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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of	)	
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corporation, Transferor to SBC Communications Inc., Transferee	)	CC Docket No. 98-141
	)	
Common Carrier Bureau and Office of Engineering Announce Public Forum on Competitive Access to Next-Generation Remote Terminals	)	NSD-L-00-48 DA 00-891

REPLY COMMENTS OF @LINK NETWORKS, INC. MGC COMMUNICATIONS, INC. d/b/a MPOWER COMMUNICATIONS CORPORATION, AND VITTS NETWORK, INC.

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July 10, 2000

SUMMARY

Two years ago, this Commission declined to propose federal performance standards because it felt the situation was not ripe for the implementation of such standards. The Commission recognized the need for, and importance of, such standards, but felt it did not have a sufficient record on which to craft such standards. In the two years since that decision, the need for such standards has heightened. The comments filed in this proceeding have demonstrated that there are fundamental problems in the provisioning of unbundled loops by incumbent local exchange carriers ("ILECs") at every stage of the provisioning process. The comments filed in this proceeding also demonstrate that the problems in loop provisioning threaten to undercut the development of local competition as envisioned by the Telecommunications Act of 1996.

The intervening two years has also witnessed the development of performance standards by various state public utility commissions, and this Commission itself. These standards have proven to be effective in promoting local competition particularly when the standards are the product of coordinated and complementary efforts between the state commissions and this Commission. The standards are not in effect on a nationwide basis, however, and there are disparities in these standards. This has led to a situation where local competition is developing in some regions and markets, but not in others.

The petition filed by ALTS provides the opportunity for this Commission to revisit the issue of the need for national standards and the use such standards may serve in promoting the timely and efficient provisioning of loops, and the competitive benefits such provisioning would produce. The Commission now has a fully-developed record of the problems surrounding the provisioning of loops and the approaches various state commissions and this Commission have taken to address the problems. From this record, the Commission can craft substantive federal

baseline standards that will ensure that the benefits of viable local competition are felt in all regions and markets of the U.S.

The ILECs raise many objections to such standards. The Commission has already rejected these objections in different contexts. For instance, the Commission has recognized the value of comparative analysis of ILEC performance and the use of such analysis to grade ILEC performance. The Commission itself has utilized such standards as key regulatory tool in various contexts, such as Section 271 applications and merger analysis.

The time has come for this Commission to build upon the work done by various state commissions, and its own efforts, to craft national loop provisioning standards that provide a baseline measure for loop provisioning performance. The Commenters have demonstrated that not only are such national standards feasible, but vital. The Commenters also demonstrate that it is not enough to require that ILECs provide service at parity, but that such service provides a true and meaningful opportunity to compete. Thus, parity rules coupled with provisioning intervals would ensure that the mandates of the 1996 Act are being met.

The Commission should look past the tired arguments of ILECs against the need for standards, and focus on the clear need for such standards demonstrated in the record of this proceeding and related proceedings. National baseline standards will benefit every segment of the industry and every region of the United States, and will make the goals of the Telecommunications Act of 1996 more of a reality.

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REPLY COMMENTS OF @LINK NETWORKS, INC.
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AND VITTS NETWORK, INC.

@Link Networks, Inc. ("@Link"), MGC Communications, Inc. d/b/a Mpower Communications Corp. ("Mpower"), and Vitts Network, Inc. ("Vitts") (collectively the "Commenters"), by undersigned counsel and pursuant to the Commission's *Public Notice* (dated May 24, 2000), submit these Reply Comments supporting the "Association for Local Telecommunications Services Petition for Declaratory Ruling: Broadband Loop Provisioning" ("*ALTS Petition*"). For the reasons stated below the Federal Communications Commission ("FCC" or "Commission") should grant the ALTS Petition and clarify, interpret, and modify its rules governing crucial aspects of loop provisioning by incumbent local exchange carriers ("ILECs"). The requested rule changes would establish necessary national baseline standards

that can be applied expeditiously and with confidence by state public utility commissions to accelerate the development of local competition.

I. National Standards Can And Should Be Established Now

The Commenters reiterate their support for the request by the Association of Local Telecommunications Services ("ALTS") for national loop provisioning standards. This request has been supported by thirty parties in this proceeding.[1] As expected, the incumbent local exchange carriers ("ILECs") are unified in their opposition to national standards.[2] Rather than reiterate the strong case for the implementation of the standards put forth by the competitive local exchange carriers ("CLECs"), trade associations, and a public interest group, this section will counter the arguments raised by the ILECs in opposition to the implementation of national loop provisioning standards.

A. The Commission Has Authority To Implement National Standards

Despite the unequivocal delineation of federal/state jurisdiction articulated by the U.S. Supreme Court in *AT&T Corporation v. Iowa Utilities Board*,[3] the ILECs still rely on tired

[1] Joint Comments of @Link Networks, Inc., Connect Communications Corp. and Waller Creek Communications, d/b/a Pontio Communications Corp. (collectively, the "@Link Joint Comments"); Comments of Allegiance Telecom; Comments of AT&T Corp.; Comments of BlueStar Communications, Inc.; Joint Comments of CoreComm Inc., MGC Communications, Inc. d/b/a MPower Communications Corp., and Vitts Network, Inc. (collectively, the "Commenters' Initial Comments"); Comments of Covad Communications Company; Joint Comments of CTSI, Inc., Network Plus, Inc., and Network Telephone Corporation (collectively, the "CTSI Joint Comments"); Comments of DSL.net Communications, LLC; Comments of Focal Communications Corp.; Comments of Jato Communications Corp.; Joint Comments of KMC Telecom, Inc., NewSouth Communications, Inc., and NextLink Communications, Inc. (collectively, the "KMC Joint Comments"); Comments of McLeodUSA Telecommunications Services, Inc.; Comments of Network Access Solutions Corp. ("NAS Comments"); Comments of Prism Communications Services, Inc.; Comments of RCN Telecom Services, Inc.; Rhythms NetConnections Comments in Support of Petition; Comments of Teligent, Inc.; Comments of Time Warner Telecom; Comments of WorldCom, Inc.; Comments of he Competitive Telecommunications Association ("CompTel Comments"); Comments of the Association of Communications Enterprises ("ASCENT Comments"); Comments of the Competition Policy Institute ("CPI Comments").

