *Id.*

given the alternative means available to LECs to ensure the security of their premises."[35] The court also affirmed the Commission's general conclusions regarding the allocation of security costs.[36]

The court, however, vacated and remanded several of the Commission's decisions. The court vacated the Commission's requirement that ILECs allow collocation of equipment "used or useful" for interconnection or access to UNEs, and remanded this determination back to the Commission for further consideration and a better explanation of the Commission's interpretation.[37]

The court also found that the Commission "went too far in giving competitors rights beyond what is reasonably required by § 251(c)(6)" when it decided "that LECs '*must* give competitors the option of collocating equipment *in any unused space* within the incumbent's premises, to the extent technically feasible, and *may not* require competitors to collocate in a room or isolated space separate from the incumbent's own equipment.'"[38] The court found that the Commission failed to give good reasons: (1) why a competitor and not the LEC should choose where to establish physical collocation; (2) why LECs are forbidden from requiring competitors to use separate entrances to access their facilities; and (3) why LECs are forbidden from requiring competitors to use separated or isolated rooms or floors.[39] The court said that

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35 *Id.*

36 *Id.* at 427.

37 *Id.* at 422-24.

38 *Id.* at 425-26 (quoting the *Advanced Services First Report and Order*, ¶ 42 (emphasis added by court)).

39 *GTE v. FCC*, 205 F. 3d at 426.

"[o]n remand, the Commission will have an opportunity to refine its regulatory requirements to tie the rules to the statutory standard."[40]

As explained below, the statute combined with the court's decision almost requires the Commission to reach the same conclusions it reached in the *Local Competition First Report and Order* and *Advanced Services First Report and Order*, albeit with better reasoning to satisfy the deference requirement of a *Chevron* step-two analysis.

III. THE MEANING OF "NECESSARY": THE COMMUNICATIONS ACT OBLIGATES ILECS TO PROVIDE COLLOCATION AS "NECESSARY" TO ACHIEVE THE PURPOSES OF SECTION 251(C)(2) AND ACCESS TO UNES UNDER SECTION 251(C)(3)

A. THE D.C. CIRCUIT DECISION ALLOWS FOR A BROADER INTERPRETATION OF "NECESSARY" IF ADEQUATELY EXPLAINED AND PROPERLY RELATED TO THE STATUTORY PURPOSES

Perhaps the most important issue facing the Commission on remand in this proceeding is the proper interpretation of the term "necessary" found in Section 251(c)(6) of the Act. Equally important is the Commission's explanation justifying that interpretation. The D.C. Circuit concluded that "in some significant respects," the Commission's earlier interpretation of the term "necessary" found no support in the Act, but the Court declined to substitute its own interpretation in deference to the Commission's role as principal interpreter of the Act.[41] Significantly, while the D.C. Circuit upheld the Commission's *Advanced Services First Report and Order* only to the extent that it "merely requires LECs to provide collocation of competitors equipment that is directly related to and thus necessary, required, or indispensable to 'interconnection or access to unbundled network elements,'" the Court also indicated that, with

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40 *Id.*

41 *Id.* at 424.

proper explanation in light of the statute's purposes, a rule that mandated physical collocation more broadly could be justified.[42]

It is crucial to recognize at the outset that terms such as "necessary" and "required" are not limited to a single interpretation as the ILECs are sure to argue. Indeed, in reversing another decision of the D.C. Circuit, the U.S. Supreme Court has observed that the triad of narrow interpretation offered by the D.C. Circuit – "necessary," "required," and "indispensable" – must yield to an agency's alternative definition of "useful or appropriate." [43] In fact, the Supreme Court in *National R.R. Passenger Corp.* interpreted a provision of the Rail Passenger Service Act of 1970 remarkably similar to Section 251(c)(6) in that it provided for the Interstate Commerce Commission to order conveyance of privately owned railroad property to Amtrak in the event negotiations between Amtrak and the owner for the sale of such property failed. The statue in question permitted the conveyance in these circumstances provided that the property was "required for intercity rail passenger service."[44] A strict interpretation of "required," the Supreme Court concluded, would "leave[] little substance to the statutory presumption in favor of Amtrak's need [for property to provide modern, efficient, and economical rail passenger service] and so is in clear tension with that part of the statute."[45]

The Court's directions to the Commission upon remand tacitly acknowledge the difficulty surrounding the interpretation of the ambiguous term "necessary." Although the Court reminded the Commission that on remand it must "operate within the limits of 'the ordinary and

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42 *Id.*

43 *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 112 S.Ct. 1394, 1402 (1992). *See also McCulloch v. Maryland*, 4 L.Ed. 579 (1819) (C.J. Marshall) ("necessary" means "convenient and useful" not merely "most direct and simple").

