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July 5, 2001

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
Office of the Secretary
445 Twelfth Street, S.W. Room TWB-204
Washington, DC 20554

Re: Ex Parte Presentation in CC Docket Nos. 96-98 and 98-147

Dear Ms. Salas:

On Tuesday, July 3, 2001, Jonathan Lee and I, on behalf of the Competitive Telecommunications Association ("CompTel"), met with Kyle Dixon, Legal Advisor to Chairman Michael K. Powell, regarding the above-referenced proceeding. During the meeting, CompTel urged the Commission to interpret the term "necessary" in section 251(c)(6) so that CLECs can collocate equipment that maximizes "collocation" throughput. CompTel also discussed similarities between its position on collocation and Qwest's position on access to ILECs' Central Offices as outlined in the attached comments that Qwest filed in CC Docket No. 01-77 on April 23, 2001.

In construing Section 251(c)(6), the Commission must take into account the relevant statutory context and the underlying Congressional objectives. Congress adopted Section 251(c)(6) in particular – and Section 251(c) in general – to promote local exchange and exchange access competition. Congress recognized that competition would flourish only if CLECs have the right to interconnect with ILECs, and to do so through the use of equipment that is collocated at the ILECs' premises. Simply put, Congress mandated interconnection so that CLECs can hand-off to, and receive traffic from, the ILECs. In construing Section 251(c)(6), the Commission must recognize the correlation between the amount of traffic exchanged between CLECs and ILECs through collocation arrangements – what CompTel calls "collocation throughput"– and Congress' objective of vibrant local competition.

In analyzing what collocation practices are "necessary for interconnection" within the meaning of Section 251(c)(6), the Commission should take into account the relationship between those practices and a CLEC's collocation throughput. If a particular collocation practice enables a CLEC to increase its collocation throughput, then that practice is "necessary for interconnection" for the CLEC's incremental collocation throughput that is directly attributable to the practice in question.

A simple example demonstrates the relevance of collocation throughput to the statutory inquiry. Suppose a CLEC collocates a piece of equipment whose sole function is to exchange traffic with the ILEC, and the CLEC exchanges 100,000 minutes per month through its collocation arrangement. Suppose that the CLEC now adds a functionality to the collocated equipment (*e.g.*, switching, or data-voice splitting), and that this added functionality enables the CLEC to now route 500,000 minutes per month through its collocation arrangement. In that example, the ability to collocate the multi-function equipment clearly is "necessary for interconnection" (in any sense of that phrase) for at least 400,000 minutes of traffic. As a result, the Commission should require ILECs to permit collocation of multi-function equipment under Section 251(c)(6).

With respect to any particular collocation practice, the Commission should focus on whether it is materially more efficient for a CLEC to engage in that practice within the collocation arrangement, or whether the CLEC suffers no material efficiency losses if it must engage in that practice elsewhere in the network. While efficiency considerations in a vacuum cannot justify a taking, such considerations can justify a taking when they show that collocation is "necessary" for a CLEC to interconnect with the ILEC for all the traffic it is capable of generating. In cases where collocation is materially more efficient, the CLEC's collocation throughput will be maximized if it can implement that practice within the collocation arrangement and, hence, the practice is "necessary for interconnection" for the CLEC's traffic.

It bears emphasis that whenever a collocation practice offers a material efficiency gain to a CLEC, that practice also represents the most efficient way of allocating space in ILEC facilities among multiple CLECs, thereby minimizing the taking necessary to fulfill the statutory directive and promote Congress' purposes. As discussed below, interpreting Section 251(c)(6) narrowly to preclude these collocation practices not only would subvert competition by forcing CLECs to engage in inefficient practices, it could result in the inefficient (*i.e.*, excessive) taking of the ILEC property.

The question arises as to how the Commission can know when it is materially more efficient for a requesting carrier to implement a practice in a collocation arrangement. CompTel submits that the Commission reasonably may establish a rebuttable presumption in favor of collocation based on marketplace forces. As the Commission has recognized before, CLECs are non-dominant carriers that have strong incentives to minimize their dependence upon the ILECs. Whenever faced with the realistic option of using their own facilities (or a non-ILEC's facilities) without suffering a significant competitive handicap, CLECs will select that

option every time to eliminate their reliance on arrangements that ILECs are providing against their will. Therefore, if non-dominant carriers desire to implement a particular collocation practice, it is only because the carriers have no other feasible option for accomplishing the same objective without suffering in the marketplace. Particularly given the overwhelming record evidence in this docket that the ILECs have thrown one obstacle after another in the way of CLECs seeking to compete through collocation arrangements, no further record evidence is needed for the Commission to establish a rebuttable presumption that the natural incentives of CLECs will ensure that they engage only in those collocation practices that satisfy the "necessary for interconnection" standard.