[2] Comments of Bell Atlantic ("Bell Atlantic Comments") at p. 11; Comments of GTE ("GTE Comments") at p. 6; Opposition of US WEST Communications, Inc. ("US WEST Comments") at p. 2; Opposition of SBC Communications, Inc. ("SBC Comments") at p. 22.

[3] *AT&T Corporation v. Iowa Utilities Board*, 525 U.S. 366 (1999)("*Iowa Utilities Board*").

jurisdictional arguments as their first line of defense to any pro-competitive proposal. The ILECs argue that ALTS is urging this Commission to usurp a role that is "properly one for the State commissions to perform."[4] The Supreme Court has recognized that "§ 201(b) explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies."[5] The Court found that the FCC has rulemaking authority to "carry out the 'provisions of this [Communications] Act,' which include §§ 251 and 252, added by the Telecommunications Act of 1996."[6] Unbundled access to network elements such as the loop fall squarely within section 251 of the Act.[7] Significantly, the Supreme Court made very clear that, while state commissions are given certain roles under the 1996 Act, *e.g.*, approval of interconnection agreements, "these assignments, like the rate-establishing assignment just discussed, do not logically preclude the Commission's issuance of rules to guide the state-commission judgments."[8]

The Commission too has recognized that it has authority to adopt federal regulations that:

> [f]acilitate administration of sections 251 and 252, expedite negotiations and arbitrations by narrowing the potential range of dispute where appropriate to do so, offer uniform interpretations of the law that might not otherwise emerge until after years of litigation, remedy significant imbalances in bargaining power, and establish the minimum requirements necessary to implement the nationwide competition that Congress sought to establish.[9]

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[4] Bell Atlantic Comments at p. 2.

[5] *Iowa Utilities Board*, 525 U.S. at 380.

[6] *Id.* at 378.

[7] 47 U.S.C. § 251(c)(3).

[8] *Iowa Utilities Board*, 525 U.S. at 385. The Commenters are not suggesting that the vital role of the state commissions be reduced in any way. The Commenters want state promulgation of performance standards to continue in a significant manner. The Commenters are requesting that this state role be undertaken in the context of national baseline standards adopted by this Commission.

[9] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, FCC 96-325, ¶ 41 (1996) ("*Local Competition Order*").

While it is true, as the ILECs note, that this Commission has heretofore refrained from implementing federal performance standards, the decision was not, as Bell Atlantic asserts, based on any intent to leave the establishment of performance standards solely to the states.[10] The FCC stated:

> [A]lthough we believe that it is appropriate to consider how performance standards might be used, we tentatively conclude that it is premature at this time for us to propose specific standards. We understand that several states are considering performance standards and encourage states in these efforts. Nevetheless, we do not believe that we have developed a sufficient record to consider proposing performance standards *at this time*. There is little in the current record to explain how such standards would be used as a method of evaluating compliance with statutory requirements. Moreover, any model performance standards should be grounded in historical experience to ensure that such standards are fair and reasonable. Because our present record lacks the necessary historical data, we believe that it would be premature for us to develop standards at this point. We tentatively conclude, therefore, that we should *postpone* consideration of performance standards until the parties have had an opportunity to consider how they would be used and have been able to review actual performance data over a period of time.[11]

Thus, the Commission did not cede its authority to the states; the Commission merely deferred the issue to another day.

B. The Record Demonstrates That Performance Standards Are A Key Regulatory Tool.

The day has now arrived for the Commission to revisit the performance standard issue. The intervening two years since the issuance of the *Performance Measurement Order* have seen the development of a more than sufficient record from which the Commission can craft standards. As the Commission predicted, many states have implemented performance

[10] Bell Atlantic Comments at p. 3-4.

[11] *In the Matter of Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, CC Docket No. 98-56, 13 FCC Rcd. 12817 at ¶ 125 (1998) ("*Performance Measurement Order*")(italics supplied).

standards.[12] The Commission itself has relied on performance data to evaluate Section 271 applications finding that "performance measurements are an especially effective means of providing us with evidence of quality and timeliness of the access provided by a BOC to requesting carriers."[13] The Commission, therefore, will utilize performance standards to ensure that SBC Communications, Inc.'s ("SBC") operations in Texas demonstrate "continued compliance with statutory requirements."[14] Moreover, the Commission has already used performance standards to determine that Bell Atlantic failed to adhere to statutory requirements in regard to its operations in New York.[15]

The Commission uses performance standards in its evaluation of carrier compliance with merger conditions. For example, this Commission established a self-executing compliance mechanism tied to objective performance standards to monitor SBC/Ameritech's compliance with merger conditions.[16] This mechanism included self-executing remedies.[17] The Commission trumpeted the importance of such standards in furthering the goals of the 1996 Act by noting:

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[12] *See* Bell Atlantic Comments at pp. 6-9.

[13] *In the Matter of Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to provide In-Region, InterLATA Services in Texas,* CC Docket No. 00-65, FCC 00-238 at ¶ 53 (June 30, 2000) ("*SBC 271 TX Order*").

[14] *SBC 271 TX Order* at ¶ 436.

[15] *Bell Atlantic-New York, Authorization Under Section 271 of the Communications Act to Provide In-region, InterLATA Service in the State of New York*, File No. EB-00-IH-0085, Order, FCC Rcd 5413 (2000). The Commission noted how its quick response, in conjunction with the New York Public Service Commission, when Bell Atlantic developed performance problems, helped alleviate the problem. *SBC 271 TX Order* at ¶ 436, fn. 1278.

[16] *In Re Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act*, Memorandum Opinion and Order, FCC 99-279, ¶ 406 (rel. October 8, 1999) ("*SBC/Ameritech Merger Order*").

