ALTS

ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

Jonathan Askin
General Counsel

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July 10, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: 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 and Technology Announce Public Forum on Competitive Access to Next-Generation Remote Terminals, NSD-L-00-48, DA 00-891

Dear Ms. Salas:

Please find attached an original and seven copies of the Reply Comments of the Association for Local Telecommunications Services (ALTS) in connection with the ALTS Petition for Declaratory Ruling on Loop Provisioning. Please include the attached Reply Comments in the above referenced dockets.

Sincerely,

Jonathan Askin

No. of Copies rec'd 0+9
List ABCDE

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of	)	
	)	
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REPLY COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES ON BROADBAND LOOP PROVISIONING PETITION

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TABLE OF CONTENTS

INTRODUCTION & SUMMARY 1

DISCUSSION 4

I. COMMISSION GRANT OF THIS PETITION IS ENTIRELY WITHIN ITS JURISDICTION AND EXPERTISE, AND IS IN THE PUBLIC INTEREST 4

A. The Commission's Plenary Authority to Implement and Enforce the 1996 Act is Unquestionable 5

B. The Commission Needs No Evidence to Adopt Normative Guidelines in Furtherance of Competition 6

II. THE RECORD OVERWHELMINGLY SUPPORTS COMMISSION ADOPTION OF FEDERAL BROADBAND LOOP RULES 7

CONCLUSION 11

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REPLY COMMENTS OF THE
ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES
ON BROADBAND LOOP PROVISIONING PETITION

The Association for Local Telecommunications Services ("ALTS"), by its attorneys and pursuant to the Commission's May 24, 2000 Public Notice,[1] submits these reply comments in connection with its petition for declaratory ruling on broadband loop provisioning. The ALTS petition urged the Commission to clarify, interpret and modify the rules governing crucial aspects of loop provisioning in accordance with its clear jurisdiction and expansive evidence the Commission has already amassed regarding the discriminatory provisioning practices of incumbent local exchange carriers ("ILECs").

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[1] *Pleading Cycle Established for Comments on ALTS Petition for Declaring Ruling: Loop Provisioning*, DA 00-114 (rel. May 24, 2000).

INTRODUCTION & SUMMARY

Thirty commenters, including competitive local exchange carriers ("CLECs") and integrated communications providers ("ICPs"),[2] communications trade organizations[3] and a highly respected public interest group,[4] have responded with "unequivocal"[5] support of ALTS' request for federally binding minimum standards for the provisioning of all broadband-related network elements. Each of these parties recognizes the critical time-sensitive issues involved in this stage of broadband rollout;[6] each of them has witnessed or experienced the intolerable delays on broadband loop provisioning that the ILECs impose.[7] McLeodUSA perhaps states the case most succinctly: "[t]he problems noted by ALTS in its Petition are real, and have a real impact on the ability of CLECs to provide competitive advanced and voice-grade services."[8] Contrary to the feeble protestations of the few ILEC opponents,[9] in the face of such a demonstration by so large a contingent of the competitive telecommunications industry, it is unlikely that the Commission

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[2] 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 "CoreComm Joint 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.

[3] Comments of the Competitive Telecommunications Association ("CompTel Comments"); Comments of the Association of Communications Enterprises ("ASCENT Comments").

[4] *Comments of the Competition Policy Institute* ("CPI Comments").

[5] Rhythms Comments at 2.

[6] *E.g.*, CoreComm Joint Comments at i (This petition "could not have come at a more fortuitous time" in advanced services deployment).

[7] @Link Joint Comments at 3-4; Allegiance Comments at 13AT&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.

[8] McLeodUSA Comments at 1.