Based on this presumption and the record evidence, the Commission should at this time adopt rules enabling CLECs to engage in two specific practices that are "necessary for interconnection." *First*, the Commission should require ILECs to enable non-dominant carriers to engage in CLEC-to-CLEC cross-connections within the central office under Section 251(c)(6). As with multi-function equipment, the record evidence and the Commission's experience demonstrate that CLECs as an industry segment desire to engage in this practice, and that it is materially more efficient to engage in this practice within the central office than elsewhere in the network. Permitting a CLEC to implement such cross-connections within the central office at cost-based rates will maximize its collocation throughput while minimizing the "taking" of ILEC property by collocating CLECs. Certainly, the collocation throughput of all CLECs collocated in a particular central office will be maximized – and the aggregate "taking" of ILEC property minimized – if the CLECs are permitted to share resources efficiently through cross-connections. As a result, CLEC-to-CLEC cross-connections satisfy the "necessary for interconnection" language in Section 251(c)(6).

*Second*, the Commission should require ILECs to enable any non-dominant requesting carrier to collocate multi-function equipment within that carrier's collocation arrangement. Based on the record evidence and the Commission's experience in this area, there is no dispute that the CLEC industry segment strongly desires to engage in this practice, and that it is materially more efficient for CLECs to collocate multi-function equipment than to construct separate network nodes for additional functionalities. CompTel understands that CLECs can achieve a much lower cost per access line when they collocate a functionality as compared to establishing that functionality outside the collocation arrangement. Indeed, the ILECs place the same multi-function equipment in their central offices for their own uses, thereby affirming the efficiency gains that can be achieved by CLECs from collocating this equipment. Because CLECs can maximize collocation throughput by collocating multi-function equipment, this practice satisfies the "necessary for interconnection" language in Section 251(c)(6).

The collocation throughput standard for interpreting the statutory term "necessary" is fully consistent with the recent *GTE* decision. The Court there was concerned that the FCC's "used or useful" standard was "impermissibly broad" because it did not appear to incorporate "some limiting standard." *GTE* at 423. The Court specifically noted that the "used

or useful" standard might be applied to justify collocating payroll or data collection features, which, in its view, would "'diverge[] from any realistic meaning of the statute.'" *Id.* at 424 (*quoting Massachusetts v. Department of Transportation*, 93 F.3d 890, 893 (D.C. Cir. 1996)). The Court acknowledged that the "used or useful" standard might permit CLECs to lower their costs and provide more services, but rejected the standard because the Commission did not adequately tie those goals to the statutory language and structure. *Id.* Similarly, the Court expressed concern that the Commission's "used or useful" rule would result in a greater taking of ILEC property than is necessary to implement Section 251(c)(6). On remand, the Commission is charged with developing an interpretation of this provision that reflects "'the ordinary and fair meaning of [the statute's] terms." *Id.* (*quoting AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 390 (1999)). The Commission is not precluded from re-adopting its previous rule if it provides a "better explanation" as to why that rule makes sense in light of the statutory language and structure. *Id.*

The collocation throughput standard reflects the type of "limiting standard" the Court found lacking in the Commission's previous rules. The example used by the Court itself is illustrative. Collocating payroll or data collection functionalities would not materially increase a CLEC's collocation throughput, and hence such functionalities need not be included in collocated equipment under this standard. In fact, CompTel is not aware of any requesting carrier which has sought to collocate such functionalities within an ILEC's central offices, thereby affirming that equipment with such functionalities is not "necessary for interconnection." CLECs suffer no loss of efficiency when they perform such functionalities outside of collocation arrangements, and therefore they prefer self-provisioning or other outsourcing to dependence upon an ILEC-controlled resource. The collocation throughput standard is not impermissibly broad because it does not justify the collocation of any and all equipment which conceivably might be utilized by an individual CLEC.

The collocation throughput standard also provides the missing link between the benefits of lowering CLECs' costs and encouraging new services, on the one hand, and the statutory language and objectives, on the other hand. By promoting collocation efficiency, the Commission will create a regulatory regime that entitles CLECs to collocate the equipment that is "necessary" for them to take advantage of mandatory ILEC interconnection for *all* of the traffic they are capable of generating. Like the Supreme Court in *AT&T Corp. v. Iowa Utilities Board*, the Court in *GTE* did not reject CLEC cost and service considerations as being irrelevant. Rather, the *GTE* Court merely rejected the presumption that such considerations, no matter how trivial, automatically satisfy the statutory standard for mandatory interconnection. By focusing upon collocation practices that have a material impact on a CLEC's ability to route traffic through its collocation arrangements, the collocation throughput standard avoids the types of irrebuttable presumptions that the courts have criticized.

