

“necessary” prong of section 251(c)(6).¹⁵⁸ In addition, as SBC points out, the D.C. Circuit has determined that the Commission’s authority under section 201(a) does not extend to requiring a carrier to allow physical collocation within its premises.¹⁵⁹ Because we also find that the competitive-LEC provisioning of cross-connects constitutes physical collocation, we must conclude that our authority under section 201 does not extend to requiring that an incumbent LEC allow such provisioning.

2. Incumbent LEC Provisioning of Cross-Connects – Section 201

62. We agree with Sprint, Qwest, Focal, and the Joint Commenters that we may order incumbent LECs to provide cross-connects to collocators pursuant to section 201.¹⁶⁰ We find that we have such authority under both sections 201(a) and 201(b). We conclude that the Commission has authority pursuant to section 201 to require incumbent LECs to provision cross-connects for carriers collocated at the incumbent’s premises, and we exercise this authority to require such cross-connects upon reasonable request. Unlike the situation with competitive LEC-owned and provisioned cross-connects, we conclude that an incumbent LEC’s provisioning of cross-connects between two separate collocation arrangements does not constitute physical collocation. In the instance of incumbent-provisioned cross-connects, because the competitive LEC does not own or provision the cross-connects, there is no collocator-owned equipment being placed or collocator activity occurring outside of the immediate collocation space. In other words, the cabling being used to facilitate the cross-connect is owned, controlled, and provisioned by the incumbent LEC.

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a collocator that installs a cross-connect cable or wire in an incumbent LEC premises is physically collocating that cable or wire. *See GTE v. FCC*, 205 F.3d at 423.

¹⁵⁸ *Id.* at 423-24. An incumbent LEC, of course, must permit a competitive LEC to cross-connect cables and equipment within the competitive LEC’s own physical collocation space. To find otherwise would render section 251(c)(6) meaningless. In addition, although we find no statutory support for requiring that an incumbent LEC permit competitive LEC-provisioned cross-connects outside of their physical collocation space, we believe that competitive LEC provisioning of cross-connects imposes a much lesser burden on the incumbent’s property in certain circumstances, such as when the carriers being cross-connected occupy immediately adjacent collocation space, than when the cross-connects would traverse common areas of the incumbent LEC’s premises. Therefore, we encourage incumbent LECs to adopt flexible cross-connect policies that would not prohibit competitive LEC-provisioned cross-connects in all instances.

¹⁵⁹ *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441, 1446 (D.C. Cir. 1994) (*Bell Atlantic I*); SBC Reply at 27.

¹⁶⁰ *See, e.g.*, Qwest Reply at 6; Focal Comments at 18-20; Joint Commenters Comments at 53-55; Letter from Richard Juhnke, General Attorney, Sprint, to Magalie Roman Salas, Secretary, FCC, CC Docket Nos. 98-147 and 96-98 at 1-2 (filed May 10, 2001) (*Sprint May 10, 2001 Letter*); *see also* Northpoint Comments at 11-13. We note that the court in *GTE v. FCC*, 205 F.3d 416 (D.C. Cir. 2000) did not have before it the question of whether the Commission could require an incumbent LEC to provide such cross-connects pursuant to its authority under section 201 of the Communications Act.

63. We find that the Commission has authority under section 201(a) of the Act to require incumbent LECs to provision cross-connects between two collocated carriers.¹⁶¹ Section 201(a) requires “every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor.”¹⁶² As explained below, under the circumstances presented here, we find that incumbent LEC-provisioned cross-connects between collocators within the incumbent’s premises constitute a “communications service” “necessary or desirable in the public interest” within the meaning of section 201(a).¹⁶³ We find that the provisioning of cross-connects between collocated competitive LECs merely puts each collocator in a position to achieve the same interconnection with other collocators that the incumbent itself is able to achieve.¹⁶⁴ Because most facilities-based competitive LECs must collocate at incumbent LECs’ premises, incumbents have the opportunity to efficiently interconnect with competitive LECs. If an incumbent LEC refuses to provision cross-connects between competitive LECs collocated at the incumbent’s premises, the incumbent would be the only LEC that could interconnect with all or even any of the competitive LECs collocated at a common, centralized point – the central office.¹⁶⁵ In addition, if collocating competitive LECs cannot interconnect with each other at the incumbent’s premises, they typically must use incumbent LEC transport facilities to obtain access to competitive transport facilities. The costs associated with purchasing incumbent LEC transport in addition to the costs associated with purchasing the competitive transport likely would severely restrict the viability of competitive transport.

64. The most direct and efficient way for two carriers collocated within the same incumbent LEC premises to exchange traffic is to cross-connect within that premises. For instance, for two competitive LECs collocated at the same central office to exchange traffic without a cross-connect, each competitive LEC would have to carry its own telecommunications traffic into its collocation space and then, in the typical case, have the incumbent LEC transport that traffic over incumbent-owned facilities to an interconnection point outside the incumbent’s premises. From this interconnection point, the other competitive LEC would likely then carry the traffic back to its own collocation space in the same central office to be transported through the competitive LEC’s network.¹⁶⁶ This approach creates additional potential points of failure,

¹⁶¹ See, e.g., Focal Comments at 18 (asserting that section 201(a) requires common carriers to furnish telecommunications services upon reasonable request).

¹⁶² 47 U.S.C. § 201(a). Section 201(a) also “authorizes the Commission, where necessary or desirable in the public interest, to order common carriers to establish physical connections with other carriers, whether or not the common carriers might choose to do so voluntarily.” See *Expanded Interconnection with Local Telephone Facilities*, 9 FCC Rcd 5154, 5161-62, para. 18 (1994) (*Virtual Collocation Order*), remanded for consideration of 1996 Act sub nom. *Pacific Bell v. FCC*, 81 F.3d 1147 (D.C. Cir. 1996).

¹⁶³ 47 U.S.C. § 201(a).

¹⁶⁴ See, e.g., Mpower Comments at 27.

¹⁶⁵ See, e.g., AT&T Comments at 33-34.

¹⁶⁶ See, e.g., WorldCom Comments at 11. “A communications channel is back hauling when it takes traffic beyond its destination and back.” Newton’s Telecom Dictionary, 84 (15th ed. 1999).

may require otherwise unnecessary signal boosting, and, perhaps most importantly and most dramatically, imposes significant wasteful economic costs on competitive LECs – costs that incumbent LECs themselves do not face and costs that the incumbents do not impose on competitive LECs that utilize the incumbent’s transport services.¹⁶⁷ These additional costs would severely impede the deployment of the innovative, competitive services that the 1996 Act seeks to facilitate.¹⁶⁸

65. We find that cross-connects between collocators within an incumbent’s premises are essential to the development of a fully competitive transport market.¹⁶⁹ Incumbents, of course, provide cross-connects within their premises to collocators that purchase the incumbents’ transport services. However, a collocating competitive LEC that cannot deliver its traffic to another collocator via a cross-connect at the incumbent’s premises would likely be forced either to use incumbent LEC transport services or to build its own transport facilities.¹⁷⁰ Surely, such results would run directly counter to the fundamental purposes of the Communications Act. First, the Act attempts to lessen, not entrench, incumbent LEC control over local markets, including the local transport market. Second, the Act clearly recognizes that competitors are unlikely to find it economic to build entirely redundant facilities and therefore allows competitors to fill in those gaps in infrastructure through the wholesale market.¹⁷¹ To this end, cross-connects between colocated carriers allow competitive LECs to use the facilities of other

¹⁶⁷ See, e.g., Focal Comments at 17 (arguing that it would be prohibitively expensive for competitive LECs to pull fiber through manholes and the streets at substantial costs in order to utilize a carrier other than the incumbent LEC for interoffice transport).