[17] *Id.*

> [T]he Carrier-to-Carrier Performance Plan also partially alleviates the Applicants' increased need and incentive to discriminate against rivals following the merger. By requiring the merged firm to report results of 20 performance measures, and achieve the agreed-upon standard or voluntarily make incentive payments, the plan provides heightened incentive for the company not to discriminate in ways that would be detected through the measures. Competing carriers operating in or contemplating entry into SBC/Ameritech territory will have an measure of confidence that the company will not engage in discrimination that would be detected through such measures. If the results reveal unequal treatment, the voluntary payment scheme, as NorthPoint notes, will 'create a direct economic incentive for SBC/Ameritech to cure performance problems quickly.'[18]

The Commission's *SBC/Ameritech Merger Order* also demonstrated how national standards can be crafted in a way that does not marginalize the important role of the states in promoting local competition. In the order, the Commission noted:

> [T]hese conditions are intended to be a floor and not a ceiling. The Applicants must abide by state rules, even though the rules may touch on identical subjects, unless the merged entity would violate one of these conditions by following the state rule. The conditions are not intended to limit the authority or jurisdiction of state commissions to impose or enforce additional requirements stemming from a state's review of the proposed merger.[19]

The Commission should build upon this idea and adopt national baseline standards that will serve as a floor for performance. State commissions would still have the freedom to impose or enforce additional requirements.[20] Such an approach would protect the vital role of the states and ensure a concerted regulatory effort to effect true, viable local competition.

In fact, in its own Comments in this docket, SBC cites its agreement to these performance measures as a way to monitor and address any discrimination.[21] Yet, SBC fails to see the full

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[18] *Id.* at ¶ 432.

[19] *Id.* at ¶ 417.

[20] This approach would also emulate what the Commission did in the *UNE Remand Order* where it allowed states to impose additional unbundling requirements to the national list of UNEs as long as the requirements conformed with the goals the 1996 Act. *UNE Remand Order* at ¶ 154.

[21] SBC Comments at p. 26.

implications of its argument. SBC cites to the performance measures to which it is subject as an example of how the *status quo* is working. However, this "*status quo*" is not in effect throughout the United States. This "*status quo*" of FCC-implemented performance standards coupled with self-executing penalties now operates only in states and companies covered by FCC merger conditions or the states where Section 271 authority has been granted. It does not apply, for instance, in Bell South or US WEST states. SBC's acknowledgment, however, of the utility of performance measures is telling in many respects. It shows that federally-imposed performance standards are utilized in certain regions of the U.S. and are very useful. The key then is to expand the use of the performance standards across the U.S.[22]

National standards will also yield invaluable public benefits. Requiring ILECs to comply with national performance standards will lead to the promulgation of data as to ILEC performance in all regions of the U.S. Interested parties can then break down this data on a state-to-state basis. Armed with such data, LECs (both ILECs and CLECs) and federal and state regulators could then identify specific states and markets where there are indications of sub-standard performance. Thus, the resources of all involved could be focused in a concerted effort to make the needed improvements. This would lead to a conservation of valuable industry and regulatory resources.

CLECs could also use the data to determine which states to enter and which to avoid until service performance improves. State-specific data will suggest to CLECs where to deploy capital resources in the most efficient manner. In those states where service performance exceeds the norm, CLECs will have greater incentives to either enter the market and/or expand

[22] It is also telling that the performance standards in the *SBC/Ameritech Merger Order* are not state-specific. SBC seems to have no problem with "one size fits all" standards in this context.

services as the lead time between capital deployment and earnings is shortened vis-à-vis other states.[23]

Thus, the Commission is no stranger to performance standards and their usefulness. The Commission can draw upon the record created in its Section 271 dockets, and its merger analyis dockets, as well as the records before the various state commissions that have crafted performance standards. It may have been premature for the Commission to address performance standards two years ago before this record was established, but the situation is certainly ripe today. The Commission has the authority to impose such standards, and now it has the foundation on which to craft the standards. Given the demonstrated need for such standards, the Commission should impose them as soon as possible so that they can be relied on by all parties, including the state public utility commissions, in current dockets.

C. The Record Demonstrates That One Size Fits All.

The ILECs argue that national standards are impractical due to variations amongst ILECs.[24] The "one size does not fit all" argument is another tired argument that offers no basis for forbearing from the implementation of national standards.[25] One size does fit all, at least, as far as the major ILECs are concerned. The Commission has found "that the major incumbent LECs (RBOCs and GTE), because they are of similar size and face similar statutory obligations

[23] Without national baseline standards, smaller CLECs with limited resources will be at a particular disadvantage in those states with less exacting, or no, performance standards. Their limited bargaining power would force them to acquiesce to less than favorable standards in interconnection agreements, and they will be unable to rely on the stronger performance measures that they may find in other states.

[24] GTE Comments at pp. 8, 14; Bell Atlantic Comments at p. 5; SBC Comments at pp. 20-21.

[25] *See* Bell Atlantic Comments at pp. 5, 8-10; SBC Comments at pp. 20-21, 24.

and market conditions, remain uniquely valuable benchmarks for assessing each other's performance."[26] The Commission predicted that ILECs would:

> [L]ikely adopt different defensive strategies to forestall competitive entry, and each particular strategy will reveal information to regulators and competitors. One incumbent LEC may claim, for example, that a particular form of interconnection is infeasible, while a second may resist the unbundling of a particular network element, and a third may oppose the collocation of certain specific types of equipment within its central offices. In such situations, the behavior of other major incumbent LECs can be used as benchmarks to evaluate the outlying incumbent's claims. Competitors in negotiating and implementing access and interconnection agreements, could point to the conduct of one incumbent to rebut another incumbent's assertion that a particular service is not feasible or must be structured or priced in a particular manner.[27]

The ILECs have nevertheless resurrected their "one size does not fit all" arguments in their assertions that there are intrinsic differences in their underlying incumbent networks and systems.[28] This reasoning has been soundly rejected by this Commission. This Commission has explicitly stated that "courts, federal and state regulators, and competitors have consistently recognized comparative practices analysis as a crucial tool, and have employed such analyses, to set industry standards and policy, detect discriminatory behavior, and promote competition."[29] As the Commission added, "comparing the practices of several major incumbent LECs has enabled the Commission to determine whether an individual incumbent's claim concerning technical feasibility is warranted, or to monitor service quality with a minimum regulatory intervention."[30] As it pointed out in the *SBC/Ameritech Merger Order*, the Commission has

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[26] *SBC/Ameritech Merger Order* at ¶ 103.