Further, adopting rules based on the collocation throughput standard would not lead to an unnecessary taking of ILEC property. Under this standard, CLECs will be permitted

to engage only in those collocation practices that are "necessary for interconnection" and promote the underlying statutory objective of fostering local competition. Moreover, the two rules CompTel supports – the collocation of multi-function equipment, and CLEC-to-CLEC cross-connections – do not impose any unnecessary taking on ILECs. Multi-function equipment will not require more physical space than other equipment. Indeed, given the technological trends in favor of such equipment, it is likely that multi-function equipment will entail a lesser taking than moribund single-function equipment. Similarly, CLEC-to-CLEC cross-connections will use scarce collocation space efficiently and minimize the commensurate taking. Without such cross-connections, CLECs would be unable to share each other's collocation resources. Instead, they would have to perform all necessary functions themselves within their own collocation arrangements, which would force them to collocate more equipment than would be the case with efficient CLEC-to-CLEC cross-connections. For example, a CLEC that required access to a frame would have to collocate its own frame even if an adjacent collocating CLEC already had a frame in its collocation space with available capacity. Permitting CLEC-to-CLEC cross-connections will enable CLECs to share collocation resources efficiently, reduce the amount of equipment that must be collocated by all CLECs in a central office, and minimize the amount of ILEC property that must be used for collocation purposes.

Lastly, the collocation throughput standard is consistent with the "ordinary and fair meaning" of Section 251(c)(6). This standard recognizes that the ultimate goal of any carrier when entering into interconnection arrangements or buying unbundled network elements is to carry traffic. Further, this standard recognizes that the type of equipment which may be collocated will directly affect *the* amount of traffic a carrier routes through its collocation arrangement. The Commission should reject any interpretation of Section 251(c)(6) that relies on a static analysis of collocation arrangements. In particular, the Commission should not assume that a CLEC has a pre-determined amount of traffic to exchange with the ILEC and then examine what collocation arrangements are "necessary" for handling that pre-determined traffic stream. By recognizing that the type of collocation practices in which CLECs engage can play a large role in determining how much traffic they can generate, the Commission is giving Section 251(c)(6) its "ordinary and fair" meaning in the context of a dynamic rather than a static telecommunications market.

In sum, CompTel urges the Commission to interpret the term "necessary" in section 251(c)(6) so that CLECs can collocate equipment that maximizes "collocation" throughput. Specifically, the Commission should require ILECs (1) to enable non-dominant carriers to engage in CLEC-to-CLEC cross-connections within the central office under Section 251(c)(6) and (2) to enable any non-dominant requesting carrier to collocate multi-function equipment within that carrier's collocation arrangement.

In accordance with Section 1.1206 of the Commission's rules, an original and one copy are being filed with your office.

Sincerely,

Todd D. Daubert

Attachments

cc: Kyle Dixon

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OFFICE OF THE SECRETARY

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

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| **In the Matter 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** |

***SEPARATE COMMENTS OF THE***
***COMPETITIVE TELECOMMUNICATIONS ASSOCIATION***

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October 12, 2000

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## SUMMARY

These separate comments give CompTel's perspective on two sets of issues in this proceeding. *First*, CompTel urges the Commission to consider the "collocation throughput" standard when interpreting the phrase "necessary for interconnection or access to unbundled network elements" in Section 251(c)(6). This standard recognizes that the relationship between permitted collocation practices and the amount of traffic a CLEC can route through its collocation arrangement is not static. That relationship is dynamic, and CompTel has identified two specific practices – the collocation of multi-function equipment, and CLEC-to-CLEC cross-connections – which, if adopted, would enable CLECs to maximize their collocation throughput. These practices are "necessary" (in any sense of that term) for interconnection of the incremental portion of a CLEC's traffic stream that these practices make possible.

The collocation throughput standard is consistent with Congress' desire to promote local competition because there is a direct correlation between collocation throughput and local competition. A market environment characterized by low collocation throughput reflects the absence of local competition, whereas a market characterized by robust collocation throughput reflects more vibrant local competition. Therefore, construing Section 251(c)(6) so that CLECs can maximize their collocation throughput would promote Congress' objectives.

In order to apply the collocation throughput standard to a specific collocation practice, the Commission should focus on whether it is materially more efficient for a CLEC to engage in that practice within the collocation arrangement. While efficiency considerations in a vacuum cannot justify collocation, such considerations can justify a taking when they show that collocation is "necessary for interconnection" for a material portion of the CLEC's traffic stream. The Commission should create a rebuttable presumption in favor of collocation for practices

desired by the CLEC market segment. CLECs are non-dominant carriers who will voluntarily choose to rely upon an ILEC-provided resource only when they have no other feasible options for accomplishing the same objective without suffering market harm.

The collocation throughput standard is consistent with the judicial admonition against overbroad standards. For example, the collocation of payroll or data collection functionalities would not meet the collocation throughput standard and would not be "necessary" for interconnection or access to network elements. Further, this standard will minimize the taking imposed on ILECs through collocation. By maximizing the efficient use of scarce collocation resources, both rules – the collocation of multi-function equipment, and CLEC-to-CLEC cross-connections – will result in the most efficient taking of property for collocation.