44 *National R.R. Passenger Corp.*, 112 S. Ct. at 1398; 45 U.S.C. § 562(d).

fair meaning of [the statute's] terms,'"[46] it also recognized that "the disputed terms in § 251(c)(6) are ambiguous in their meanings."[47] Importantly, the Court did not condemn the Commission's interpretation of the term "necessary" outright, but stated that "the FCC *appears* to ignore the statutory reference to 'necessary'"[48] and that "the Collocation Order as presently written *seems* overly broad and disconnected from the statutory purpose enunciated in § 251(c)(6)."[49] On remand, the Court instructed the Commission that the statutory reference to "necessary" must be construed in a fashion that is consistent with the ordinary and fair meaning of the word, *i.e.*, so as to limit "necessary" to that which is required to achieve a desired goal. The [Supreme] Court's admonition seems particularly relevant here where a broader construction of "necessary" under § 251(c)(6) might result in an *unnecessary* taking of private property.[50]

Accordingly, rather than narrowly focus on the semantics of the term "necessary" – which to some extent the D.C. Circuit did - the Commission should first direct its attention to the context of Section 251(c)(6) and the statutory purposes that provision is designed to serve so as to ensure that its interpretation of Section 251(c)(6) is consistent with a reasonable reading of the words of the statute and furthers those purposes.[51]

(...continued)

45 *National R.R. Passenger Corp.*, 112 S. Ct. at 1402.

46 *GTE v. FCC*, 205 F. 3d at 424 (citing *Iowa Utilities Bd.*, 525 U.S. 366, 390 (1999) (remanding the FCC's rule establishing a minimum list of UNEs for failure to give any effort to the "necessary" and "impair" provision of Section 251(d)(2)).

47 *Id.* at 421.

48 *Id.* (emphasis added)

49 *Id.* (emphasis added)

50 *Id.* at 423 (emphasis in original).

51 *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (the "meaning of statutory language, plain or not, depends on context"); *Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 610 (1944) (although a literal reading of a statute can produce a result, it would be arbitrary to examine a phrase ignoring the purpose of the statute).

B. THE PROPER INTERPRETATION OF SECTION 251(C)(6) IS THAT ILECS MUST PROVIDE PHYSICAL COLLOCATION OF EQUIPMENT AS NEEDED TO FURTHER THE PRO-COMPETITIVE PURPOSES OF THE ACT

1. SECTION 251(C)(6) MUST BE INTERPRETED IN LIGHT OF THE STATUTORY PURPOSES OF SECTIONS 251(C)(2) AND 251(C)(3)

The Joint Commenters submit that, interpretation of Section 251(c)(6) in light of the structure of the 1996 Act as a whole, and the context and purposes of Section 251(c) in particular, makes clear that the Commission may and should interpret the ILECs' obligation to provide for collocation under Section 251(c)(6) more broadly than the strict sense of "required or indispensable" would permit. As the D.C. Circuit recognized in *GTE v. FCC*, a central purpose of the 1996 Act is the promotion of competition.[52] If the ILECs under Section 251(c)(6) are obligated only to permit collocation of equipment of a type that meets a minimum physical threshold of interconnection or access to UNEs, that purpose will be frustrated.

More specifically, a strict interpretation of Section 251(c)(6) would create a strong tension with the particular statutory objectives of Sections 251(c)(2)[53] and 251(c)(3).[54] As detailed below, when adopting rules to implement Section 251(c)(6), the Commission is

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52 205 F. 3d at 425.

53 Section 251(c)(2) promotes facilities-based competition by requiring ILECs to provide interconnection with their by other carriers networks for purposes of transmitting or routing telephone exchange service or exchange access. Section 251(c)(2) requires ILECs to provide interconnection "at any technically feasible point within the carrier's network" (251(c)(2)) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. 47 U.S.C. § 251(c)(2)(D). The statute specifically provides that such interconnection must be at least equal in quality to that provided by the LEC *to itself* or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection, *i.e.*, the ILEC must provide nondiscriminatory access to interconnection. 47 U.C.C. § 251(c)(2)(C) (emphasis added).