¹⁶⁸ See WorldCom Comments at 11.

¹⁶⁹ The Commission has long recognized the importance of a competitive transport market. In fact, over the last decade, the Commission has adopted specific rules in its *Expanded Interconnection Proceeding* to facilitate competition in the competitive transport market. *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 I*, 24 F.3d 1441 (D.C. Cir. 1994); *First Reconsideration*, 8 FCC Rcd 127 (1993); vacated in part and remanded, *Bell Atlantic I*, 24 F.3d 1441 (D.C. Cir. 1994); *Second Reconsideration*, 8 FCC 7341 (1993); *Second Report and Order*, 8 FCC Rcd 7374 (1996) (*Switched Transport Order*), vacated in part and remanded, *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994); *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 (D. C. Cir. 1996) (collectively referred to as *Expanded Interconnection*). In addition, in furtherance of the procompetitive, deregulatory framework established by the 1996 Act, the Commission’s pricing flexibility rules place significant importance on the presence of competitive transport providers in order to grant pricing flexibility to incumbent LECs. See *Access Charge Reform, Fifth Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 96-262, 14 FCC Rcd 14221 (1999), *aff’d sub nom. WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

¹⁷⁰ See, e.g., Sprint Comments at 13 (arguing that if Sprint cannot deliver traffic from its collocation space in an incumbent LEC office to another colocated competitive LEC, it would be forced either to use the incumbent’s transport services or to build out its own local transport facilities); Focal Comments at 17 (asserting that an inability to cross-connect would place competitive LECs at a competitive disadvantage because they would essentially lack any choice for transport from non-incumbent LEC sources).

¹⁷¹ See *AT&T v. FCC*, 220 F.3d 607, 611 (D.C. Cir. 2000); *Joint Explanatory Statement, supra* note 13, at 1.

competitive LECs rather than relying solely on the incumbent LEC to fill in the gaps in their network.¹⁷²

66. Without the ability to cross-connect at the incumbent's premises, a collocated competitive LEC that has its own transport facilities would be severely restricted in its ability to optimize the utilization of their transport facilities through the wholesale provision of transport services to other competitive LECs.¹⁷³ In addition, a competitive LEC wishing to purchase transport from another competitive LEC with transport facilities would be in the untenable position of having to purchase additional transport from the incumbent out of the incumbent's premises in order to access and interconnect with the other competitive transport provider's facilities at some point outside of the incumbent's premises. Once interconnected, the carrier could utilize the competitive transport service. This added expense, however, almost assuredly would make the competitive transport cost-prohibitive and would be economically wasteful.¹⁷⁴ The effect would be to entrench the incumbent LECs' power in the transport market in direct contradiction of the Act's fundamental purpose to "open[] all telecommunications markets to competition."¹⁷⁵

67. Importantly, we find that providing cross-connects between collocated carriers will not materially burden incumbent LECs. The provisioning of cross-connects in a central office is not an extraordinary occurrence. The central office and other incumbent LEC premises are, by design, places where a carrier can cross-connect equipment. Moreover, such provisioning is far less burdensome than requiring incumbents to allow competitive LECs to self-provision their own cross-connects. After balancing the interest of promoting competition with the property interest of the incumbent, we conclude that requiring incumbent LECs to provision cross-connects between two collocating carriers substantially furthers Congress' goal of promoting competition while minimizing, if not eliminating, any invasion on the incumbent's property interests. While cross-connects between collocators within incumbent LEC premises are critical to the development of facilities-based competition, a requirement that incumbents provide cross-connects to competitors collocated at their premises constitutes at most a minimal invasion of the incumbent's property rights, particularly since this service would only have to be provided between two already collocated competitive LECs. Because the incumbent would

¹⁷² Although incumbent LECs argue that competitive LECs could also have a competitive transport provider pull individual fibers to each collocation space, *see, e.g.*, Verizon Reply 4-5, this approach could require the competitive transport provider to obtain local permits and dig up the streets every time it wishes to reach a new competitive LEC in the same incumbent LEC premises.

¹⁷³ *See* Sprint Comments at 13 (contending that the competitive LEC's alternative would be to build facilities that, given the very high capacity of fiber optic cable today, may be so underutilized as to be uneconomic).

¹⁷⁴ *See Detariffing the Installation and Maintenance of Inside Wiring*, 7 FCC Rcd 1334, 1335, para. 8 (1992) (recognizing that requiring telephone subscribers to purchase inside wiring service from a LEC, even if they wish to purchase those services from the LEC's competitors, would eliminate virtually all potential for competition for inside wiring services); *see also* *NARUC v. FCC*, 880 F.2d 422, 430 (D.C. Cir. 1989) (*NARUC III*).

¹⁷⁵ *Joint Explanatory Statement, supra* note 13, at 1; *see, e.g.*, Focal Comments at 17 (arguing that Congress enacted the 1996 Act to facilitate competition, not ensure the incumbents an interoffice transport monopoly).

maintain control over the provisioning and maintenance, we find that this requirement imposes little, if any, additional burden on the incumbent's property interest. We believe that whatever burden this requirement does place on this interest, it is significantly outweighed by the requirement's pro-competitive effects.

68. We find that the Commission has authority to compel carriers to make a cross-connect service generally available to similarly situated customers, especially when it uses that authority in such a targeted and discrete fashion. Courts generally have affirmed the ability of administrative agencies to impose specific common carriage obligations on entities that are regulated as common carriers.¹⁷⁶ We note that our action here is similar in many respects to the Commission's prior actions pursuant to section 201(a). In the *Specialized Common Carrier Proceeding*, for example, the Commission relied on section 201(a) in requiring the LECs then affiliated with AT&T to provide specialized common carriers with interconnection facilities and services that those carriers needed to provide private line services.¹⁷⁷ This action was an important early step in opening the long-distance market to competition. Similarly, in the *Virtual Collocation Order*, the Commission relied on section 201(a) in requiring incumbent LECs to provide virtual collocation within their central offices.¹⁷⁸ This action was designed to promote competition in the transport market.

69. We view our instant action as comparable to those prior Commission actions. Indeed, requiring incumbent LECs to provision cross-connects between collocated carriers furthers Congress' decision in the 1996 Act to open all telecommunications markets to competition and is consistent with (though less intrusive than) the Act's requirement that incumbent LECs allow physical collocation within their premises under section 251(c)(6). Thus, our instant action promotes competition by permitting carriers that collocate for purposes of competing against the incumbent to select the transport provider of their own choosing, rather than being forced to rely solely on the incumbent LEC or their own facilities for provision of that service. At the same time, this competitive goal is achieved without requiring the incumbent LEC to permit competitive LECs to own, install, and maintain these cross-connects.