[27] *Id.* at ¶ 108.

[28] SBC Comments at p. 21.

[29] *SBC/Ameritech Merger Order* at ¶ 125.

[30] *Id.* at ¶ 130. Ironically, the RBOCs used to be fervent supporters of benchmarking when they argued for the lifting of line-of-business restrictions arguing that the lifting of such restrictions was justified because the performance of one RBOC could be measured against that of the six others. *Id.* at ¶ 126.

"employed 'best-practices' benchmarking in implementing the local competition provisions of the 1996 Act." It has already found "that successful interconnection at a particular level of quality in one LEC's network is substantial evidence of the feasibility of interconnection at the same level of quality in another LEC's network."[31] Thus, the Commission has already recognized that a "one size fits all standard" is not only feasible, but it has also been proven to provide a valuable frame of reference.[32]

D. Comparative Analysis Can Be The Basis for National Standards

Comparative analysis proves to be quite helpful in the context of issues raised in this proceeding. For instance, as ALTS noted, the most common ILEC explanation for sequential imposition of provisioning periods is that no orders can enter their systems unless identified by a Carrier Facility Assignment ("CFA") number.[33] Thus, ILECs require that collocation be completed before loop orders can be accepted. NEXTLINK pointed, however, that it convinced one ILEC to accept loop orders before collocation delivery dates after both sides concluded that the CFA could be assigned 15 days before the collocation delivery date. This shortened the delivery interval for the loops.[34] Thus, comparative analysis can demonstrate that specific practices are feasible for ILECs, and therefore expedites delivery of services to CLECs.

The Commission, however, does not have to rely solely on a "best of class" approach. As this Commission has noted, "just as best-practices benchmarking forms the foundation for the Commission's analysis of technical feasibility and collocation issues, average-practices

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[31] *Id.* at ¶ 131.

[32] For all its posturing here about capabilities being ILEC- and time-specific, SBC, in its Section 271 application for Texas, utilized performance yardsticks set for Bell Atlantic in New York to support its application. *See, e.g.*, CC Docket 00-65, Reply Brief in Support of Supplemental Application of Southwestern Bell, p. 4.

[33] *ALTS Petition* at p. 9.

[34] KMC Joint Comments at pp. 7-8.

benchmarking is the Commission's primary tool for monitoring service quality and detecting unreasonable or discriminatory cost or practices."[35] Thus, utilizing a combination of these comparative approaches would help the Commission promulgate standards that address differences in ILEC-capabilities without diluting those standards.

E. National Standards Are Feasible.

National standards would provide a national baseline to ensure not only that CLECs operating in Kansas get comparable service quality to CLECs in New York, but more importantly, that consumers of ILECs and CLECs in those states and others get comparable service.[36]

Bell Atlantic's claim that "an incumbent operating in the mountains of West Virginia clearly faces different operational challenges and local conditions than an incumbent operating in the plains of Iowa or on the crowded streets of New York City" is belied by its own acknowledgment that the Vermont Department of Public Service and Bell-Atlantic-Vermont have jointly recommended to the Vermont Public Service Board that it adopt the New York carrier-to-carrier performance standards.[37] While the two states may be in close proximity geographically, it is hard to imagine more dissimilar conditions than those obtaining in rural Vermont and urban New York City. Yet, Bell Atlantic agrees that the same standards are applicable to both areas. Bell Atlantic has already recognized that an inn-keeper operating a small inn in rural Vermont should be receiving the same quality of service as a Manhattan-based conglomerate. Similarly, while the state of Texas is so vast that SBC will face conditions in

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[35] *SBC/Ameritech Merger Order* at ¶ 134.

[36] *See* Rhythms Comments at p. 4, stating, "a maximum loop provisioning interval will ensure customers in Montana and Oregon can receive loops in the same timeframe as consumers in Texas."

[37] Bell Atlantic Comments at pp. 5, 8.

providing loops in downtown Dallas that are very different from those it will face in providing loops to a ranch in some other part of the state. Under the TX PUC regulatory framework, the same standards apply. Given that the ILECs themselves agreed to use common standards in these extreme situations, there is no reason that national baseline standards cannot be implemented on all ILECs.

F. Parity Is Not Enough

Along the same lines, the ILECs argue that implementing national standards will, in some cases, require them to give CLECs service that is of a better quality than it provides its own customers.[38] Parity, they argue, should be the prevailing standard. In effect, the sole standard of evaluation would be comparison with the service the ILEC provides itself. The Commission has already rejected this reasoning:

> [W]hile we agree that parity rules are valuable, we nonetheless find that parity considerations cannot substitute for all forms of benchmarking. Parity rules will not serve the public and protect competition if, for example, an incumbent deems it profitable to provide lackluster service or charge excessive rates to both its retail affiliates and its competitors. For example, without discriminating, the incumbent LEC may profit from imposing high loop charges, or access charges, on both its affiliates and its competitors, because the charges to its affiliates constitute only an internal transfer. While parity requirements attempt to level the playing field, therefore, traditional comparative practices analyses remain necessary to ensure that this level does not sink below an acceptable standard.[39]

The adverse effect of such "parity" practices is particularly pronounced in innovative markets. As the Commission observed:

> [f]or innovative entrants, in particular, parity rules will not always suffice. As Sprint notes, if the innovation requires a new form of interconnection or access, '[t]he incumbent can slow-roll the innovator, declining to provide the new kind of input, until the incumbent has a similar or leapfrogging innovation available.' If a

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[38] SBC Comments at pp. 20-21.

[39] *SBC/Ameritech Merger Order* at ¶ 176.