54 Section 251(c)(3) obligates ILECs to provide requesting carriers access to unbundled network elements in the ILECs network in order to allow requesting carriers to provide telecommunications services of their own choosing. Specifically, Section 251(c)(3) requires such access to be nondiscriminatory, available at any technically feasible point, (continued...)

empowered to require – and ILECs must be obligated to allow – collocation to the extent needed to advance the objectives of these two sections. In this sense, the use of the term "necessary" in Section 251(c)(6) to relate to the stated objectives of Sections 251(c)(2) and 251(c)(3), albeit limited to the context of collocation, is more akin to the use of the term "necessary" in Section 4(i) and 201(b) of the Act, whereby the Commission may take whatever actions are necessary to fulfill the purposes, objectives, and goals of the Act.[55] In the following sense, then, the D.C. Circuit erred in its focus: the inquiry is not whether collocation of a particular type of equipment is necessary to interconnect or access a UNE in some minimalist engineering sense. Rather the challenge is to ascertain what equipment in what types of arrangements must requesting carriers, taken as a whole, have the ability to collocate if the statutory purposes of Sections 251(c)(2) and 251(c)(3) are to be fulfilled.

The close link between Section 251(c)(6) and Sections 251(c)(2) and 251(c)(3) the Joint Commenters urge herein is not novel. Indeed, when the Commission first examined Section 251(c)(6) in its *Local Competition First Report and Order*, it recognized that collocation was merely one of several means by which interconnection and access to UNEs could be achieved.[56] As the Commission recognized in its *Local Competition First Report and Order*, there are several ways to interconnect two networks, such as meet points or interconnection

(...continued)
and provided on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. 47 U.S.C. § 251(c)(3).

55 *See* 47 U.S.C. §§ 154(i), 201(b).

56 11 FCC Rcd at 15779 ¶ 550 ("We are not persuaded that Congress intended to limit interconnection points to location only where collocation is possible.")

trunks, that do not involve collocation.[57] These same methods could also permit a carrier to access the unbundled network element of an ILEC, in essence using the trunks as some sort of super cross-connect.[58] Thus, if, indeed, the inquiry was simply whether collocation is "required" or "indispensable" to interconnect or to access a UNE from the standpoint of network architecture, the answer in many cases arguably might be "no."[59] But the inquiry is not so limited because the statutory purposes of the 1996 Act are not so narrow. The structure of the Act makes clear – and four years of experience has shown – that collocation under 251(c)(6) is a means of implementing interconnection under 251(c)(2) and access to UNEs under 251(c)(3). Any interpretation of the Act must proceed accordingly or there would be little substance to Section 251(c)(6) and the pro-competitive provisions of Section 251 would be undermined.

The purpose of Section 251(c)(6), to further the statutory objectives of Sections 251(c)(2) and 251(c)(3), has previously been recognized by the Commission. As the Commission stated in the *Local Competition First Report and Order*: "both the interconnection and unbundling sections of the Act, *in combination with the collocation obligations imposed by Section 251(c)(6)*, allow competing carriers to choose technically feasible methods of achieving interconnection or access to unbundled network elements."[60] More pointedly, the Commission "conclude[d] that, under Sections 251(c)(2) and 251(c)(3), any requesting carrier may choose *any* method of technically feasible interconnection or access to unbundled elements at a

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57 *Id.* at 15779-82; *see also Bell-Atlantic New York Application for Section 271 Authority*, 15 FCC Rcd 3979, ¶ 66 (1999) (technically feasible networks of interconnection include interconnection trunking, meet point arrangements, and collocation).

58 *Local Competition First Report and Order*, 11 FCC Rcd at 15719-15720, ¶ 444.

59 *See infra* note 73 and accompanying text.

60 11 FCC Rcd at 15588, ¶ 172 (emphasis added).

particular point."[61] In other words, if the objectives of these two sections are to be met, Section 251(c)(6) cannot be interpreted in the strictest sense within the vacuum of only its own terms. Rather, Section 251(c)(6) must be read in the context of Section 251(c) as a whole and to support its pro-competitive goals.

The subservience of Section 251(c)(6) to the objectives of Sections 251(c)(2) and 251(c)(3) is further illustrated by the competitive checklist in Section 271 of the Act of items that Bell operating companies must meet before they are permitted to provide in-region interLATA service. Under the checklist, Bell operating companies are required to provide interconnection and access in accordance with Sections 251(c)(2) and 251(c)(3) of the Act, but the checklist is silent as to any requirement to provide physical collocation.[62] The reason for this is that the Section 251(c)(6) obligation to provide physical and virtual collocation supports and furthers the objectives of Sections 251(c)(2) and 251(c)(3).[63]

2. SECTION 251(C)(6) WAS REQUIRED IN ADDITION TO SECTIONS 251(C)(2) AND 251(C)(3) TO ENSURE THE COMMISSION HAD THE REQUISITE AUTHORITY TO ORDER COLLOCATION

If physical and virtual collocation are only two types out of a greater number of methods of interconnection and access to UNEs of those contemplated by Sections 251(c)(2) and 251(c)(3), a strict interpretation of "necessary" would raise the issue of why Section 251(c)(6)

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61 11 FCC Rcd at 15779, ¶ 549.