70. For these reasons, we find that that the provision of cross-connects by incumbent LECs to collocated competitive LECs is a common carrier service pursuant to section 201(a).¹⁷⁹

¹⁷⁶ See *Akron, Canton & Youngstown R.R. v. ICC*, 611 F.2d 1162 (6th Cir. 1979), *cert. denied*, 449 U.S. 830 (1980) (upholding requirement that railroad carrier transport spent fuel and radioactive waste even though the railroad had not held itself out as a common carrier with respect to such cargo); *cf. Associated Gas Distributors v. FERC*, 824 F.2d 981, 995-101 (D.C. Cir. 1987) (upholding Federal Energy Regulatory Commission decision to impose common carriage open access requirements on interstate gas pipeline companies in order to prevent pipelines from discriminating against non-pipeline gas suppliers and to ensure that consumers are able to obtain gas at competitive levels.); see also *NARUC II*, 533 F.2d at 609 (where the agency has imposed such obligations, that is adequate to confer common carrier status).

¹⁷⁷ See *Bell Telephone Co. of Pennsylvania v. FCC*, 503 F.2d 1250, 1253-54 (3rd Cir. 1974).

¹⁷⁸ *Virtual Collocation Order*, 9 FCC Rcd at 5161-62, paras. 18-19.

¹⁷⁹ There are two ways to determine that a communications service qualifies as a common carrier service. A communications service will be considered a common carrier service if: (1) a common carrier holds out the service (continued....)

As discussed above, without the ability to cross-connect at an incumbent's premises, competitive transport would likely be cost-prohibitive and economically wasteful. The effect would be to entrench the incumbent LECs' power in the transport market.¹⁸⁰ These adverse effects on the public interest persuade us that we should exercise our authority under section 201 to require incumbent LECs to provision cross-connects as described above.¹⁸¹

71. We reject SBC's argument that the Commission cannot rely on section 201(a) to require incumbent LECs to provide cross-connects between collocated carriers.¹⁸² That argument is based on the D.C. Circuit's holding in *Bell Atlantic v. FCC* that section 201(a) does not authorize the Commission to provide for *physical* collocation within an incumbent LEC's central offices.¹⁸³ That holding, however, does not preclude the Commission from mandating that an incumbent provide facilities and equipment dedicated to a particular carrier's use, as long as that carrier does not have access to the incumbent's property for the purpose of installing or maintaining the facilities or equipment.¹⁸⁴ As the Commission recognized in the *Virtual Collocation Order*, incumbent LECs frequently dedicate facilities and equipment to particular customers in their normal course of business.¹⁸⁵ Our requirement that incumbent LECs install and maintain cabling that permits a collocator to cross-connect with another telecommunications carrier within the incumbent's premises is not only consistent with that practice, but also necessary or desirable in the public interest.

72. In addition, section 201(b) supports Commission authority to require incumbent LECs to provision cross-connects between two collocated competitive LECs. Section 201(b) states that "[a]ll charges, practices, classifications and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification or regulation that is unjust or unreasonable is hereby declared to be unlawful."¹⁸⁶

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to the general public on a common carrier basis or (2) the Commission finds that it is "necessary or desirable in the public interest" for the service to be provided on a common carrier basis. See *NARUC v. FCC*, 525 F.2d 630, 641, 644 n.76 (D.C. Cir. 1976) (*NARUC I*); see also *NARUC v. FCC*, 533 F.2d 601, 608-9 (D.C. Cir. 1976) (*NARUC II*) (binding requirement by agency that company provide service on indifferent basis is adequate to confer common carrier status). We exercise our authority under the second prong to designate the provision of cross-connects between two collocated carriers as a common carrier service.

¹⁸⁰ See, e.g., Focal Comments at 17.

¹⁸¹ See Joint Commenters at 53-55 (arguing that as a final – and least desirable – alternative, the Commission should require incumbent LECs to tariff a cross-connection service, in accordance with sections 201(a) and 251(a)(1)); see also *Bell Telephone Co. of Pa. v. FCC*, 503 F.2d 1250, 1270-73 (3d Cir. 1974) (*Pennsylvania Bell v. FCC*).

¹⁸² See SBC Reply at 27.

¹⁸³ *Bell Atlantic I*, 24 F.3d at 1444-46.

¹⁸⁴ *Virtual Collocation Order*, 9 FCC Rcd at 5163-34 paras. 25-26.

¹⁸⁵ *Id.*

¹⁸⁶ 47 U.S.C. § 201(b).

Under section 201(b), we find an incumbent LEC's refusal to provision cross-connects to be an unjust and unreasonable practice in connection with existing services of incumbent LECs.

73. Ultimately, we agree with Qwest that cross-connects are not functionally different from other nonswitched services, such as special access services, that incumbent LECs provide to other carriers and end users.¹⁸⁷ Like these other services, the cross-connect provides a dedicated transmission path between two points, in this case between collocated carriers. Therefore, our requirement to provide cross-connects between collocated competitive LECs is not burdensome; rather, it is a "practice" needed in connection with an incumbent LEC's existing special access services to render the provisioning just and reasonable under section 201(b).¹⁸⁸ Without this specific offering, an incumbent instead could require, as reasoned above, that the collocator purchase incumbent transport to carry the traffic out of the incumbent's premises to an interconnection point outside the incumbent's premises. From this interconnection point, the competitive transport provider likely would then carry the traffic back to the incumbent's premises for carriage through the competitive transport provider's transport network.

74. In making available a cross-connect offering, we find that, pursuant to its obligations to provide a communications service upon reasonable request, and to engage in just and reasonable practices, an incumbent LEC must provide the appropriate cross-connect as requested by the collocated competitive LECs. We note that the "appropriate" cross-connect facility may constitute a "lit" service or a dark fiber service depending upon the requirements of the two collocated competitors. Requiring carriers to purchase a "lit" service when they only require unlit fiber cabling would add significant expense and almost assuredly would make the competitive transport cost-prohibitive and uneconomical.

75. Our decision to include dark fiber as part of the cross-connect service that incumbents must provide to collocators upon request is limited in scope. Indeed, we are not requiring incumbent LECs to provide a general dark fiber service. Rather, only in the limited context of cross-connects between collocated carriers must incumbent LECs provide dark fiber service under this Order.¹⁸⁹ Our decision to require this is due to the technical and competitive circumstances existing in the marketplace. We find that incumbent LEC provisioned cross-connects, including cross-connects in the form of lit or unlit fiber, are essential to allow the

¹⁸⁷ See Qwest Reply at 6 (asserting that there can be little doubt that the Commission can require an incumbent LEC to provide special access services between two locations outside the incumbent's central office and that the Commission similarly can require the incumbent to provide a special access interconnection service (*i.e.*, a cross-connect) within a central office for competitive LECs that are lawfully collocated in that office).

¹⁸⁸ This offering includes what amounts to the provision of a dedicated circuit or line (carrying both interstate and intrastate traffic) that connects collocated equipment to the competitive LEC's transport provider of choice when that transport provider is collocated.

¹⁸⁹ We note that this is not the same situation that was present in *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994) (*Southwestern Bell v. FCC*). In *Southwestern Bell v. FCC*, the court found that the Commission did not have adequate support for its conclusion that LECs had offered "dark fiber service" on a common carrier basis. However, in the instant case, the Commission is declaring that a dark fiber service with respect to cross-connects is a common carrier service using the second prong under *NARUC II*. See note 179, *supra*.

development of a competitive transport market in light of existing technological and economic factors.