[9] SBC Comments at 22; GTE Comments at 6; Bell Atlantic Comments at 11; BellSouth Comments at 2.

can find that the requests for relief that ALTS seeks are "premature." To the contrary, such action "could not . . . come at a more fortuitous time" in broadband development.[10]

Nothing in the wooden comments submitted by the ILECs should deter the Commission from assuming the necessary task of establishing federal normative standards that will foster competition in advanced services. First, Section 251 of the Telecommunications Act of 1996 ("1996 Act"),[11] as interpreted by the Supreme Court,[12] empowers the Commission to implement rules in furtherance of Congress's unbundling and interconnection mandates.[13] Second, the Commission has always reserved the right to impose additional, more detailed provisioning rules "in order to reflect developments in the dynamic telecommunications industry."[14] Third, the widely disparate results of the few state commission decisions regarding broadband loops, contrary to the ILECs' assertions, is clear evidence that there remains ambiguity and controversy in the law such that a Commission declaratory ruling is proper.[15] Finally, the continued absence of quantifiable and certain Commission-sanctioned provisioning rules creates a debilitating "Catch-22" for both CLECs and ILECs. Without guidelines, there can be no meaningful compliance analysis; without compliance analysis, there result no guidelines.[16]

ALTS' petition therefore provides the Commission the opportunity to establish uniformity in broadband element provisioning, to clarify ILEC obligations for purposes of making the compliance determination that is requisite for review of any Section 271 application or merger condition monitoring, and to comply with Congress's mandate that the telecommunications mar-

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[10] CoreComm Joint Comments at i.

[11] 47 U.S.C. § 251.

[12] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

[13] 47 U.S.C. § 251(d).

[14] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd. 15,499, 15,530 (1996) ("*Local Competition First Report and Order*").

[15] *See* 47 C.F.R. § 1.2

ketplace "shift monopoly markets to competition as quickly as possible"[17] while achieving rapid broadband deployment to all Americans in accordance with Section 706.[18] The Commission can choose to exercise its settled authority to expeditiously resolve the disputes about the ILEC obligations by adopting the clarifications outlined by ALTS and its supporters without risk of penalty to the incumbent or competitive LECs; or the Commission can risk inundation of the already embattled attorneys of the Enforcement Bureau from continual requests for relief by the commenting parties whose very livelihood rests on ILEC loop provisioning.[19] As the saying goes, "you can pay me now, or you can pay me later." For the sake of all concerned, as well as the interests of the public in receiving competitive broadband connectivity as soon as possible, Commission action at this time is certainly the wiser course.

DISCUSSION

I. COMMISSION GRANT OF THIS PETITION IS ENTIRELY WITHIN ITS JURISDICTION AND EXPERTISE, AND IS IN THE PUBLIC INTEREST

Despite Congress's clear language in the 1996 Act, the ILECs inexplicably argue that the Commission is without the authority to issue a declaratory ruling to make clear the parameters of the ILECs' unbundling duties.[20] Indeed, SBC broadly proclaims, "ALTS' requests have no basis in the language or policies of the Act."[21] As we will again explain, however, a Commission ruling that clarifies existing unbundling policies in a procompetitive manner is perhaps the only action that would be "based in the language and policies" of the 1996 Act in light of the ample record evidence already before the Commission.

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[16] *See* Covad Comments at 7-8 (discussing the "battle of the data" that presently occurs in Section 271 reviews); Rhythms Comments at 4; @Link Joint Comments at 2.

[17] H.R. Rep. No. 104-204, 104th Cong., 2nd Sess. at 89 (1996).

[18] 1996 Act, § 706.

[19] *See* Covad Comments at 3.

A. The Commission's Plenary Authority to Implement and Enforce the 1996 Act is Unquestionable

The ILECs' predictable response to the ALTS petition is that the Commission has no authority to impose specific unbundling obligations on the ILECs. A hybrid born of a states-rights argument and a "one size does not fit all" approach,[22] this response has no basis, neither in the 1996 Act as interpreted by the Supreme Court nor in simple common sense. The Commission's authority to adopt federal unbundling policy is plenary, and is the only means of ensuring uniform, steady broadband deployment.[23]

As CoreComm correctly argues,[24] Justice Scalia's majority opinion in *Iowa Utilities* makes clear that the only defensible reading of the 1996 Act enables the Commission to set nationwide unbundling policy, reserving to the states the power to set rates and any additional necessary rules not inconsistent with that policy.[25] What ALTS seeks lies entirely within the Commission's authority to provide federal guidance on the regulation of telecommunications services of nationwide import. It is in fact the Commission's charge to supervise the implementation of competitive provisioning, and to ensure that one size *does* fit all to some minimal degree.[26] Absent such supervision, Congress's mandates could never be realized, as the practices of each ILEC in each of their respective regions gravely impacts the rollout of broadband services in a timely manner. Further, this supervision is absolutely necessary where, as here, the

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[20] SBC Comments at 2-6; GTE Comments at 2-3; BellSouth Comments at 1-2; USWest Comments at 2.