62 *See* 47 U.S.C. § 271(c)(2)(B).

63 For example, the Commission when approving the Bell Atlantic New York request for Section 271 Authority stated that "[t]he provision of collocation is an essential prerequisite to demonstrating compliance with item 1 [interconnection under Section 2451(c)(2)] of the competitive checklist." *Bell Atlantic New York Application for Section 271 Authority* 15 FCC Rcd 3979, ¶ 66, (1999). *See also BellSouth (Louisiana) Application for Section 271 Authority*, 15 FCC Rcd 4035, ¶163 (1998)(absence of definite terms and conditions for collocation caused BellSouth to fail item 2 [access to UNEs under Section 251(c)(3)] of the checklist).

was required at all? The answer is straightforward and further illustrates why a narrow reading would be innappropriate. As the Commission recognized in its *Local Competition First Report and Order*, before the 1996 Act, its attempts to require ILECs to offer physical collocation foundered because the Act did not give the Commission specific statutory authority necessary to order what the D.C. Circuit thought would likely be a taking of ILEC property.[64] The Commission found in that *Order* that the question of such authority "largely evaporates" in the context of the 1996 Act, and Section 251(c)(6) in particular.[65] The D.C. Circuit in *GTE v. FCC* agreed.[66] The objective of Section 251(c)(6) is not simply to provide for physical or virtual collocation *per se* when no other method of collocation is available, however, but to promote competition by allowing for collocation that furthers the larger statutory purpose that requesting carriers be able to choose from among the various technically feasible methods of interconnection and access to UNEs.[67]

Stated otherwise, the structure of Section 251 taken as whole inevitably leads to the following conclusions: one, Congress intended that the ILECs permit interconnection and provide access to unbundled network elements; two, Congress, preserving the rulemaking authority of the Commission under Section 201(b), intended the Commission as an expert agency adopt rules and regulation consistent with the Act "as may be necessary in the public interest to

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64 *Local Competition First Report and Order* 11 FCC at 15809 ¶ 613, 15810-11 ¶ 615 (citing *Bell Atlantic v. FCC*, 24 F. 3d 1441 (D.C. Cir. 1994)).

65 *Id.* at 15811, ¶ 616.

66 205 F. 3d at 419-20.

67 *Local Competition First Report and Order*, 11 FCC Rcd at 15779, ¶ 550 (CLECs must be able to choose *any* method of interconnection or access to UNE).

carry out the provisions of [the] Act," including Section 251(c);[68] three, Section 251(c)(6) is intended to further Sections 251(c)(2) interconnection and Section 251(c)(3) unbundling;[69] and four, that absent the need for express statutory authority for physical collocation identified in *Bell Atlantic v. FCC*, Section 251(c)(6) would be mere surplusage relative to Sections 251(c)(2) and 251(c)(3).

In this context, Section 251(c)(6) therefore authorizes the Commission to order physical collocation that the Commission deems necessary to fulfill the requirements of Sections 251(c)(2), interconnection, and 251(c)(3), access to network elements. The inescapable implication of the Commission's reading of the *Bell Atlantic v. FCC* decision is that, without Section 251(c)(6) or similar express statutory authority, it would not be possible for the Commission to impose physical collocation rules and regulations as necessary to ensure that ILECs meet their interconnection and unbundling obligations under Sections 251(c)(2) and (c)(3) of the Act and the pro-competitive purposes of these section.[70] Properly seen, therefore, because collocation is a method both of interconnection and of access to UNEs, Section 251(c)(6) is necessary to ensure that the goals and objectives of Sections 251(c)(2) and 251(c)(3) could be achieved. Concomitantly, Section 251(c)(6), in general, and the term "necessary," in particular,

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68 47 U.S.C. § 201(b). *See also* 47 U.S.C. § 251(i)(Commission's authority under Section 201 preserved). In *AT&T Corp. v. Iowa Utilities Board*, the U.S. Supreme Court recognized that Section 201(b) gave the Commission the authority to adopt rules and regulations to implement the provisions of Sections 251 and 252 of the Act. 525 U.S. at 377-85. That authority extends to the authority to adopt regulations implementing Section 251(c)(6), as well as Sections 251(c)(2) and 251(c)(3) and the pricing provisions of the Act.