76. We also note that in provisioning cross-connects, incumbent LECs should use the most efficient interconnection arrangements available that, at the same time, impose the least intrusion on their property interest. For example, in cases where incumbents interconnect with collocators at equipment that is closer to the collocators' space than the incumbent's main distribution frame, we would expect the cross-connect to be provisioned, where technically feasible, at or near that equipment, rather than at the main distribution frame. This provides competitive LECs with the most efficient interconnection arrangements while minimizing the amount of cable that has to be routed through the incumbent's central office. We recognize that incumbent LECs, however, are not required to provide competitors better interconnection or access to the network than already exists. This requirement merely allows the collocator to use the existing network in as efficient a manner as the incumbent uses it for its own purposes. Furthermore, we expect that incumbent LECs should be able to provision these cross-connects in a time frame no longer than that which the incumbent provides itself or any affiliate or subsidiary.¹⁹⁰

77. We recognize, of course, that the Commission's exercise of its authority under section 201 historically has been limited to interstate and foreign communication by wire or radio. Physical connections between collocators and other carriers, like other portions of the telecommunications network, typically transmit both interstate and intrastate traffic. We have previously determined that special access lines carrying both interstate and intrastate traffic are subject to the Commission's jurisdiction where it is not possible to separate the uses of the special access lines by jurisdiction.¹⁹¹ We have typically exercised that jurisdiction, however, only when the amount of interstate traffic transmitted over a special access line constitutes more than ten percent of all traffic transmitted over that line.¹⁹² We have reasoned that lesser percentages of interstate traffic should be considered *de minimis*.¹⁹³

78. We conclude that a similar approach is appropriate with regard to a cross-connect service between collocators and other carriers provided pursuant to section 201. As with special access traffic, we would expect that the traffic carried through these cross-connects typically includes interstate or foreign communication. To the extent that our cross-connect requirements are dependent upon our authority under section 201, we require incumbent LECs to provide a

¹⁹⁰ See generally, AT&T Apr. 20, 2001 Letter, *supra* note 93, at 5.

¹⁹¹ GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148, 13 FCC Rcd 22466, 22478-22481, paras. 22-27 (1998) (GTE ADSL Service Order).

¹⁹² *Id.* at 22479, para. 23; see also MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, Decision and Order, 4 FCC Rcd 1352, 1357, para. 30-32 (Jt. Bd. 1989); adopted MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, 4 FCC Rcd 5660, 5660-61, paras. 6-9 (1989) (MTS and WATS Market Structure Order) (adopting ten percent rule for jurisdictional separations purposes).

¹⁹³ GTE ADSL Service Order, 13 FCC Rcd at 22479, para. 23.

cross-connect within its premises where: (1) two collocated carriers request such a cross-connect; and (2) more than a *de minimis* amount of the traffic to be transmitted through the cross-connect will be interstate.¹⁹⁴ Where the interstate or foreign traffic would be more than *de minimis*, the incumbent LEC must provision the cross-connect through its interconnection facilities or equipment. Where a collocator is requesting this cross-connect solely pursuant to our action under section 201, it shall provide a certification to the incumbent that it satisfies the *de minimis* threshold of ten percent. Upon receipt of such certification, the incumbent shall promptly provision the service. The incumbent cannot refuse to accept the certification but instead must provision the service promptly. If the incumbent feels that the certification is inaccurate, it can file a section 208 complaint with the Commission.¹⁹⁵

3. Incumbent LEC Provisioning of Cross-Connects – Section 251

79. Similar to our reasoning under section 201, we find, as a second, alternative ground, that incumbent LEC-provisioned cross-connects between two collocators, and the attendant obligations to make dark fiber available as a cross-connect and to use the most efficient arrangement available, are also supported by section 251 of the Act. Incumbent LEC-provisioned cross-connects are properly viewed as part of the terms and conditions of the requesting carrier's collocation in much the same way as the incumbent LEC provisions cables that provide electrical power to collocators. Once equipment is eligible for collocation, the incumbent LEC must install and maintain power cables, among other facilities and equipment, to enable the collocator to operate the collocated equipment. The power cables are not "collocated" merely because the incumbent LEC installs and maintains these cables in areas outside the requesting carrier's immediate collocation space. Instead, the incumbent provides the power cables as part of its obligation to provide for interconnection and collocation "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."¹⁹⁶ As with power cables, an incumbent installs and maintains cross-connect cables – or refuses to install and maintain them – as part of the terms and conditions under which the incumbent provides collocation. Indeed, the Commission has long considered cross-connects to be part of the terms and conditions under which LECs provide interconnection.¹⁹⁷ The exercise of our authority under section 251(c)(6) is also quite limited in scope and should not be read as implying that a requesting carrier is entitled

¹⁹⁴ Our authority to impose cross-connect requirements under section 251(c)(6) does not depend upon the presence of interstate traffic.

¹⁹⁵ 47 U.S.C. § 208.

¹⁹⁶ 47 U.S.C. § 251(c)(6).

¹⁹⁷ *Expanded Interconnection with Local Telephone Company Facilities, First Report and Order*, 7 FCC Rcd 7369, 7442, para. 157 (1992) (*Special Access Order*) (addressing LEC-to-collocator cross-connects), *vacated in part and remanded*, *Bell Atlantic I*, 24 F.3d 1441 (D.C. Cir. 1994); *First Reconsideration*, 8 FCC Rcd 127 (1993); *vacated in part and remanded*, *Bell Atlantic I*, 24 F.3d 1441 (D.C. Cir. 1994); *Second Reconsideration*, 8 FCC 7341 (1993); *Second Report and Order*, 8 FCC Rcd 7374 (1996) (*Switched Transport Order*), *vacated in part and remanded*, *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994); *Remand Order*, 9 FCC Rcd 5154 (1994) (*Virtual Collocation Order*), *remanded for consideration of 1996 Act sub nom. Pacific Bell. v. FCC*, 81 F.3d 1147 (D.C. Cir. 1996) (collectively referred to as *Expanded interconnection Proceeding*).

to obtain services from the incumbent superior to those the incumbent provides itself, its affiliates, subsidiaries, or other parties. On the contrary, our action reflects our overriding concern that an incumbent LEC would be acting in an unreasonable and discriminatory manner if it refused to provide cross-connects between collocators.

80. The requirement that incumbent LECs provision cross-connects between collocated carriers is consistent with the original obligation for cross-connects that the Commission imposed in the *Local Competition Order*.¹⁹⁸ Although it did not fully amplify its reasoning there, the Commission concluded that cross-connects were required under section 251(c)(6) to ensure that “collocation be provided ‘on . . . terms and conditions that are just, reasonable, and nondiscriminatory’”¹⁹⁹ That conclusion is consistent with our view that an incumbent LEC’s refusal to provide a cross-connect between two collocated carriers would violate the incumbent’s duties under section 251(c)(6) to provide collocation “on . . . terms and conditions that are just, reasonable, and nondiscriminatory.”²⁰⁰ Although we now conclude that the Commission overreached in further extending competitors’ cross-connect rights in the *Advanced Services First Report and Order*, we believe the initial approach in the *Local Competition Order* was a reasonable interpretation of the applicable statutory language.²⁰¹ In particular, we find Qwest’s arguments in favor of this approach to be persuasive in view of its market position as both an incumbent LEC and a competitive LEC.²⁰²

81. Our decision to require incumbent LEC-provided cross-connects pursuant to section 251(c)(6) is not inconsistent with the D.C. Circuit Court’s opinion. In *GTE v. FCC*, the court found that the Commission appeared to have overstepped its authority under section 251(c)(6) when it required physical collocation of cross-connects in the *Advanced Services First Report and Order*.²⁰³ The D.C. Circuit stated that “[s]ection 251(c)(6) is focused solely on connecting new competitors to [incumbent] LECs’ networks.”²⁰⁴ We disagree with SBC’s position that this statement forecloses us from requiring, pursuant to section 251(c)(6), that an incumbent LEC provision cross-connects between collocated carriers upon request. The court’s statement is part of a larger discussion that uses cross-connects as an example of how the

¹⁹⁸ See *Local Competition Order*, 11 FCC Rcd 15499 at 15588, para. 173. As indicated previously, see note 145, *supra*, the Eighth Circuit generally affirmed the collocation rules adopted in the *Local Competition Order* without specifically addressing the cross-connects rule adopted in that *Order*. See *Iowa Utilities Bd. v. FCC*, 120 F.3d at 818.