> competitive LEC seeks the provision of properly conditioned loops in order to provide xDSL service, an incumbent LEC which is not ready to provide xDSL service itself would have the incentive to deny this competitor the properly conditioned loops. In this circumstance, parity rules would provide no remedy for the competitive LEC, for the incumbent LEC would not be providing to its retail arm anything that it was denying its competitor. Exclusive reliance on parity rules, therefore, could slow the provision of innovative services to the public.[40]

This has been borne out recently by the high costs for conditioned loops in Texas. SBC was provisioning loops without conditioning at parity with retail for five consecutive months, but for loops with conditioning it was substantially out of parity.[41] SBC tried to excuse this performance by arguing that its charges for line conditioning have depressed the demand for its service, thereby limiting the number of its customers that seek to use conditioned loops.[42] As Sprint noted:

> [T]his is no reason to excuse SWBT's performance. Indeed, it is cause for concern because it shows that by insisting on high loop conditioning charges for its own customers, SWBT can suppress demand for its own services which, in turn, gives it the opportunity to degrade service to CLECs without significantly impacting its own service to its retail customers. In other words, by limiting the amount of SWBT customers who rely on conditioned xDSL loops, while CLEC customers rely on such loops to a far greater extent, SWBT can harm a significant number of CLEC customers by providing uniformly poorer service for conditioned xDSL loops with little damage to its own business interests.[43]

Thus, parity, without more, is not enough. Parity rules need to be coupled with rules specifying provisioning intervals and forward-looking pricing to ensure that service is being provided at an acceptable level of quality. An ILEC's claims that it is providing service at parity could otherwise be used to mask anti-competitive practices. The situation can build upon itself

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[40] *Id.* at ¶ 177.

[41] CC Docket 00-65, April 26, 2000 Petition to Deny of Sprint Communications Company, L.P. at p. 12 ("*Sprint SBC 271 Comments*").

[42] *Sprint SBC 271 Comments* at pp. 12-13.

[43] *Id.* at p. 13.

as well. For instance, if SBC is charging prohibitive loop conditioning rates it can push competitors out of the advanced services market while still arguing that it is providing service at parity. The high loop conditioning rates will be of no import to SBC's affiliate which can rely on the Project Pronto architecture and line sharing to facilitate its provision of xDSL service. Thus, SBC can sneak through the backdoor into the advanced services market while not technically violating the mandates of "parity."

In addition, parity rules are of little use where there is no retail analogue for the service that the ILEC provides to the CLEC. US WEST argues that there is "no retail service analogue to the sale of unbundled loops."[44] US WEST asserts that:

> [S]elling unbundled loops to CLECs and selling finished end-to-end products to retail customers are not comparable services. Indeed, the Commission explicitly recognized this distinction in concluding that there are "[Operations Support Systems] functions that have no retail analogue, such as ordering and provisioning of unbundled network elements.[45]

Disregarding for the moment the fact that retail analogues have been found for many ordering and provisioning functions related to unbundled network elements,[46] US WEST's argument would actually support the need for implementing standards for ordering and provisioning of unbundled network elements. The applicable standard where there is no retail analogue is that the ILEC must "demonstrate that the access it provides to competing carriers would offer an efficient carrier a 'meaningful opportunity to compete.'"[47] Since there is no retail analogue to provide a comparative basis, performance standards would be even more necessary in areas

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[44] US WEST Comments at p. 4.

[45] *Id.*

[46] *See, generally*, Section III of Commenters' Initial Comments at pp. 9-32.

[47] *SBC TX 271 Order* at ¶ 44.

where there is no retail analogue. For instance, hot cuts have no retail analogue,[48] so the Commission already utilizes performance measures to evaluate a carrier's performance in this area.[49] Without a set provisioning standard it would be very difficult to evaluate performance in this area, and any determination as to whether there is a meaningful opportunity to compete would be purely subjective.

G. Disparate State Standards Produce Disparate Service Quality

The ILECs cite a laundry list of states that have implemented performance standards and argue that the standards are sufficient.[50] The Commenters applaud the states that have implemented performance standards and cite this as a perfect indication of the large record from which the Commission can craft standards. The standards, however, are not uniform, and the disparity in the standards mean that customers in differing states are not getting comparable service.

The danger of a state-specific approach devoid of a national baseline is seen in the context of the SBC Section 271 TX proceeding's consideration of hot cuts. The goal in this evaluation was to determine if the ILEC's provision of hot cuts was providing a meaningful opportunity to compete.[51] The Commission there found that differences in performance standards made direct comparison with the performance discussed in prior orders difficult, if not impossible.[52]

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[48] *Id.* at ¶ 258.

[49] *Id.* at ¶¶ 262-263.

[50] Bell Atlantic Comments at pp. 6-8; SBC Comments at p. 23.

[51] *SBC TX 271 Order* at ¶ 258.

[52] *Id.*

The proceeding, which commenced in January, at various times had three different standards for hot cuts in play – the performance metrics utilized by the New York Public Service Commission ("NYPSC"), the standards adopted by the Commission in its *Bell Atlantic New York Order*,[53] and the performance metrics utilized by the Texas Public Utility Commission ("Texas PUC"). For instance the Texas PUC utilized a provisioning benchmark that required 100% of orders of 24 loops or fewer to be completed within two hours, while the FCC required that 90% of hot cut orders of ten lines or fewer be completed within one hour.[54]

An overabundance of standards lays the seeds for confusion and sleights of hand in regard to what the data shows. Initially, SBC had argued that it met applicable performance standards in regard to hot cuts, but it justified this assertion only by using a "mix and match" approach to the standards. For instance, it wanted the Commission to evaluate its performance on the basis of the TX PUC's two-hour completion interval, but not to apply the 100% on-time performance standard for that interval. Instead, it sought to continue use of the 90% standard that Bell Atlantic used coupled with a time frame much longer than the one used for Bell Atlantic.[55]

Utilizing state-specific approaches without a baseline also creates a danger of dilution of standards. For instance, TX PUC performance standards were based on two-hour completion intervals and orders of 1-24 lines. But most orders are for fewer than 10 lines, and on average are for fewer than five loops. Orders for 20 or more loops are very rare, yet the Texas PUC used

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[53] *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, FCC 99-404, CC Docket 99-295, Memorandum Opinion and Order (December 22, 1999).

[54] *SBC TX 271 Order* at ¶ 262.