69 As the Commission recognized in the *Local Competition First Report and Order and Advanced Services First Report and Order*, collocation is a primary method by which CLECs achieve interconnection and access to unbundled network elements. *See also* 47 C.F.R. §51.321(b).

should be interpreted, in conjunction with the Commission's general rulemaking authority in Section 201(b), as empowering the Commission to require ILECs to permit physical collocation as the Commission deems necessary to achieve the goals of the Act. Accordingly, the Commission should define the provision "physical collocation of equipment necessary for interconnection or access to unbundled network elements" to mean collocation of equipment needed to fulfill the requirements of the sections that define interconnection and access to network elements, Sections 251(c)(2) and (c)(3), respectively.[71] In short, in addition to the more general provisions of Sections (c)(2) and (c)(3) which are sufficient for the Commission to order that non-collocation methods be made available, Section 251(c)(6) is required if collocation is to be among the choices that a CLEC has to interconnect or obtain access to UNEs.

3. THE INTERPRETATION URGED BY THE JOINT COMMENTERS IS CONSISTENT WITH THE D.C. CIRCUIT'S INSTRUCTIONS THAT SOME LIMITING STANDARDS BE APPLIED

Significantly, the interpretation the Joint Commenters urge here takes heed of the D.C. Circuit's admonition that the obligation to allow physical collocation not be unlimited, but related to the statute's purposes.[72] Numerous limitations are inherent in both the interconnection and unbundling provisions of the Act, as well as Section 251(c)(6) itself. First, physical collocation is not an obligation where it is impractical because of space limitations. 47 U.S.C. §251(c)(6). Second, physical collocation is not required where it would be technically infeasible.

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70 *See Local Competition First Report and Order* 11 FCC Rcd at 15809, ¶ 613. *See also BA v. FCC*, 24 F. 3d at 1446-47.

71 The centrality of these objectives to Congressional interest is that the FCC may not forbear from enforcing Sections 251(c)(6) – as well as 251(c) in general – until its "requirements have been fully implemented." 47 U.S.C §10(d).

72 *GTE v. FCC*, 205 F. 3d at 424.

47 U.S.C. §§251(c)(2)(6), 251(c)(3) and 251(c)(6). Third, only telecommunications carriers are entitled to collocation. 47 U.S.C. §§251(c)(2), 251(c)(3), and 251(c)(6). Fourth, where the collocation is to be used for interconnection purposes, such interconnection must be for the transmission and routing of local exchange service or exchange access. 47 U.S.C. §251(c)(2)(A). Fifth, where the collocation is being used to access UNEs, such UNEs must be used for the provision of a telecommunications service. 47 U.S.C. §251(c)(3).

The foregoing standards ensure that physical collocation rules, as advocated herein, will be closely related to the statutory purposes of Sections 251(c)(2) and (3), thereby setting limiting parameters on the definition of "necessary" in particular, and the ILEC obligation in Section 251(c)(6) in general, to satisfy the admonitions of the Supreme Court and D.C. Circuit. Any further restrictions would be impermissible under the plain language of the Act and in insoluble tension with the pro-competitive objectives of the Act and Sections 251(c)(2) and 251(c)(3). The Commission should resist any temptation to add further limitations or restrictions on its interpretation of these key market-opening provisions as they are not warranted under the statute.[73]

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[73] If "necessary" is interpreted in some narrow fashion such as "required or indispensable," such that Section 251(c)(6) applies solely to the equipment types that represent the physical minimum that permit interconnection or access to UNEs, section 251(c)(6) would be rendered meaningless. As the FCC found in the *Local Competition First Report and Order*, collocation *per se* is not absolutely required if the reference to "necessary for interconnection or access to unbundled network elements" in Section 251(c)(6) is limited to some bare bones method of interconnection or access; there are alternative methods for providing interconnection and access, *i.e.*, "meet point" interconnection. Thus, if "necessary" modifies the equipment without which a CLEC could not obtain interconnection or access, as opposed to physical collocation required to meet ILEC obligations imposed by sections 251(c)(2) and (c)(3), than arguably in my circumstances *no* equipment would meet the requirements of section 251(c)(6). As a result, one would be led to the absurd conclusion that collocation for interconnection and access to UNEs is not permitted pursuant to section 251(c)(6) because collocation is not, strictly speaking, indispensable for interconnection or access. If "necessary" were read in this strictest sense, then the obligations of an ILEC to provide for collocation might be