¹⁹⁹ *Local Competition Order*, 11 FCC Rcd 15499 at 15801, para. 594.

²⁰⁰ 47 U.S.C. § 251(c)(6).

²⁰¹ *Advanced Services First Report and Order*, 14 FCC Rcd at 4779-80, para. 32-33.

²⁰² See Qwest Comments at 16 (arguing that it would not be just and reasonable to prohibit a competitive LEC from cross-connecting with other competitive LECs when those competitive LECs have otherwise legitimately obtained collocation under the Act).

²⁰³ *GTE v. FCC*, 205 F.3d 416 (D.C. Cir. 2000).

²⁰⁴ *Id.* at 423-24.

Commission's prior interpretation of "necessary" in section 251(c)(6) might unnecessarily take incumbent LEC property.²⁰⁵ The court had before it a Commission requirement that an incumbent LEC allow collocators to self-provision and thus collocate cross-connects outside of their immediate collocation space.²⁰⁶ The court stated that such a requirement "has no *apparent* basis in the statute" and observed that the Commission had not attempted to show that cross-connects are "necessary for interconnection or access to unbundled network elements."²⁰⁷ The court did not address specifically whether we could require incumbent LEC provisioned cross-connects pursuant to the "rates, terms, and conditions" clause of section 251(c)(6). Nor did the court address specifically whether we could require incumbent LEC provisioned cross-connects pursuant to other provisions of the Communications Act.²⁰⁸

82. Our conclusion that an incumbent LEC's provisioning of cross-connects to two collocated carriers is required under section 251(c)(6) reaffirms obligations imposed under the *Local Competition Order* and is based, in part, on the same reasons discussed above regarding section 201's requirement to provide services in a *just* and *reasonable* manner. An incumbent also has a duty to provide collocation terms and conditions that are *nondiscriminatory* pursuant to section 251(c)(6).²⁰⁹ The provisioning of cross-connects within the incumbent's premises merely puts the collocator in position to achieve the same interconnection with other competitive LECs that the incumbent itself is able to achieve. Thus, the refusal to provision such cross-connects would be discriminatory toward competitive LECs.²¹⁰

83. In addition, because incumbents provide cross-connects within their premises to those collocators that purchase the incumbents' transport services, an incumbent LEC's failure to provide cross-connects within its premises to collocators that wish to utilize a competitive

²⁰⁵ *Id.*

²⁰⁶ *See id.*

²⁰⁷ *Id. (emphasis added).*

²⁰⁸ *See id.*

²⁰⁹ Verizon argues that such a requirement would turn their central office into a hub. Verizon Reply at 5 (asserting that collocators do not have a right to use precious central office space as a hub to connect to each other, regardless of whether it would be more or less expensive than connecting on their own premises, and that Congress would not have restricted collocation to that which is "necessary for interconnection or access to unbundled network elements" if it intended to allow unfettered occupation of central office space by competing carriers); *see also* SBC Reply at 26. We disagree. Requiring incumbent LECs to provision cross-connects between two collocated competitive LECs does not expand the number of competitive LECs that can collocate at an incumbent's premises. Incumbent LEC provisioning of cross-connects does not allow "unfettered occupation of central office space by competing carriers." *See* Verizon Reply at 5. Indeed, competitive LECs must continue to meet the same statutory requirements to qualify for collocation at an incumbent LEC's premises. *See* Qwest Comments at 16 (stating that the Act does not allow a competitive LEC to obtain collocation from an incumbent LEC for the sole or primary purpose of cross-connecting to other competitive LECs). Our cross-connect requirement is very limited in scope – an incumbent LEC must provision cross-connects between carriers that are lawfully collocated at the incumbent's premises.

²¹⁰ *See* AT&T Comments at 33; Qwest Reply at 5-6; WorldCom Reply at 13-14.

transport provider also raises this nondiscrimination issue. Specifically, we find that it would be discriminatory not to provide such cross-connects because of the vast disparity in costs and efficiency associated with the two alternatives. In fact, a failure to provide cross-connects would in effect force the competitive LEC to purchase incumbent LEC transport in order to access a competitive provider's transport service.

84. Requiring incumbent LECs to provision cross-connects between requesting carriers is consistent with the statutory scheme outlined in section 251 and is consistent with Congress' explicit goal of ensuring interconnected networks. Indeed, pursuant to section 251(a)(1), all telecommunications carriers have a statutory obligation to interconnect directly or indirectly with the facilities or equipment of other telecommunications carriers.²¹¹ As we recognized in the *Local Competition Order*, "the duty to interconnect directly or indirectly is central to the 1996 Act and achieves important policy objectives."²¹² Thus, we believe our cross-connect requirement is consistent with and furthers Section 251's fundamental purpose of promoting the interconnection of all telecommunications networks by ensuring that incumbent LECs are not the only carriers that are able to interconnect efficiently with other carriers. As has been the practice in the past, we anticipate that cross-connect disputes, like other interconnection-related disputes, can be addressed in the first instance at the state level.

D. Space Allocation and Access

1. Background

85. Section 251(c)(6) requires incumbent LECs to provide for physical collocation "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."²¹³ In the *Local Competition Order*, the Commission required incumbent LECs to make physical collocation space available to requesting carriers on a first-come, first-served basis. The Commission also required that collocators seeking to expand their collocated space should be allowed to use contiguous space where available, and that incumbents should not be required to lease or construct additional space to provide physical collocation where existing space had been exhausted.²¹⁴ In addition, observing that physical security arrangements surrounding collocation space protect both incumbent and collocator equipment from interference by unauthorized parties, the Commission permitted incumbent LECs to require reasonable security arrangements to separate collocation space from the incumbents' facilities.²¹⁵

86. In the *Advanced Services First Report and Order*, the Commission amended its physical collocation rules to require that "an incumbent LEC must give competitors the option of

²¹¹ 47 U.S.C. § 251(a)(1).

²¹² *Local Competition Order*, 11 FCC Rcd at 15991, para. 997.

²¹³ 47 U.S.C. § 251(c)(6).

²¹⁴ *Local Competition Order*, 11 FCC Rcd at 15797-98, para. 585.