[55] CC Docket 00-65, April 26, 2000 Supplemental Comments of AT&T Corp. at p. 36 ("*AT&T SBC 271 Comments*").

the time it would take to cut over a 24-loop order as the basis of its sole performance standard for cut over intervals. Thus, it set a two hour time frame for cut overs which may seem appropriate for orders of over 24 lines, but which would be much too long for the vast majority of orders.[56] Commenters in the Section 271 proceeding argued that the two-hour interval was too generous.[57]

Ultimately, SBC finally showed that it could disaggregate its data such that an evaluation could be made under the same standards utilized in the *Bell Atlantic New York Order*, and the Texas PUC spent much of its analysis reviewing the data in light of the standards of the *Bell Atlantic New York Order*.[58] This Commission ended up evaluating SBC's hot cut performance under the interval it established in the *Bell Atlantic New York Order*.[59] The Texas PUC is now revising its hot cut interval, and the new interval is strikingly similar to the one in the *Bell Atlantic New York Order*.[60] Thus, the baseline standard provided by this Commission in the *Bell Atlantic New York Order* facilitated comparison and evaluation of data and ensured that performance did not fall below a certain level.

Thus, for all the talk of the need for state-specific standards, the standard applied by a state commission ended up being the one imposed by the FCC. Only when the data was evaluated under that federal standard was every party on the same page, and a considered and thorough evaluation was able to be conducted.

In addition, state standards operating on their own do not alleviate problems of discriminatory treatment. For instance, the Commission found that "Bell Atlantic's performance

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[56] *Id.*

[57] *SBC 271 TX Order* at ¶ 744.

[58] *See, generally,* CC Docket 00-65, April 26, 2000 Evaluation of the Public Utility Commission of Texas.

[59] *SBC 271 TX Order* at ¶¶ 263-264.

[60] *Id.* at ¶ 263, fn. 744.

in providing order acknowledgments, confirmation and rejection notices, and order completion notices for UNE-Platform local service orders deteriorated following Bell Atlantic's entry into the New York long distance market."[61] This occurred despite the presence of the state standards set by the New York Public Service Commission. In Texas, despite the presence of state standards set by the Texas PUC, SBC was still failing to meet crucial performance measures.[62] These performance deficiencies occurred in states where the carrot of the 271 grant, or the removal thereof, was then very much in play. One can only imagine ILEC performance deficiencies in states where there are no standards at all.

This Commission recently recognized the value of a prompt "coordinated two-pronged enforcement response when Bell Atlantic developed performance problems."[63] This Commission also is quite confident that "cooperative state and federal oversight and enforcement can address any backsliding that may arise with respect to SWBT's entry into the Texas long distance market."[64] Clearly the Commission recognizes that it needs to take a pro-active role in conjunction with the states. Thus, this Commission needs to take an active role in promulgating its own standards and enforcement measures to ensure that local competition develops in all areas of the U.S., and not just in the most lucrative markets.

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[61] *In the Matter of Bell Atlantic-New York Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, File No. EB-00-IH-0085, FCC 00-92, 15 FCC Rcd. 5413 at ¶ 7 (2000).

[62] Commenters' Initial Comments at p. 42.

[63] *SBC 271 TX Order* at ¶ 436, fn. 1278.

[64] *SBC 271 TX Order* at ¶ 436.

H. National Standards Would Aid Section 271 Evaluations

The confusion caused by the multiplicity of standards described above could have been prevented by the presence of clear standards from the beginning. As the Commission has noted, it is often handicapped when "new and unresolved interpretive disputes" arise in a Section 271 proceeding.[65] For instance, much of the SBC Section 271 TX proceeding was spent debating which standard to use. The Commission observed that a Section 271 proceeding is not the best forum for the resolution of such disputes, especially given the tight time frame.[66] The Commission stated that these issues of general application are more appropriately the subject of "industry-wide notice-and-comment rulemaking."[67] The ALTS Petition, and the proceeding it has initiated, provides the opportunity for the Commission to address these issues. The Commission can use this proceeding to clarify and expand upon existing rules, and to initiate expedited rulemakings to consider other needed rules. The existence of clear rules at the start will facilitate evaluation of Section 271 applications and preclude much of the posturing that takes place in such proceedings. The focus will solely be on whether the ILEC's performance has satisfied the established standards.

I. The Availability of Complaint Proceedings Would Not Solve the ILEC Performance Problem.

The ILECs argue that aggrieved CLECs who feel they have received discriminatory treatment should seek relief under state or federal complaint proceedings.[68] The Comments filed

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[65] *SBC 271 TX Order* at ¶ 23.

[66] *Id.*

[67] *Id.*

[68] SBC Comments at p. 5; GTE Comments at p. 5.

in this proceeding clearly demonstrate that the issue of loop provisioning standards is not one suited for *ad hoc* complaint proceedings. Thirty parties have filed comments supporting ALTS' request for national standards, and many have witnessed or experienced intolerable delays on loop provisioning.[69] The Commission has recognized that two-party adjudications are not suitable to resolve issues where many carriers have an interest in the issues.[70] Further, as WorldCom notes, use of complaint proceedings will be ineffectual given the lack of performance standards and penalties.[71] The Commission first needs to establish these standards and penalties, and then use the complaint process to adjudicate discrete disputes.

II. National Standards Should Be Implemented On An Expedited Basis

National standards for timely loop provisioning are not only desirable, but vital. A well-developed record has already been produced in this proceeding as to the need for national standards for loop provisioning, a need particularly acute in areas involving collocation, loop conditioning, and DLC/fiber loops. The evidence encompasses not only the anecdotal and documentary evidence produced in this proceeding, but also the evidence produced in other Commission proceedings considering related issues. Yet, ILECs continue to argue that there is no support for national standards.[72]

Rather than restate an already voluminous evidentiary record supporting national standards, the Commenters will focus on one discrete example that speaks volumes about the

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[69] @Link Joint Comments at 3-4; Allegiance Comments at 13; AT&T Comments at 4; Covad Comments at 6, 11; CPI Comments at 1, 12; Focal Comments at 2-3; McLeodUSA Comments at 1; Prism Comments at 9; Rhythms Comments at 8.