*Second*, the Commission should adopt rules designed to ensure that NGDLC systems do not discriminate against particular carriers or classes of carriers. The Commission should adopt a rule requiring ILECs to implement NGDLC systems in a manner that promotes cost-based access by multiple carriers to the maximum feasible extent. In addition, the Commission should do the following: (i) adopt a disclosure-and-comment process before ILECs may deploy NGDLC systems; (ii) require ILECs to use cross-connect panels rather than splice points wherever it is technically feasible; (iii) establish electronic OSS capabilities for multiple carriers to use remote feature servers to access all NGDLC features and functionalities; (iv) prohibit ILECs from using NGDLC systems in ways that CLECs cannot; and (v) prevent ILECs from retiring copper loops until CLECs an provide all services from remote terminals that they now can provide from collocation arrangements in central offices. The Commission also should adopt rules to ensure that NGDLC systems do not interfere with the ability of CLECs to provide services from collocation arrangements in ILEC central offices.

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

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| Deployment of Wireline Services Offering Advanced Telecommunications Capability | ) | CC Docket No. 98-147 |
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***SEPARATE COMMENTS OF THE***
***COMPETITIVE TELECOMMUNICATIONS ASSOCIATION***

The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby submits these separate comments in response to the *Second Notice of Proposed Rulemaking* (FCC 00-297) [hereinafter "*Second Notice*"] released by the Commission in this proceeding on August 10, 2000. CompTel is participating in joint comments being submitted today by a number of competitive local exchange carriers ("CLECs") and their industry associations. CompTel is filing these separate comments to present its own perspective on several issues raised in the *Second Notice*.

## I. THE COMMISSION SHOULD INTERPRET THE TERM "NECESSARY" IN SECTION 251(C)(6) SO THAT CLECS CAN COLLOCATE EQUIPMENT THAT MAXIMIZES COLLOCATION THROUGHPUT.

Section 251(c)(6) of the Communications Act of 1934, as amended (the "Act"), requires incumbent local exchange carriers ("ILECs") to enable CLECs to collocate equipment "necessary for interconnection or access to unbundled network elements." 47 U.S.C. § 251(c)(6). The U.S. Court of Appeals vacated and remanded the Commission's construction of that provision. *GTE Service Corporation v. FCC*, 205 F.3d 416, 422-24 (D.C. Cir. 2000)

[hereinafter "*GTE*"]. The Commission has now asked parties to comment on the interpretation it should adopt of the phrase "necessary for interconnection or access to unbundled network elements" in Section 251(c)(6).

### A. The Meaning of the Term "Necessary"

In construing Section 251(c)(6), the Commission must take into account the relevant statutory context and the underlying Congressional objectives.[1] Congress adopted Section 251(c)(6) in particular – and Section 251(c) in general – to promote local exchange and exchange access competition. Congress recognized that competition would flourish only if CLECs have the right to interconnect with ILECs, and to do so through the use of equipment that is collocated at the ILECs' premises. Simply put, Congress mandated interconnection so that CLECs can hand-off to, and receive traffic from, the ILECs. In construing Section 251(c)(6), the Commission must recognize the correlation between the amount of traffic exchanged between CLECs and ILECs through collocation arrangements – what CompTel calls "collocation throughput" in these comments[2] – and Congress' objective of vibrant local competition. A market environment characterized by low collocation throughput reflects the absence of local competition, whereas a market environment characterized by robust collocation throughput reflects more vibrant local competition.

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1 *See, e.g., National Railroad Passenger Corp. v. Boston Maine Corporation,* 503 U.S. 407 (1992) (examining the context of the term and the purpose of the statute as a whole to determine the interpretation of the word "required"); *King v. St. Vincent's Hospital*, 502 U.S. 215 (1991) (stating that words cannot be taken out of context and that the entire statute must be examined).

2 CompTel uses the term "collocation throughput" to refer to the amount of traffic that an individual CLEC routes through its collocation arrangement (or that all CLECs route in the aggregate through their collocation arrangements at a particular central office), not the amount of traffic which any particular equipment is designed to handle.

In analyzing what collocation practices are "necessary for interconnection" within the meaning of Section 251(c)(6), the Commission should take into account the relationship between those practices and a CLEC's collocation throughput. If a particular collocation practice enables a CLEC to increase its collocation throughput, then that practice is "necessary for interconnection" for the CLEC's incremental collocation throughput that is directly attributable to the practice in question.

A simple example demonstrates the relevance of collocation throughput to the statutory inquiry. Suppose a CLEC collocates a piece of equipment whose sole function is to exchange traffic with the ILEC, and the CLEC exchanges 100,000 minutes per month through its collocation arrangement. Suppose that the CLEC now adds a functionality to the collocated equipment (*e.g.*, switching, or data-voice splitting), and that this added functionality enables the CLEC to now route 500,000 minutes per month through its collocation arrangement. In that example, the ability to collocate the multi-function equipment clearly is "necessary for interconnection" (in any sense of that phrase) for at least 400,000 minutes of traffic.[3] While ILECs and CLECs can debate whether collocating the multi-function equipment is "necessary for interconnection" for 100% of the CLEC's traffic,[4] there can be no debate that collocation of the multi-function equipment is "necessary for interconnection" for the incremental traffic that

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[3] Throughout these comments, and solely for convenience, CompTel shall refer to the statutory phrase "necessary for interconnection" as a shorthand for the full statutory phrase "necessary for interconnection or access to unbundled network elements." By focusing on interconnection, CompTel does not mean to suggest that collocation is not equally necessary for access to unbundled network elements.