²¹⁵ *Id.* at 15803, para. 598.

physically collocating equipment in any unused space within the incumbent's premises, to the extent technically feasible.”²¹⁶ The Commission precluded an incumbent LEC from restricting physical collocation to “a room or isolated space separate from the incumbent's own equipment.”²¹⁷ The Commission specified that, while an incumbent LEC could require physical collocators to use a central entrance to the incumbent’s premises, the incumbent could not require construction of a new entrance for these collocators’ use.²¹⁸

87. In *GTE v. FCC*, the D.C. Circuit determined that the Commission had not adequately justified these revised rules adopted in the *Advanced Services First Report and Order*. The court stated that these rules “appear to favor the [incumbent] LECs’ competitors in ways that exceed what is ‘necessary’ to achieve reasonable ‘physical collocation’ and in ways that may result in unnecessary takings of [incumbent] LEC property.”²¹⁹ The court therefore vacated and remanded these rules. The court stated, however, that the Commission would have the opportunity on remand to “refine [its] regulatory requirements to tie the rules to the statutory standard, which only mandates physical collocation as ‘necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier.’”²²⁰

88. As discussed below, we find that, in adopting the physical collocation rules overturned by the D.C. Circuit, the Commission focused primarily on the 1996 Act’s goal of promoting competition and innovation, without giving sufficient weight to the incumbent LECs’ property interests. To correct this problem, we adopt rules that return decision-making authority regarding space assignments to the incumbents, while requiring that incumbents exercise this authority in accordance with certain principles designed to ensure that their space assignment decisions are made in a just, reasonable, and nondiscriminatory manner, as section 251(c)(6) requires. These principles will guide the incumbents’ space assignment decisions and provide general parameters for more detailed physical collocation rules that the state commissions may craft. We also establish certain presumptions for use in evaluating an incumbent LEC’s space assignment policies and practices. In addition, we discuss incumbent LECs’ ability to restrict physical collocators to separated space and entrances, recognizing the incumbents’ right to address legitimate security concerns, but balancing that right with the statutory goal of promoting competition and innovation.

2. Space Assignments

89. With regard to the requirement that an incumbent LEC allow requesting carriers to physically collocate in any unused space within its premises, the D.C. Circuit held that the

²¹⁶ *Advanced Services First Report and Order*, 14 FCC Rcd at 4784-85, para. 42 (adopting 47 C.F.R. § 51.323(k)(2)).

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *GTE v. FCC*, 205 F.3d at 426.

²²⁰ *Id.* (quoting 47 U.S.C. § 251(c)(6)).

Commission had not adequately explained “why a competitor, as opposed to the [incumbent] LEC, should choose where to establish collocation on the LEC’s property . . .”²²¹ In the *Second Further Notice*, the Commission therefore invited comment on what space assignment policies are necessary to achieve reasonable and nondiscriminatory physical collocation that does not result in any “unnecessary taking” of incumbent LEC property.²²² Based on the D.C. Circuit’s opinion and the record developed in response to the *Second Further Notice*, we agree with several parties that the rules adopted in the *Advanced Services First Report and Order* failed to properly balance the congressional goal of promoting competition against the need to protect an incumbent LEC’s property interests against unwarranted intrusion.²²³

90. In recognition of the incumbent’s right to use and manage its own property, we find that each incumbent should maintain ultimate responsibility for assigning collocation space within its premises. An incumbent is far more familiar with the design and layout of its premises than are its competitors, who neither own nor manage those premises.²²⁴ The incumbent is also the only party with direct knowledge of all competitive LEC collocation requests, as well as all other tenant requirements.²²⁵ In addition, unlike the incumbent LEC, an individual requesting carrier has no duty to consider the impact of its collocation space choices on the incumbent and other collocators.²²⁶ Therefore, we believe the revised physical collocation rules adopted in the *Advanced Services First Report and Order* went too far in removing the incumbent LEC’s ability to use and manage its own property. Importantly, section 251(c)(6) does not turn an incumbent LECs’ premises into common property. Rather, that provision requires that an incumbent LEC make space available to competitors within the confines of its own private property.

91. In light of the D.C. Circuit’s opinion, we disagree with the approach of those commenters that recommend blanket re-adoption, albeit with some clarification, of the rules vacated in *GTE v. FCC* to ensure that physical collocation space is allocated in accordance with the statute.²²⁷ As the D.C. Circuit noted, “[i]t is one thing to say that [incumbent] LECs are forbidden from imposing unreasonable minimum space requirements on competitors; it is quite another thing, however, to say that competitors, over the objection of [incumbent] LEC property owners, are free to pick and choose preferred space on the [incumbent] LECs’ premises, subject only to technical feasibility.”²²⁸ Ultimately, it is the incumbent who will be responsible for

²²¹ *GTE v. FCC*, 205 F.3d at 426.

²²² *Second Further Notice*, 15 FCC Rcd at 17848, para. 96; see also *GTE v. FCC*, 205 F.3d at 426.

²²³ E.g., SBC Comments at 26-27; Verizon Comments at 14.

²²⁴ SBC Comments at 27-28.

²²⁵ Qwest Comments at 23; SBC Reply at 27-28.

²²⁶ SBC Comments at 28; Verizon Reply at 8.

²²⁷ CoreComm Comments at 30-31; Covad Comments at 32; DSLnet Comments at 41-42; Joint Commenters Comments at 35-36.

²²⁸ See *GTE v. FCC*, 205 F.3d at 426.

planning and maintaining the premises for the benefit of all users – the incumbent, its affiliates and subsidiaries, and other collocators.²²⁹ Allowing requesting carriers to exercise primary decision-making authority over space assignment decisions would give those carriers the ability to usurp an incumbent LEC's right to manage its own property. Such a result would go beyond the limits established by the statute.

92. An incumbent LEC, however, must assign space in accordance with the statutory requirement that it provide for physical collocation “on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.” We recognize that an incumbent LEC has powerful incentives that, left unchecked, may influence it to allocate space in a manner inconsistent with this statutory duty. We conclude that to meet the statutory standard, an incumbent LEC must act as a neutral property owner and manager, rather than as a direct competitor of the carrier requesting collocation, in assigning physical collocation space. To ensure that competitive concerns do not influence an incumbent LEC's space assignment decisions, we believe that we should enunciate principles that give more specific meaning to the incumbent's statutory duty to provide for physical collocation “on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.” Of course, state commissions should continue to play a primary role in resolving specific space assignment disputes.

93. First, we require that an incumbent LEC's space assignment policies and practices must not materially increase a requesting carrier's collocation costs or materially delay a requesting carrier's occupation and use of the incumbent LEC's premises. Physical space assignments that require costly conditioning or lengthy provisioning intervals, when less expensive and quicker alternatives are available, simply do not meet the statutory “just, reasonable, and nondiscriminatory” standard.²³⁰ Such space assignment policies could also drive competitors to opt for virtual collocation even though physical collocation is technically feasible, frustrating the 1996 Act's preference for physical collocation.²³¹ For example, it would be presumptively unreasonable for an incumbent to assign non-conditioned collocation space to a competitor when technically feasible, conditioned space is available within the incumbent's premises. This presumption should promote the efficient use of conditioned space and will help ensure that physical collocation space is made available in a timely manner. An incumbent LEC that assigns unconditioned space when conditioned space is available must show that operational constraints, unrelated to the incumbent's or any of its affiliates' or subsidiaries' competitive concerns, require that the requesting carrier be assigned unconditioned space.

²²⁹ See, e.g., Qwest Comments at 23; Verizon Comments at 14-15.

²³⁰ The record makes clear that when space assignments have been left to the incumbent's unfettered discretion, the incumbent's policies and practices have frequently resulted in central offices with large, unused areas unavailable for physical collocation, little adequate space available for physical collocation, and extremely high physical collocation construction charges. Covad Comments at 32-33; CTSI Comments at 18; Rhythms Comments at 39-40; Mpower Reply at 7.

²³¹ See 47 U.S.C. § 251(c)(6).