[70] *American Telephone and Telegraph Company v. Federal Communications Commission*, 978 F.2d 727, 732 (D.C.Cir. 1992).

[71] *WorldCom Comments* at p. 15.

[72] SBC Comments at p. 23.

need for national standards. There is clearly a problem in regard to the provisioning of UNE loops. As ASCENT notes, nearly four years after the enactment of the Telecommunications Act of 1996, loops provided by incumbent LECs to competitors as unbundled network elements constitute less than one percent of total switched lines.[73] The Commission has spoken of its belief that "the ability of requesting carriers to use unbundled network elements, including various combinations of unbundled network elements, is integral to achieving Congress' objective of promoting rapid competition to all consumers in the local telecommunications market."[74] The Commission went on to add that the ability of carriers to use unbundled network elements "is a necessary precondition to the subsequent deployment of self-provisioned network facilities."[75]

The above-cited data suggests, however, that we are not much closer to the goal of viable, facilities-based local competition than we were four years ago. Even in areas where 271 approval has been granted, such as Texas, these areas have not seen the development of viable UNE-based competitive entry. As recently as February of this year, the Department of Justice concluded that "markets for local services in Texas are not fully and irreversibly open to competition by carriers seeking to offer advanced services using unbundled xDSL-capable loops, or by carriers seeking to offer services using unbundled voice grade loops."[76] This is in the State of Texas, where standards were set by a state commission, and the incumbent was seeking a Section 271 grant.

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[73] ASCENT Comments at p. 3.

[74] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238, CC Docket 96-68 at ¶ 5 (November 5, 1999) ("*UNE Remand Order*").

[75] *Id.*

[76] CC Docket 00-65, February 14, 2000 Evaluation of the United States Department of Justice, p. 10.

The Competitive Telecommunications Association ("CompTel") in its Comments relates the experiences of a CLEC attempting to provide voice and data services in low population areas. The affidavit of Susan Tyriver of Advanced TelCom Group ("ATG") demonstrates that outside the urban areas of New York and Texas, competition has had even more difficulty taking hold. ATG provides voice and data services to small and medium-sized businesses and residential customers in smaller cities and towns.[77] In Nevada, the ILEC in the month of May 2000, failed to properly install IDSL capable loops for ATG 45% of the time. From March to June 2000, the percentage of failed installations was 33%.[78] The problem, as CompTel notes, is compounded when the CLEC is forced to navigate "cumbersome, and inefficient, 'repair' procedures simply to get the initial order installed correctly."[79] The cumbersome and inefficient repair procedures detailed in the ATG affidavit are very similar to the ordeal that Vitts documented in the Initial Comments.[80]

The Commenters documented in their Initial Comments loop provisioning problems at every stage of the process from pre-ordering to repair.[81] The experiences of ATG and others relate in this proceeding demonstrate that these are not isolated problems, but problems that permeate every stage of the loop provisioning process in every region of the United States. The situation is particularly troubling for CLECs such as the Commenters attempting to serve small business and/or residential customers. The quality of loop provisioning seems to be sorely lacking in this market segment.

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[77] CompTel Comments, Affidavit of Susan Tyriver at ¶ 2 ("Tyriver Aff.").

[78] Tyriver Aff. at ¶ 7.

[79] CompTel Comments at p. 4.

[80] *See* Declaration of Bruce Dyke on behalf of Vitts Network, Inc.

[81] Commenters Initial Comments at pp. 9-32.

National standards will ensure that certain areas of the U.S. or particular market segments are not underserved. Local competition should be a reality not only in New York City or Dallas, but in rural Nevada as well. The Commission has utilized performance standards in the context of merger and Section 271 orders, but that is not proving to be enough. For instance, as WorldCom made clear:

> [I]n the Local Competition First Report and Order, the Commission ordered ILECs to provide CLEC access to all ILEC interfaces by January 1, 1997. Most ILECs have made no attempt to meet that requirement even three and a half years later. The 'carrot' of Section 271 of the Act apparently has not proven much of a motivator for the RBOCs. Given the lack of competitive pressure from entrants that did not have to depend on RBOC OSS systems, it has been sound RBOC business strategy to remain intransigent in providing CLEC access to its OSS, and thereby protect their local market from competition, even if that meant a delay in entering the long distance market. With no market forces available to motivate the ILECs to comply with the law, the motivational "stick" of imposing penalties for failing to provide electronic access to OSS now is critical.[82]

Thus, an ILEC, unless there is a Section 271 application or merger in its future, is unlikely to provide the nondiscriminatory access required by the Act. Imposing national standards will force all ILECs to step to the plate. For instance, the full implementation of electronic access to OSS systems on a true parity basis would address many of the pre-ordering and ordering problems raised by the Commenters in its Initial Comments.[83] Without Commission action, its hopes in regard to the promotion of local competition through access to UNEs will remain a distant reality.

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[82] WorldCom Comments at p. 14.

[83] Commenters Initial Comments at pp. 10-20.

III. The ILECs Fail to Explain their Noncompliance with Subloop Unbundling Rules.

The ILEC comments[84] exaggerate the scope of the *ALTS Petition*'s request for meaningful access to markets served by Digital Loop Carriers ("DLCs"), and at the same time gloss over their refusals to implement the Commission's subloop unbundling rules. The ILEC comments mischaracterize the Petition as a sweeping request to forever burden ILECs with the maintenance of their existing copper facilities.[85] On the contrary, implementation of the key regulations and clarifications warranted to remedy the problems outlined in the Petition and the CLEC comments would not impede the ability of the ILECs to modernize their networks and compete with cable broadband providers. In particular, ILECs could readily implement unbundling of all types and portions of subloops, remote terminal equipment that supports integrated services, and swapping of analog voice services to fiber to free copper for DSL service requests.