[4] As stated in the CLEC coalition comments, CompTel fully agrees that collocation of multi-function equipment (and CLEC-to-CLEC cross-connections) are "necessary for interconnection" for 100% of a CLEC's traffic. *See Joint Comments* at Sections III.C., V.A.I. CompTel submits that the analyses contained in these comments and in the *Joint Comments* are reasonable, alternative justifications for adopting the rules proposed herein.

would not exist but for the use of that equipment. As a result, CLECs should be entitled to collocate such equipment under Section 251(c)(6).

It is no answer for the ILECs to suggest that the CLEC in this example could locate the additional functionality outside the collocation arrangement. For many CLECs, establishing one or more separate network points for switching, voice/data splitting, or other functionalities is far more costly than collocating multi-function equipment. The costs of establishing separate nodes would force the CLEC to ramp up services more slowly, limit geographic coverage, or raise retail rates, thereby reducing collocation throughput and weakening local competition. In some cases, the CLEC could be forced to abandon or severely limit its use of additional functionalities because it does not have access to sufficient capital to establish separate network nodes outside its collocation arrangements. As a result, the CLEC in the example above would have generated significantly less than 500,000 minutes per month if forced to incur the enormous costs of establishing separate nodes. Hence, a CLEC's (theoretical) ability to establish a particular functionality outside its collocation arrangements does not remove the necessity of collocating multi-function equipment to ensure interconnection for 100% of the traffic that the CLEC is capable of generating from the equipment.

With respect to any particular collocation practice, the Commission should focus on whether it is materially more efficient for a CLEC to engage in that practice within the collocation arrangement, or whether the CLEC suffers no material efficiency losses if it must engage in that practice elsewhere in the network. While efficiency considerations in a vacuum cannot justify a taking, such considerations can justify a taking when they show that collocation is "necessary" for a CLEC to interconnect with the ILEC for all the traffic it is capable of generating. In cases where collocation is materially more efficient, the CLEC's collocation

throughput will be maximized if it can implement that practice within the collocation arrangement and, hence, the practice is "necessary for interconnection" for the CLEC's traffic.

It bears emphasis that whenever a collocation practice offers a material efficiency gain to a CLEC, that practice also represents the most efficient way of allocating space in ILEC facilities among multiple CLECs, thereby minimizing the taking necessary to fulfill the statutory directive and promote Congress' purposes. As discussed below, interpreting Section 251(c)(6) narrowly to preclude these collocation practices not only would subvert competition by forcing CLECs to engage in inefficient practices, it could result in the inefficient (*i.e.*, excessive) taking of the ILEC property.

The question arises as to how the Commission can know when it is materially more efficient for a requesting carrier to implement a practice in a collocation arrangement. CompTel submits that the Commission reasonably may establish a rebuttable presumption in favor of collocation based on marketplace forces. As the Commission has recognized before, CLECs are non-dominant carriers[5] that have strong incentives to minimize their dependence upon the ILECs. Whenever faced with the realistic option of using their own facilities (or a non-ILEC's facilities) without suffering a significant competitive handicap, CLECs will select that option every time to eliminate their reliance on arrangements that ILECs are providing against their will. Therefore, if non-dominant carriers desire to implement a particular collocation practice, it is only because the carriers have no other feasible option for accomplishing the same objective without suffering in the marketplace. Particularly given the overwhelming record evidence in this docket that the ILECs have thrown one obstacle after another in the way of

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5 *See Local Competition Order*, 11 FCC Rcd, 15499, 15981, para. 979 (1996) (stating that non-incumbent LECs definitionally lack the market power possessed by incumbent LECs).

CLECs seeking to compete through collocation arrangements,[6] no further record evidence is needed for the Commission to establish a rebuttable presumption that the natural incentives of CLECs will ensure that they engage only in those collocation practices that satisfy the "necessary for interconnection" standard.[7]

Based on this presumption and the record evidence, the Commission should at this time adopt rules enabling CLECs to engage in two specific practices that are "necessary for interconnection." *First*, the Commission should require ILECs to enable any non-dominant requesting carrier to collocate multi-function equipment within that carrier's collocation arrangement. Based on the record evidence and the Commission's experience in this area, there is no dispute that the CLEC industry segment strongly desires to engage in this practice, and that it is materially more efficient for CLECs to collocate multi-function equipment than to construct separate network nodes for additional functionalities.[8] CompTel understands that CLECs can achieve a much lower cost per access line when they collocate a functionality as compared to establishing that functionality outside the collocation arrangement. Indeed, the ILECs place the same multi-function equipment in their central offices for their own uses, thereby affirming the efficiency gains that can be achieved by CLECs from collocating this equipment. Because CLECs can maximize collocation throughput by collocating multi-function equipment, this practice satisfies the "necessary for interconnection" language in Section 251(c)(6).