94. Second, an incumbent LEC must not assign physical collocation space that will impair the quality of service or impose other limitations on the service a requesting carrier wishes to offer.²³² For example, the incumbent's choice of space must not materially reduce a requesting carrier's ability to reach potential customers.²³³

95. Third, an incumbent LEC's space assignment policies and practices must not reduce unreasonably the total space available for physical collocation or preclude unreasonably physical collocation within the incumbent's premises.²³⁴ We recognize that certain space within an incumbent LEC's premises will not be suitable for physical collocation and, thus, may be withheld from physical collocation without violating section 251(c)(6). We find that space within an incumbent's premises is generally suitable for physical collocation unless it is: (a) physically occupied by non-obsolete equipment; (b) assigned to another collocater in accordance with our rules; (c) used to provide physical access to occupied space; (d) used to enable technicians to work on equipment located within occupied space; (e) properly reserved for future use, either by the incumbent LEC or by another carrier; or (f) essential for the administration and proper functioning of the incumbent LEC's premises.²³⁵ The incumbent may allocate any space that falls outside these categories among different uses, including physical collocation, provided that the incumbent performs this allocation in accordance with the statute, our rules, and any consistent state rules.

96. Although a requesting carrier may not make the final determination as to the location of its particular physical collocation space, an incumbent LEC must allow a requesting carrier to submit physical collocation space preferences prior to assigning that carrier space. This will enable the requesting carrier to request the space that best fits its operational needs. To request specific space intelligently, a requesting carrier will require more information than our existing space report rule expressly requires that an incumbent provide.²³⁶ We therefore amend that rule to require that, upon request, an incumbent LEC must submit to the requesting carrier a report describing in detail the space that is available for collocation in a particular incumbent LEC premises. This report is due within ten days of its being requested, the same time period as in our existing rule.²³⁷

²³² See Northpoint Comments at 21-22; Sprint Reply at 7; *Sprint Apr. 26, 2001 Letter, supra* note 121, at Att., p. 2.

²³³ See Sprint Comments at 14.

²³⁴ See CTSI Comments at 18; Sprint Reply at 7; *Sprint Apr. 26, 2001 Letter, supra* note 121, at Att., p. 2.

²³⁵ We note that the *Second Further Notice* invited comment on whether the Commission should adopt national standards governing the periods for which incumbent LECs and collocating carriers may reserve space for future use in incumbent LEC premises. See *Second Further Notice*, 15 FCC Rcd at 17856, para. 117. We will address this area at a later date.

²³⁶ That rule requires that an incumbent LEC must provide, upon request, "a report indicating the incumbent LEC's available collocation space in a particular LEC premises." 47 C.F.R. § 51.321(h).

²³⁷ See *id.*

97. We believe the approach set forth above will help limit disputes over the availability of physical collocation space as well as the appropriateness of specific space assignments. This approach also will provide requesting carriers with information that will help them assess whether the incumbent is meeting its statutory obligations, while discouraging each incumbent from abusing its discretion in assigning physical collocation space. We do not intend to preclude state commissions from imposing additional space assignment requirements, as long as they are consistent with the terms of the Communications Act and our implementing rules. A competitive LEC may challenge a space assignment with the appropriate state commission if the competitive LEC believes that the assignment is unjust, unreasonable, or discriminatory, violates our rules, or violates any additional consistent rules the state commission has established.

3. Separate Rooms and Entrances

98. In the *Advanced Services First Report and Order*, the Commission stated that incumbent LECs must allow competitors to physically collocate “without requiring the construction of a room, cage, or similar structure, and without requiring the creation of a separate entrance to the competitor’s collocation space.”²³⁸ Although the D.C. Circuit affirmed the Commission’s rule requiring incumbent LECs to allow cageless collocation, the court held that the Commission had not reasonably justified the portions of the rule that forbade incumbent LECs “from requiring competitors to use separate entrances to access their own equipment” and “from requiring competitors to use separate or isolated rooms or floors.”²³⁹ The Commission invited comment on whether it might, consistent with section 251(c)(6), preclude incumbents from placing collocators in a room or isolated space separate from the incumbent’s own equipment.²⁴⁰ The Commission also invited comment on whether section 251(c)(6) permits an incumbent LEC to require requesting carriers to construct or pay for new entrances to the incumbent’s premises for the collocators’ use.²⁴¹

99. Although we find that it is not *per se* unreasonable or discriminatory for an incumbent LEC to restrict physical collocation to space segregated from space housing the incumbent’s equipment, or to require the construction and use of a separate entrance to access physical collocation space, we find that it would be unreasonable for the incumbent to require such separation measures as a general policy. As competitive LECs contend, mandatory separation of physical collocation space can substantially increase physical collocation costs.²⁴² In addition, placement of DSL equipment, such as DSLAMs, in isolated or separate space can

²³⁸ See *Advanced Services First Report and Order*, 14 FCC Rcd at 4785, para. 42 (adopting 47 C.F.R. § 51.323(k)(2)).

²³⁹ See *GTE v. FCC*, 205 F.3d at 426; *Advanced Services First Report and Order*, 14 FCC Rcd at 4785, para. 42;

²⁴⁰ *Second Further Notice*, 15 FCC Rcd at 17849, para. 97.

²⁴¹ *Id.* at para. 98.

²⁴² @Link Comments at 30; Covad Comments at 34; Mpower Comments at 30; Rhythms Comments at 39.

affect a collocator's ability to access unbundled local loops.²⁴³ Moreover, a requirement that all collocators place their equipment solely in a particular area of a central office could prematurely exhaust physical collocation space.²⁴⁴ Similarly, a requirement that separate entrances always be built could decrease the space available in the central office for collocation;²⁴⁵ and adding a new entrance to an existing structure could simply delay the requesting carrier's occupation and use of the incumbent LEC's premises, and increase the requesting carrier's costs.²⁴⁶

100. As a general matter, we find it reasonable to interpret section 251(c)(6) in a manner that reduces the likelihood that space limitations will preclude physical collocation. Although, as Verizon points out, virtual collocation is available where separate physical collocation space is exhausted,²⁴⁷ section 251(c)(6) establishes a clear preference for physical over virtual collocation – permitting an incumbent LEC to substitute the latter for the former only if the incumbent “demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.”²⁴⁸ An interpretation that would allow an incumbent to require separation of equipment or separate entrances in all cases, regardless of the potential effect on competition, would fail to properly balance the statute's competing interests. This is especially true since, in many instances, separated equipment and separate entrances are not needed to ensure that the incumbent is able to protect its own property.²⁴⁹

101. We find, based on the record before us, that there is simply insufficient evidence to support a finding that incumbent LECs' security concerns require physical separation of collocated equipment from the incumbent's own equipment in every instance. Incumbents claim that the placement of competitors' equipment in the incumbent's premises raises serious security concerns that can only be or are best addressed by physical segregation of the competitors'

²⁴³ Covad Comments at 33. Specifically, relegating collocators to isolated or separated space can increase the distance between the DSLAM and a customer's premises. This is a particular problem for DSL service providers because a DSLAM must be placed within a reasonable distance, usually less than 18,000 feet, of a DSL customer's premises if service is to be provided. *See id.*; *see also Collocation Reconsideration Order & Second Further Notice*, 15 FCC Rcd at 17812, para. 10.

²⁴⁴ *See @Link Comments* at 30; *Joint Commenters Comments* at 40; *Northpoint Comments* at 21; *Rhythms Comments* at 42-43.