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Four years of CLEC experience with trying to obtain physical collocation underscore that collocation is a vital means of interconnection and access to UNEs if competition is to take hold. The rules of statutory construction require that the Commission give meaning to this provision of the statute consistent with the context and overall purpose of the Act. Because the strict application of the term "necessary" to refer to only that equipment indispensable for interconnection or access to UNEs renders Section 251(c)(6) all but meaningless and will not further these statutory purposes, it would be unreasonable to interpret the term narrowly in the circumstances. Instead, Section 251(c)(6) should be read to authorize physical collocation that the Commission deems required to fulfill the goals of Section 251(c), including the collocation of any equipment without which the Commission concludes that the ILECs cannot satisfy their obligations under Sections 251(c)(2) and (c)(3) and the pro-competitive objectives of the Act cannot be achieved. What that means is discussed more fully below.

C. REQUESTING CARRIERS MUST BE PERMITTED TO COLLOCATE ANY EQUIPMENT THAT THEY INTEND TO USE FOR INTERCONNECTION OR ACCESS TO UNES AND TO UTILIZE ALL FUNCTIONS RELATED TO THESE OPERATIONS

As explained above, ILECs must provide physical collocation to the extent the Commission deems required to further the goals and objectives of Sections 251(c)(2) and 251(c)(3). Previously, in the *Local Competition First Report and Order* and the *Advanced Services First Report and Order*, the Commission required ILECs under Section 251(c)(6) to permit physical collocation of the following types of equipment:

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little more than those applying to all carriers under Section 251(a) – *i.e.*, collocation would be strictly voluntary -- and Section 251(c)(6) would impermissibly be rendered
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- Transmission equipment, including optical terminating equipment, concentration equipment, and multiplexers.[74]

- DSLAMs, routers, ATM multiplexers, remote switching modules and other equipment used to interconnect with an ILEC or to access unbundled network elements for the provision of telecommunication services.[75]

Provided that such collocated equipment is used for such interconnection or access, the *Advanced Services First Report and Order* permitted the collocating carriers to use other functions integrated into such equipment, including switching and enhanced services functionality.[76]

There has been no debate from the ILECs that they must accommodate physical collocation of basic transmission equipment of the sort described in the first bullet above. Indeed, collocation of this type of equipment was expressly required in the *Local Competition First Report and Order*, and the ILECs did not appeal that finding.[77]

The debate revolves around integrated and multifunction equipment that not only provides for direct access to UNEs and/or interconnection, but has other related functionality as well. The regulatory treatment of such equipment is particularly important for the development of competition because modern technology is eradicating the need for separate transmission, multiplexing, switching, and information services equipment, to name a few examples. The Commission has already recognized that equipment integrating multiple functions is more

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meaningless. *See Moskal v. US*, 498 U.S. 103, 109-110 (1990) (there is an interpretive obligation to try to give meaning to all the statutory language).

74 *Local Competition First Report and Order* 11 FCC Rcd at 15794, ¶580.

75 *Advanced Service First Report and Order* 14 FCC Rcd at 4776-4777 ¶28.

76 *Id.* at 4777-4778 ¶29.

77 *See Local Competition First Report and Order*, 11 FCC Rcd at 15799, ¶ 580.

efficient and cost effective. Such equipment also facilitates the provision of a broader range of services.[78]

The Joint Commenters submit that provided the equipment a CLEC seeks to collocate is deployed for purposes of access to UNEs and/or interconnection and meets minimum threshold requirements, such as NEBS Level 1 safety standards,[79] the burden should be on the ILEC to demonstrate that collocation of such equipment should not be allowed. To succeed, ILECs must show that the requested collocation is not technically feasible, is impractical because of space limitations, or violates other bases expressly in the Commission's rules, namely that the collocation of such equipment is not required to "fully implement" the provisions and objectives of Sections 251(c)(2) and 251(c)(3).

Unless such equipment as described above, and equipment that provides similar functionality, is permitted under the rules the Commission adopts in this proceeding, the goals and objectives of Sections 251(c)(2) and 251(c)(3) will be frustrated for several reasons:

First, CLECs will not be able to compete effectively with ILECs because they will either be unable to provide the same services as the ILEC in all cases or the cost of providing services will increase unreasonably, giving ILECs an insurmountable and discriminatory competitive edge. For example, as the Commission recognizes, in order to provide xDSL services, a carrier's DSLAM cannot be located beyond a certain distance from the end user and the equipment must have direct access to the copper loop.[80] In most instances, this

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78 *See Advanced Services First Report and Order*, 14 FCC Rcd at 4775, 4777-4778, ¶¶ 26, 29.