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6 *See, e.g.*, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 4761, 4783 (1999) (stating that the record is replete with evidence of provisioning delays) ("*Collocation Order*"); *see also Local Competition Order*, 11 FCC Rcd at para. 10 (stating that ILECs have few incentives to assist new entrants obtain a greater share of the market).

7 *See Allentown Mack Sales and Service, Inc. v. National Labor Relations Board*, 118 U.S. 818, 828 (1998) (agency has substantial discretion to adopt evidentiary presumptions).

*Second*, the Commission should require ILECs to enable non-dominant carriers to engage in CLEC-to-CLEC cross-connections within the central office under Section 251(c)(6). As with multi-function equipment, the record evidence and the Commission's experience demonstrate that CLECs as an industry segment desire to engage in this practice, and that it is materially more efficient to engage in this practice within the central office than elsewhere in the network.[9] Permitting a CLEC to implement such cross-connections within the central office at cost-based rates will maximize its collocation throughput while minimizing the "taking" of ILEC property by collocating CLECs. Certainly, the collocation throughput of all CLECs collocated in a particular central office will be maximized – and the aggregate "taking" of ILEC property minimized – if the CLECs are permitted to share resources efficiently through cross-connections. As a result, CLEC-to-CLEC cross-connections satisfy the "necessary for interconnection" language in Section 251(c)(6).

### B. The GTE Decision

The collocation throughput standard for interpreting the statutory term "necessary" is fully consistent with the recent *GTE* decision. The Court there was concerned that the FCC's "used or useful" standard was "impermissibly broad" because it did not appear to incorporate "some limiting standard." *GTE* at 423. The Court specifically noted that the "used or useful" standard might be applied to justify collocating payroll or data collection features, which, in its view, would "'diverge[] from any realistic meaning of the statute.'"[10] The Court

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(...continued)

8 *See Collocation Order*, 14 FCC Rcd at 4778, para. 31 (denying competitive carriers the ability to collocate multi-function equipment would be a competitive disadvantage for CLECs).

9 *See id.* at 4779, para. 33; *see also* Joint *Comments* at Section V.B.

10 *Id.* at 424 (*quoting Massachusetts v. Department of Transportation*, 93 F.3d 890, 893 (D.C. Cir. 1996)).

acknowledged that the "used or useful" standard might permit CLECs to lower their costs and provide more services, but rejected the standard because the Commission did not adequately tie those goals to the statutory language and structure.[11] Similarly, the Court expressed concern that the Commission's "used or useful" rule would result in a greater taking of ILEC property than is necessary to implement Section 251(c)(6). On remand, the Commission is charged with developing an interpretation of this provision that reflects "'the ordinary and fair meaning of [the statute's] terms."[12] The Commission is not precluded from re-adopting its previous rule if it provides a "better explanation" as to why that rule makes sense in light of the statutory language and structure.[13]

The collocation throughput standard reflects the type of "limiting standard" the Court found lacking in the Commission's previous rules. The example used by the Court itself is illustrative. Collocating payroll or data collection functionalities would not materially increase a CLEC's collocation throughput, and hence such functionalities need not be included in collocated equipment under this standard. In fact, CompTel is not aware of any requesting carrier which has sought to collocate such functionalities within an ILEC's central offices, thereby affirming that equipment with such functionalities is not "necessary for interconnection." CLECs suffer no loss of efficiency when they perform such functionalities outside of collocation arrangements, and therefore they prefer self-provisioning or other outsourcing to dependence upon an ILEC-controlled resource. The collocation throughput standard is not impermissibly broad because it does not justify the collocation of any and all equipment which conceivably might be utilized by an individual CLEC.

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11 *Id.*

12 *Id.* (*quoting AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 390 (1999)).

The collocation throughput standard also provides the missing link between the benefits of lowering CLECs' costs and encouraging new services, on the one hand, and the statutory language and objectives, on the other hand. By promoting collocation efficiency, the Commission will create a regulatory regime that entitles CLECs to collocate the equipment that is "necessary" for them to take advantage of mandatory ILEC interconnection for *all* of the traffic they are capable of generating. Like the Supreme Court in *AT&T Corp. v. Iowa Utilities Board*, the Court in *GTE* did not reject CLEC cost and service considerations as being irrelevant.[14] Rather, the *GTE* Court merely rejected the presumption that such considerations, no matter how trivial, automatically satisfy the statutory standard for mandatory interconnection. By focusing upon collocation practices that have a material impact on a CLEC's ability to route traffic through its collocation arrangements, the collocation throughput standard avoids the types of irrebuttable presumptions that the courts have criticized.

Further, adopting rules based on the collocation throughput standard would not lead to an unnecessary taking of ILEC property.[15] Under this standard, CLECs will be permitted to engage only in those collocation practices that are "necessary for interconnection" and promote the underlying statutory objective of fostering local competition. Moreover, the two rules CompTel supports – the collocation of multi-function equipment, and CLEC-to-CLEC cross-connections – do not impose any unnecessary taking on ILECs. Multi-function equipment will not require more physical space than other equipment. *See Joint Comments* at VII.C.