[21] SBC Comments at 2.

[22] BellSouth Comments at 2; Bell Atlantic Comments at 5-6; GTE Comments at 14-15; SBC Comments at 16.

[23] The Commission has recognized that "the benefits of uniform loop unbundling outweigh the costs of creating a patchwork regime" of unbundling obligations. *UNE Remand Order* ¶ 200. ALTS and 10 additional commenters agree. ALTS Petition at 7; @Link Joint Comments at 3-4; AT&T Comments at 4; CPI Comments at 12; Covad Comments at 6, 11; Rhythms Comments at 4; Prism Comments at 9; CoreComm Joint Comments at 4.

[24] CoreComm Joint Comments at 4;

[25] "If there is any 'presumption' applicable to this question, it should arise from the fact that a federal program administered by 50 independent agencies is surpassing strange." *Iowa Utilities*, 525 U.S. at 378.

means for implementing Congress's unbundling mandates remain ambiguous and unclear even four years after passage of the 1996 Act.[27] To argue otherwise is to deny the purpose for which federal regulatory agencies were established.

B. The Commission Needs No Evidence to Adopt Normative Guidelines in Furtherance of Competition

Unsurprising to any party that has sought redress for ILEC poor provisioning practices, some ILEC commenters oppose the ALTS petition with familiar arguments to the effect that: CLECs cannot prove ILEC "fault" for loop provisioning failures. This argument is a red herring, for two simple reasons. First, CLECs have presented the Commission with reams of evidence, both statistical and anecdotal, in every possible forum, including the Bell Atlantic-New York and SBC-Texas 271 reviews as well as within this very proceeding.[28] Even the anecdotal evidence, occurring as it does with such regularity, presents a clear enough picture that ILEC broadband loop provisioning warrants Commission attention. In fact, the Commission itself recognized the ILECs' provisioning deficiencies just last fall, flatly declaring that "unbundled network elements have not been made fully available to requesting carriers as the Commission expected in 1996."[29]

Second, definitive evidence of bad practices is, in any event, not a necessary predicate to an agency's establishment of normative guidelines for the entities it regulates. This petition is

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[26] Even the ILECs have agreed that a "one size fits all" approach is necessary to deter needless state-by-state regulation in favor of rapid telecommunications deployment. Bell Atlantic Petition for Reconsideration, CC Docket No. 98-147, *et. al.*, at 7 (Feb. 9, 2000).

[27] Contrary to the ILECs' assertions (SBC Comments at 1; Bell Atlantic Comments at 2), the lack of clarity in some of the Commission's provisioning rules is apparent in the fact that state commissions have implemented federal policy in such varying manners. As DSL.net, the CTSI Joint Commenters and others point out, the differences between the recent orders issued by the Connecticut Department of Public Utility Control and the Texas Commission regarding cost-based loop de-conditioning rates are staggering. DSL.net Comments at 28; CTSI Joint Comments at 21.

[28] *See* Allegiance Comments at 4-7; BlueStar Comments at 7; NAS Comments at 3; Rhythms Comments at 9 n.30; McLeodUSA Comments at 3; CTSI Joint Comments at 8; CoreComm Joint Comments at 12-20; CompTel Comments, Affidavit of Susan Tyriver, ATG.

not an enforcement action. The petition seeks clarification of yet-unclear provisioning rules in order to remedy a competitive disparity in the broadband services market without undue penalty to ILECs or CLECs. The Commission may, and indeed must, intercede in this market for good cause where broadband rollout is unduly hindered or slowed.[30] The competitive telecommunications industry has provided the Commission with more than good cause based on the evidence already submitted. The Commission can stand squarely on this evidence and declare that minimum federal guidelines are required and what those guidelines shall be.

II. THE RECORD OVERWHELMINGLY SUPPORTS COMMISSION ADOPTION OF FEDERAL BROADBAND LOOP RULES

The many commenters in this proceeding have provided the Commission with thoughtful arguments and explanations in support of the relief sought in the ATLS petition. As the record is already replete with evidence in favor of each clarification and interpretation the CLEC industry requires, ALTS will not repeat these arguments on reply. Rather, we address the ILECs' chief concerns regarding the petition to provide assurance that the relief sought is well within the bounds of the 1996 Act and the public interest.