79 *Id.* at 4780-81, ¶¶ 34-35.

80 *See UNE Remand Order*, at 15 FCC Rcd at 3838-3839, ¶313 ("xDSL services generally may not be provisioned over fiber facilities. . . . We agree that if a requesting carrier is unable to install its DSLAM at the remote terminal or obtain spare copper loops

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will require collocation or the CLEC will have to construct its own loop facilities, a requirement Section 251(c)(3) was meant to obviate (subject to the necessary and impair standards of Section 251(d)). Thus, in order to use interconnection or access to UNEs, to compete with ILECs, collocation of certain equipment must be permitted in the ILEC premises.[81]

Notably, the "additional" functionalities being described herein are those the CLEC would have no reason to utilize if the equipment were not also being used for interconnection with the ILEC network or access to UNEs. Thus, for example, integrated switching functionality will act on traffic that is exchanged with the ILEC network (interconnection) or over unbundled loops and/or transport (access to UNEs). Accordingly, such functions in addition to basic transmission functions are, in any reasonable sense of the words, used for interconnection or access to UNEs and their deployment is inextricably related to the purposes of Sections 251(c)(2) and 251(c)(3).[82]

If collocation of modern integrated or multifunction equipment is denied, competitors' costs will increase unnecessarily, denying CLECs a meaningful opportunity to compete. Denying CLECs the ability to collocate such equipment will force CLECs to buy multiple pieces of less efficient, single function equipment, only some of which may be

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necessary to offer the same level of quality for advanced services, the incumbent LEC can effectively deny competitors entry into the packet switching market."). Notably, the decision by the FCC in some circumstances to not make certain advanced service UNEs available, such as packet switching and permanent virtual circuits, was predicated on the ability of CLECs *to collocate* DSLAMs and related multifunction equipment in ILEC premises. *Id.* at 3838-3839, ¶ 313.

81 The need for collocation in the remote terminals of ILECs to provide certain advanced services is discussed more fully below in Section VIII.

82 The D.C. Circuit, in *GTE v. FCC*, referred to "straw man" integrated functionalities such as payroll or data collection unrelated to interconnection or access to UNEs. 205 F. 3d at

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collocated (under such a narrow interpretation), despite the fact that the functions of the integrated equipment all intricately relate to interconnection or access to UNEs. In addition to the expenditures for additional pieces of equipment, a CLEC's associated land and building costs to achieve the same functionality will increase if it cannot collocate integrated or multi-function equipment but must find space both in and outside of ILEC premises for multiple pieces of equipment. The CLEC will also incur the additional costs of unnecessary transport and cross connections between these multiple pieces of equipment. Further, because of these connections, additional points of failure will be needlessly introduced into CLEC network architectures. As the Commission stated when it rejected efforts by the ILECs to require intermediate single point of termination ("SPOT") frames and other arrangements between unbundled elements and collocated equipment, additional points of failure are unnecessary and introduce inefficiencies into the networks of competitors.[83] Moreover, as the D.C. Circuit recognized in *GTE v. FCC*, economic and operational factors such as these are properly considered when ascertaining whether the Commission's rules further the statutory purposes of the Act.[84]

Second, if ILECs are not required to permit collocation of such multifunction equipment, ILECs will be given an enhanced, if not inherent, ability to discriminate against CLECs in violation of Sections 251(c)(2), 251(c)(3), and 251(c)(6) of the Act. Specifically, ILECs will be capable of discriminating because, unlike CLECs, they will be able to install and use the most efficient technology and equipment to access network elements directly. Section

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424. The Joint Commenters are unaware of any desire of CLECs to have such functionalities integrated into collocated equipment.

83 *See Advanced Service Order* 14 FCC Rcd at 4784-4785 ¶ 42.

84 205 F. 3d at 425.