The Commenters recognize the value of DLCs in certain circumstances to extend the reach of DSL to customers otherwise too far from central offices. However, it would be inconsistent with the Act to permit ILECs to deploy DLC networks in a manner designed, purposefully or not, to needlessly limit competition and diversity of xDSL broadband services. The Commission requires ILECs to provide non-discriminatory access to "any portion of the loop that is technically feasible to access at terminals in the incumbent LEC's outside plant,"[86] and CLECs are entitled to make effective use of these subloops for voice or data traffic either

[84] The various ILECs have established different positions on many of these issues, and the illustrations provided in the comments filed in this proceeding do not demonstrate noncompliance by every ILEC on every issue. However, the record does reflect sufficient impediments to competition and to the effectuation of the Commission's prior orders to warrant further investigation and rulemaking.

[85] *See, e.g.*, Bell Atlantic Comments at 2, SBC Comments at 9-10.

[86] 47 C.F.R. § 51.319(a)(2).

through the collocation in remote terminals, acquisition of DSL-capable copper bypass loops, or purchase of packet-switching as a UNE on a line at a time basis. Despite the claims by ILECs in their comments that they are complying with these requirements, the various CLEC comments illustrate that some ILECs have placed unwarranted limitations on the availability of subloops by refusing to provide all types of subloops, including fiber subloops, subloops to be used for voice services, and subloops between the remote terminal and central office.[87] Bell Atlantic's standard proposal for subloops does not include a UNE subloop that connects the RT with the central office, despite the plain language of the *UNE Remand Order* that includes such loops.[88] Several CLECs have therefore found it necessary to arbitrate or litigate in numerous Bell Atlantic states to obtain the ability to order what, under the *UNE Remand Order,* should have been available by May 17, 2000.

The *ALTS Petition* emphasized the importance of the ability of competitors to offer multiple services over DLC networks. This request was motivated in large measure by Project Pronto, since SBC's existing remote terminal equipment does not support a variety of services. Therefore, the Commission should take due notice of the promise in SBC's comments that it "is currently developing an additional network service arrangement to accommodate CLECs that want to provide integrated voice and data xDSL service over SBC's new DLC equipment."[89] The Commission should guarantee this promise by requiring all ILECs to enable the provisioning of integrated services over their DLC networks. The subloop and remote terminal

[87] *See, e.g.*, Rhythms Comments at 15-16.

[88] *See UNE Remand Order* at ¶¶ 206-207.

[89] SBC Comments at 12. Bell Atlantic likewise states in its comments that CLECs may use subloops for voice-only and integrated services, although this promise is hollow until it permits CLECs to obtain as a UNE the subloop between the remote terminal and central office, and, where needed, packet switching on a line at a time basis. Bell Atlantic Comments at p. 19.

rules adopted in the *UNE Remand Order* were premised on a determination that the Act requires ILECs to provide to competitors meaningful access to end-users served by DLCs. The Commission should elaborate that meaningful access includes the ability to provide integrated voice, video and data broadband services to end-users.

The ILECs exaggerate the Petition's attempt to address the impact of copper scarcity on competitive advanced services. Bell Atlantic and SBC suggest that the remedy urged by ALTS would require ILECs to construct new copper facilities if needed to fill a CLEC request.[90] However, the impact of DLC on the availability of DSL-capable copper could be significantly contained by simple, non-burdensome regulations, including (1) a requirement that existing functional copper loops not be retired so long as existing usage or market demand reasonably assures that the ILEC can lease the loop, and (2) a requirement that ILECs offer "swapping" to free a copper loop for DSL service by moving a circuit-switched voice service to available fiber. These rules would not burden ILECs, and in fact are similar to promises already made by some of them. The copper retirement rule would guarantee and effectuate SBC's promise not to retire copper loops as long as they provide acceptable levels of service and can be economically maintained.[91] Further, Bell Atlantic already offers swapping, and other ILECs could readily implement the same policy.[92]

All of these issues associated with DLCs, including ILEC deployments other than Project Pronto, warrant immediate attention from the Commission. The ILEC Comments question the need for any further rulemaking.[93] Yet Bell Atlantic's own comments acknowledge that there

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[90] *See* Bell Atlantic Comments at p. 2, SBC Comments at pp. 9-10.
[91] *See* SBC Comments at p. 10.

[92] *See* Bell Atlantic Comments at pp. 19-20.

[93] *See* Bell Atlantic Comments at pp. 17-18, GTE Comments at p. 11, SBC Comments at p. 11.

remain "complex issues" associated with meaningful CLEC access to DLC-served customers.[94] While some of these issues are only complex because the ILECs have so far refused to fully implement the Commission's orders, the Commenters nonetheless agree that the Commission should move to address them. Review of unresolved DLC issues could be conducted based upon the existing record in Dockets 98-147 and 96-98, the Common Carrier Bureau's investigation of competitive access to next-generation remote terminals (NSD-L-00-48), and/or as part of a new rulemaking proceeding.

CONCLUSION

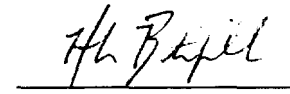
Despite ILEC assertions to the contrary, there is a clear need for national baseline standards. The ILECs have invoked the same tired arguments they have always invoked to block any pro-competitive measure. The ILECs prefer the maintenance of the *status quo,* recognizing that the *status quo* will permit them to continue blocking the development of viable local competition, while at the same time allowing them to make inroads into the long distance market.

The Commenters have demonstrated the need for national standards, and their undeniable utility. They have also shown that there is a record for Commission to review in devising standards. It is now time for the Commission to build upon the solid work done by the states so far, and its own experience with performance standards in a variety of settings, to craft performance standards that further the goal of the 1996 Act. These standards need to be implemented on a nation-wide basis so the service available to consumers in Montana is

[94] Bell Atlantic Comments at p. 19.

comparable to that available to consumers in New York City. The time is ripe for this Commission to act.

Respectfully submitted,



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July 10, 2000

CERTIFICATE OF SERVICE

I, Harisha J. Bastiampillai hereby certify that on this 10th day of July 2000, copies of the foregoing Reply Comments of @Link Networks, Inc., MGC Communications, Inc. d/b/a Mpower Communications Corp. and Vitts Network, Inc. were delivered by hand and First Class Mail to the persons listed on the attached list.

Harisha J. Bastiampillai

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