²⁴⁵ *See @Link Comments* at 41-42 (asserting that separate entrances require new doors, walls, and hallways, wasting space that might otherwise be used for collocation); *CTSI Comments* at 19 (stating that there is no apparent reason for mandatory equipment segregation requirements except to inhibit competitors from collocating).

²⁴⁶ *Covad Comments* at 34; *Mpower Comments* at 30-31; *Rhythms Comments* at 39.

²⁴⁷ *Verizon Comments* at 17.

²⁴⁸ 47 U.S.C. § 251(c)(6); *see also Rhythms Reply* at 29 (stating preference for physical, rather than virtual, collocation).

²⁴⁹ *Rhythms Comments* at 43 (stating that less obstructive alternatives, such as locked cabinets, can ensure protection of the incumbent's equipment); *Rhythms Reply* at 28-29.

equipment from the incumbent's equipment.²⁵⁰ In contrast, competitors argue that the D.C. Circuit rejected this argument, finding that there were "alternative means available to [incumbent] LECs to ensure . . . security."²⁵¹ Competitors also contend that security is not one of the limits established in section 251(c)(6) on the incumbent's obligation to provide physical collocation.²⁵² The D.C. Circuit recognized that incumbents' security concerns could be addressed by alternative measures.²⁵³ Our rules currently permit incumbent LECs to install security cameras or other monitoring systems, and to require competitive LEC personnel to use badges with computerized tracking systems while on the incumbent's premises, among other security options.²⁵⁴ We find that such measures will provide sufficient security for an incumbent's equipment in most circumstances.²⁵⁵

102. While we recognize that incumbents, like other users of incumbent LEC premises, have a right to protect their equipment from harm,²⁵⁶ incumbents also have incentives to overstate security concerns so as to limit physical collocation arrangements and discourage competition.²⁵⁷ We therefore conclude that an incumbent LEC may require the separation of collocated equipment from its own equipment only if the proposed separated space is: (a) available in the same or a shorter time frame as non-separated space; (b) at a cost not materially higher than the cost of non-separated space; and (c) is comparable, from a technical and engineering standpoint, to non-separated space. We also conclude that an incumbent LEC may require such separation measures only where legitimate security concerns, or operational constraints unrelated to the incumbent's or any of its affiliates' or subsidiaries competitive concerns, warrant them. We believe this policy will help promote the efficient use of limited space and thereby advance the statutory preference for physical over virtual collocation. We also believe that this policy reasonably balances the congressional goal of promoting competition against the incumbent's right to use and manage its own property.

²⁵⁰ See Verizon Comments at 17-18 (arguing that an incumbent should not be required to allow placement of physically collocated equipment in same room as its own equipment because segregation of equipment is the "only effective means of providing security in a collocated environment").

²⁵¹ See, e.g., Joint Commenters Reply at 18 (quoting *GTE v. FCC*, 205 F.3d at 425); see also Rhythms Comments at 43.

²⁵² *Id.* at 31-32.

²⁵³ See *GTE v. FCC*, 205 F.3d at 425 ("[I]t is hardly surprising that the FCC opted to prohibit [mandatory caged collocation], particularly given the alternative means available to LECs to ensure the security of their premises.").

²⁵⁴ 47 C.F.R. § 51.323(i).

²⁵⁵ Rhythms Comments at 43.

²⁵⁶ SBC Reply at 32-33.

²⁵⁷ Despite the D.C. Circuit's explicit finding that the Commission's decision to allow cageless collocation was "hardly surprising . . . particularly given the alternative means available to LECs to ensure the security of their premises," Verizon insists that equipment segregation "is the only effective means of providing security in a collocated environment." Compare *GTE v. FCC*, 205 F.3d at 425 with Verizon Comments at 17-18.

103. While we reject an interpretation of section 251(c)(6) that would allow incumbent LECs to require, without exception, that competitors use segregated collocation space and separate entrances, this does not mean an incumbent LEC may never make use of segregated collocation space and separate entrances. Separate entrance requirements will meet the “just, reasonable, and nondiscriminatory” standard only where a separate entrance already exists that provides access to the collocation space at issue, or where construction of such an entrance is technically feasible, and will neither artificially delay collocation provisioning nor materially increase the requesting carrier’s costs.²⁵⁸ In addition, an incumbent LEC may construct or require the construction of a separated entrance only where legitimate security concerns, or operational constraints unrelated to the incumbent’s or any of its affiliates’ or subsidiaries competitive concerns, warrant them. Similarly, where an incumbent LEC assigns separated space for collocation or requires requesting carriers to access their collocated equipment through a separate entrance, the incumbent LEC’s affiliates and subsidiaries and their employees and contractors must also be subject to such restrictions. An incumbent LEC may require collocators to pay only for the least expensive, effective security option that is viable for the physical collocation space assigned.²⁵⁹ Otherwise, the incumbent would be providing collocation on unreasonable terms and conditions.

104. As with space assignment objections generally, a competitive LEC may challenge a separate space assignment or a separate entrance requirement with the appropriate state commission if the competitive LEC believes the assignment or requirement is unjust, unreasonable, discriminatory, violates our rules, or violates any additional, consistent rules the state commission has established.

V. PROCEDURAL MATTERS

A. Final Regulatory Flexibility Analysis

105. As required by the Regulatory Flexibility Act (RFA),²⁶⁰ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Second Further Notice of Proposed Rulemaking* in CC Docket No. 98-147.²⁶¹ The Commission sought written public comment on the proposals in *Second Further Notice*, including comment on the IRFA.²⁶² Appendix C sets forth a Final Regulatory Flexibility Analysis for the present *Fourth Report and Order*.

²⁵⁸ Separate entrances must also comply with the applicable fire code.

²⁵⁹ For example, SBC has indicated that, where it installs partitions between competitor’s equipment and its own, SBC will only charge the lesser of the cost of the partitions or other viable security measures, such as cameras, to address the security risks posed by collocation. SBC Comments at 29.

²⁶⁰ See 5 U.S.C. § 603.

²⁶¹ *Second Further Notice*, 15 FCC Rcd at 17864, para. 137.

²⁶² *Id.*

B. Final Paperwork Reduction Act Analysis

106. The *Second Further Notice of Proposed Rulemaking* from which this *Fourth Report and Order* issues proposed changes to the Commission's collocation requirements. As required by the Paperwork Reduction Act of 1995, the Commission sought comment from the public and from OMB on the proposed changes.²⁶³ This *Order* contains new or modified reporting and recordkeeping requirements or burdens that are being submitted to the Office of Management and Budget (OMB) for approval. Implementation of these information collections is subject to OMB approval, as prescribed by the Paperwork Reduction Act.

VI. ORDERING CLAUSES

107. Accordingly, IT IS ORDERED, pursuant to sections 1-4, 201, 202, 251-254, 256, 271, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-54, 201, 202, 251-54, 256, 271, and 303(r), that this *Fourth Report and Order* IS ADOPTED.

108. IT IS FURTHER ORDERED, pursuant to sections 1-4, 201, 202, 251-54, 256, 271, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-54, 201, 202, 251-54, 256, 271, and 303(r), that Part 51 of the Commission's rules, 47 C.F.R. Part 51, IS AMENDED, as set forth in Appendix B, and that those rule amendments SHALL BECOME EFFECTIVE thirty days after publication of the text or summary thereof in the Federal Register, unless the Commission publishes a document in the Federal Register to delay or withdraw them.

109. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *Fourth Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

²⁶³ *Id.* at 17864, para. 138.