251(c)(3) prohibits ILECs from providing access to UNEs discriminatorily. The Commission recognizes that the nondiscrimination requirement is met only if the elements *and the access to those elements* that CLECs receive are of the same quality as the elements and access thereto that *the ILEC itself enjoys*:[85]

> [T]he phrase "nondiscriminatory access" in Section 251(c)(3) means at least two things: first the quality of an unbundled network element that an incumbent LEC provides, *as well as the access provided to that element,* must be equal between all carriers requesting access to that element; second, where technically feasible, the access and unbundled network element provided by an incumbent LEC must be at least equal in quality to that *which the incumbent LEC provides to itself.*[86]

Moreover, as the Commission noted in the *Local Competition First Report and Order*, "because Section 251(c)(3) includes the terms 'just' and 'reasonable,' this duty encompasses more than the obligation to treat carriers equally."[87] Specifically, Section 251(c)(3) requires that the means of access to unbundled elements, as well as the elements provided, must give carriers a "meaningful opportunity to compete" with the ILEC.[88] As noted above, if CLECs, unlike ILECs, are required to incur the additional and unnecessary equipment, space, and transport costs described above – as well as introduce additional points of failure into their networks — in order to interconnect with ILEC, and access UNEs to provide telecommunication services, they will be denied such a meaningful opportunity to compete.

Similarly, the Commission concluded that the term "discriminatory" as used in Section 251(c)(2) "applies to the terms and conditions [of interconnection] that an incumbent

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85 *Local Competition First Report and Order* 11 FCC Rcd at 15657, ¶ 312.

86 *Id.* (emphases added).

87 *Id.* at 15660, ¶ 315.

88 *Id.*

LEC imposes on third parties *as well as on itself*."[89] The Commission also explained that where the interconnection the ILEC provides is "less efficient than an incumbent LEC provides itself, the incumbent LEC violates the duty to be just and reasonable under Section 251(c)(2)(D)."[90] Where a CLEC is limited to collocating equipment on an ILECs premises that is more costly and less efficient that an ILEC itself can place in those premises, then the collocation provided is discriminatory, unjust, and unreasonable and in violation of Section 251(c)(2).

Significantly, Section 251(c)(6), in a manner fully complementary to Sections 251(c)(2) and (c)(3), also includes the obligations that terms and conditions be just, reasonable, and nondiscriminatory. ILECs have no restrictions on the placement of integrated or multi-function equipment on their premises used to access elements in their network or otherwise interconnect such equipment with existing network configurations. Denying CLECs the same flexibility would be unjust, unreasonable, and discriminatory in violation of Section 251(c)(6).

Third, if the types of equipment that can be collocated are defined to exclude those which integrate functions that are not in the strictest "stand alone" sense absolutely required for the physical activities of interconnection and access to UNEs, albeit they are used in conjunction with such activities, ILECs will be able to delay a CLEC's efforts at collocation and its delivery of services to consumers.[91] Specifically, ILECs will have the incentive to challenge, on a regular basis, whether the functionality of the equipment that the CLEC intends to collocate to access UNEs or interconnect with the ILEC network complies with the Commission's rules and regulations. Regardless of where the Commission draws the line between equipment types

89 *Id.* at 15612, ¶ 218 (emphasis supplied).

90 *Id.*

that CLECs must be allowed to collocate and equipment that CLECs are not entitled to collocate absent ILEC consent, ILECs must not be allowed to be the arbiters of what equipment they are obligated to permit requesting carriers to collocate on their premises. That authority must always reside in a *bona fide* regulatory body which makes such determination *de novo*, guided, of course, by appropriate Commission rules.

In short, to ensure that CLECs are given a meaningful opportunity to compete, the market and efficient network and equipment design – not regulation – should determine where and what types of equipment CLECs may collocate in order to access unbundled network elements and interconnect with ILECs. Only by permitting collocation of the different types of equipment described above will the Commission foster the achievement of the goals and objectives of Sections 251(c)(2) and 251(c)(3), as well as the broader purposes of the 1996 Act. Accordingly, the physical collocation of such equipment is "necessary for interconnection or access to unbundled network elements" under Section 251(c)(6), read in conjunction with Sections 251(c)(2) and 251(c)(3).

IV. THE REQUIREMENTS OF SECTIONS 251(C)(2), (C)(3) AND (C)(6), ALONG WITH THE DECISION OF THE D.C. CIRCUIT, PROVIDE THE COMMISSION WITH SUFFICIENT GUIDANCE TO DETERMINE THE MEANING OF "PHYSICAL COLLOCATION" UNDER SECTION 251(C)(6)

As detailed in Section II, in the *Advanced Services First Report and Order*, the Commission adopted several pro-competitive decisions that facilitated physical collocation in ILEC offices, but were vacated by the D.C. Circuit. First, the Commission required ILECs to allow collocation in any unused space, as long as there were no technical reasons for not

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[91] For a fuller discussion of the impact on CLECs and their customers resulting from delays in collocation, see Section VI, A., *infra*.