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(...continued)

13 *Id.*

14 In upholding the Commission's rules on cageless collocation, the *GTE* Court noted with approval that cageless collocation would promote the efficient use of limited space in the ILEC facilities. *GTE* at 425. Clearly, considerations of cost and efficiency are not irrelevant to the statutory inquiry under Section 251(c)(6).

15 *See National Railroad Passenger Corp.*, 503 U.S. at 407.

Indeed, given the technological trends in favor of such equipment, it is likely that multi-function equipment will entail a lesser taking than moribund single-function equipment. Similarly, CLEC-to-CLEC cross-connections will use scarce collocation space efficiently and minimize the commensurate taking. Without such cross-connections, CLECs would be unable to share each other's collocation resources. Instead, they would have to perform all necessary functions themselves within their own collocation arrangements, which would force them to collocate more equipment than would be the case with efficient CLEC-to-CLEC cross-connections. For example, a CLEC that required access to a frame would have to collocate its own frame even if an adjacent collocating CLEC already had a frame in its collocation space with available capacity. Permitting CLEC-to-CLEC cross-connections will enable CLECs to share collocation resources efficiently, reduce the amount of equipment that must be collocated by all CLECs in a central office, and minimize the amount of ILEC property that must be used for collocation purposes.

Lastly, the collocation throughput standard is consistent with the "ordinary and fair meaning" of Section 251(c)(6). This standard recognizes that the ultimate goal of any carrier when entering into interconnection arrangements or buying unbundled network elements is to carry traffic. Further, this standard recognizes that the type of equipment which may be collocated will directly affect the amount of traffic a carrier routes through its collocation arrangement. The Commission should reject any interpretation of Section 251(c)(6) that relies on a static analysis of collocation arrangements. In particular, the Commission should not assume that a CLEC has a pre-determined amount of traffic to exchange with the ILEC and then examine what collocation arrangements are "necessary" for handling that pre-determined traffic stream. By recognizing that the type of collocation practices in which CLECs engage can play a

large role in determining how much traffic they can generate, the Commission is giving Section 251(c)(6) its "ordinary and fair" meaning in the context of a dynamic rather than a static telecommunications market.

### C. Statutory Interpretation.

The collocation throughput standard is fully consistent with well-established rules of statutory construction. Courts consistently have construed statutory terms by reference to the language, the statutory and industry context, and the underlying Congressional objectives.[16] It is particularly important to follow these rules when implementing a statute that applies in a technical area, such as collocation.[17] The collocation throughput standard is faithful to the literal meaning of the statutory terms – it requires that equipment be collocated only when it is "necessary" for interconnection. Further, it reflects accurately the dynamic relationship between collocation and interconnection – the amount of traffic a CLEC exchanges with the ILEC depends in part on the types of collocation practices it may engage in -- as well as the reality that CLECs must be able to use their collocation arrangements efficiently in order to fulfill Congress' desire that they enter the local market and compete effectively. There is no dispute from any party (even, if they are candid, the ILECs) that permitting CLECs to collocate multi-function equipment and to engage in CLEC-to-CLEC cross-connections will promote Congress' goal of fostering vibrant local competition.

At bottom, the ILECs would like the Commission to construe Section 251(c)(6) so narrowly that CLECs cannot use collocation arrangements efficiently to provide competitive

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16 *See, e.g., King v. St. Vincent's Hospital*, 502 U.S. at 215; *Shell Oil Company v. Iowa Department of Revenue*, 488 U.S. 19 (1998).

17 Even the *GTE* court recognized that the terms to be defined are found in a "circumscribed statutory provision that seeks to ensure competition in areas of advanced technology in telecommunications. . . ." *GTE* at 426.

local services. There is no way to reconcile that result with Congress' intention that Section 251(c) promote local competition. If the language of Section 251(c)(6) required such a narrow interpretation, then the Commission's options might be few. Fortunately, the statutory language is more than capable of supporting a reasonable interpretation that enables CLECs, as Congress intended, to use mandatory collocation as a tool for entering previously closed local markets to provide long-desired competition to the ILECs' monopoly services.

## II. THE COMMISSION SHOULD ADOPT RULES TO ENSURE THAT THE DEPLOYMENT OF NEXT GENERATION DIGITAL LOOP CARRIER SYSTEMS DOES NOT DISCRIMINATE AGAINST PARTICULAR CARRIERS OR CLASSES OF CARRIERS.

Last month the Commission adopted an order permitting SBC Communications, Inc. to move forward with its program, the so-called Project Pronto, to deploy next generation digital loop carrier ("NGDLC") systems on a widespread in-region basis.[18] As the Commission knows, the proliferation of various types of remote terminals poses difficult policy and technical issues in connection with CLECs who desire to use the remote terminals to provide services to end users, as well as CLECs who desire to use collocation arrangements in central offices to provide services to end users. The Commission should adopt rules to ensure that the deployment of NGDLC systems does not discriminate against any carriers in the provision of services to end users.

### A. Multiple Carrier Access.

The Commission should require ILECs to construct, design and deploy NGDLC systems in a manner that promotes cost-based access by multiple requesting carriers to the maximum feasible extent. Without such access, the ILECs and their affiliates will have

[18] *Ameritech Corp. and SBC Communications, Inc., Second Memorandum Opinion and Order*, CC Docket No. 98-141, FCC 00-336 (rel. Sept. 8, 2000).

preferential (and in many cases constructively exclusive) access to the NGDLC systems. As NGDLC systems come to dominate the local network infrastructure in the United States, full and fair local competition requires that these systems be designed to incorporate the open architecture necessary for multiple carriers to use the systems efficiently to provide a wide array of services to end users. This policy is critical if consumers are to see the benefits of local competition through more choices of service providers and competitive rates for services. The Commission should adopt this fundamental policy in this proceeding so that ILECs will know how their efforts to deploy NGDLC systems will be assessed by the Commission and the industry.

In order to implement this policy, the Commission should require every ILEC to publicly disclose in advance any plans it may have to deploy NGDLC systems that affect a specified percentage of subscribers within its region. The Commission should then give interested parties sufficient time to challenge at the Commission or state public utility commissions those aspects of the deployment plan which they feel are not consistent with the fundamental goal of multiple carrier access. Further, the Commission should require ILECs to provide as much information about their plans as possible so that CLECs can assess on a complete factual record whether the ILEC has complied with the multiple carrier access policy and what modifications may be necessary to comply with that policy. ILECs should not be permitted to implement NGDLC deployment plans until after this disclosure-and-comment process has been completed. CompTel believes that this approach will not delay the introduction of NGDLC systems by ILECs. Rather, it would merely ensure that CLECs and regulators are able to understand and monitor the ILEC's plans during their developmental period when it is still possible for pro-competitive alternatives to be implemented, in contrast to being presented

with a *fait accompli* at the end of that period (as the industry was by SBC Communications with Project Pronto).

Based on the industry's experience with Project Pronto, the Commission should adopt several rules to ensure multiple carrier access. *First*, SBC has installed NGDLC systems that use splice points rather than cross-connect panels to interconnect a Serving Area Interface, or other intermediate aggregation point, with the remote terminals.[19] The use of splice points shows that SBC desired only one carrier (its affiliate) to be able to use the remote terminal efficiently to provide services to subscribers. Had SBC used cross-connect panels rather than splice points, multiple CLECs could use their collocation (or adjacent collocation) arrangements to interconnect with the Service Area Interfaces. By using splice points, SBC effectively has forced collocating CLECs to trench and bury their own feeder cables out to the Serving Area Interfaces. This is a needless significant expense on top of an already difficult collocation process at remote terminals, and it will constitute a significant barrier to the installation and use of collocation (or adjacent collocation) arrangements by CLECs at remote terminals. Therefore, the Commission should require ILECs to use cross-connect panels rather than splice points wherever it is technically feasible to do so within the NGDLC systems.

*Second*, it is imperative that SBC and other ILECs develop immediately the electronic operations support systems ("OSS") capabilities necessary for multiple carriers to remotely access all features and functions of remote terminals. These OSS capabilities are essential because remote terminals are too numerous, and have such serious constraints regarding size, power, etc., that it is simply not feasible for many CLECs to directly access all (or even

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19 *See, e.g., Section 271 Compliance Monitoring of Southwestern Bell Telephone Company of Texas*, Transcript of Proceedings Before the Public Utility Commission of Texas, PUC Project No. 20400, Boyer Testimony at 67-72.

some) of these remote terminals to provide services to end users. CLECs should be able to establish their own feature servers to interact directly with the ILECs' centralized switches to remotely access the full features and functionalities of hundreds or even thousands of remote terminals. Once these electronic OSS capabilities are developed and available, CLECs will be able to provide the full range of services available from a remote terminal without having to engage in collocation (or adjacent collocation) at the remote terminal or otherwise directly access the remote terminal. The Commission should establish a date-certain by which ILECs who already use NGDLC systems must establish these OSS capabilities, and require all other ILECs to fully comply with this requirement before they introduce NGDLC systems for the first time.

*Third*, the Commission should prohibit the ILECs or their affiliates from providing services over NGDLC systems that CLECs are not yet able to provide in the same manner using the same functionalities. Unfortunately, the Commission did not adhere to this non-discrimination policy when it authorized SBC to move forward with Project Pronto, as SBC was able to offer integrated voice and data services immediately while CLECs have been forced to wait until SBC develops the capability for them to provide similar services through remote terminals.[20] It is inherently discriminatory for the ILEC or its affiliate to be able to use remote terminals in ways that are effectively precluded to unaffiliated carriers. In order to provide the necessary incentive for ILECs to move expeditiously to make all features and functions of NGDLC systems available to CLECs, and thereby ensure that consumers have competitive choices among numerous carriers for services, the Commission must strictly prohibit ILECs and their affiliates from using remote terminals in ways that are not fully available to non-affiliated requesting carriers.