The ILECs defend their refusal to permit CLEC provisioning of multiple services over a single loop on the grounds that the Commission's line sharing rules explicitly permit only ILEC voice–CLEC data line sharing.[31] This linguistic argument is mere semantics, ignoring bedrock principles of the 1996 Act. No market actor may dictate to a competitor which services the competitor may provide. This principle appears prominently in the Commission's 1996 Act policies,

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[29] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 (rel. Nov. 5, 1999) ("*UNE Remand Order*").

[30] 1996 Act, § 706(b).

[31] GTE Comments at 9-10; USWest Comments at 7-8.

which make use restriction on UNEs illegal.[32] On a more general level, any attempt to prevent CLECs from offering multiple services could be termed tortuous interference with contract. In response to these ILEC efforts to obfuscate the impact of the Commission's line sharing decision, ALTS suggests that the Commission expressly clarify that any competitive telecommunications provider must be able to provide whichever services over a single loop as prevailing technical parameters allow.[33]

As to special access circuit provisioning, SBC has protested that the Commission may not issue federal guidelines on the matter because, since special access has not yet been identified as a UNE, the statutory standards of Sections 251 and 252 do not apply.[34] The nondiscrimination mandate of Section 202, however, continues to apply to all carrier provisioning, and prohibits ILECs from serving themselves in a manner superior to competitors.[35] This nondiscrimination requirement extends equally to the provisioning of the circuit as to the information about that circuit to which ILECs have exclusive access.[36] Thus, the clear discrimination that (despite Bell Atlantic's tortured statistical gymnastics)[37] is demonstrated in the Bell Atlantic-NYNEX evidence ALTS has provided,[38] fully justifies a remedy from the Commission. This remedy is easily provided in a ruling that clarifies existing Commission special access provisioning rules, imposing the requirement that each ILEC install special access circuits for CLECs within the same

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[32] *Local Competition First Report and Order*, 11 FCC Rcd. at 15,646.

[33] *See* ASCENT Comments at 5-6; AT&T Comments at 16; CPI Comments at 4-5; Prism Comments at 7; WorldCom Comments at 7-9.

[34] SBC Comments at 14.

[35] Time Warner Comments at 8-9 (*citing MCI v. FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990)).

[36] Time Warner Comments at 11-13.

[37] Bell Atlantic Comments at 16-17.

[38] Evidence presented by the carriers themselves corroborates the exemplar Bell Atlantic-NYNEX evidence. NEXTLINK states that Bell Atlantic-New York has an on-time rate of as low as 19%. KMC Joint Comments at 15.

interval it is capable of providing these circuits to itself.[39] Such a standard should include timely and meaningful firm order commitments ("FOCs") and accurate jeopardy notices, as Focal has argued.[40] Given the extreme competitive importance of special access circuits, ALTS urges the Commission to modify its rules to extend such parity treatment to these facilities.[41]

On the issue of federal broadband loop rules, nearly every non-ILEC commenter strongly supports ALTS' requests.[42] Noting the "Kafka-esque service provisioning process" that the ILECs have imposed,[43] CPI emphasizes that the current lack of clarity in loop provisioning rules is depriving residential consumers of broadband connectivity[44] while simultaneously damaging the reputation of the competitive broadband industry, perhaps irrevocably.[45] Several parties, including the CTSI Joint Commenters, DSL.net and the @Link Joint Commenters, [46] have provided the Commission with established, thorough metric standards that will immediately bring clarity to the current "crazy-quilt"[47] of broadband element regulation. By adopting in this proceeding these or similar metrics — which have already been studied and approved in exhaustive proceedings[48] — the Commission will, to a great extent, reify Congress's vision of rapid broadband deployment in accordance with its clear authority to do so.

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[39] Time Warner states the remedy as "ensur[ing] that provisioning of special access to competitors is at parity with provisioning to con-competitor customers." Time Warner Comments at 12.

[40] Focal Comments at 4.

[41] Several commenters support this request. *See* ASCENT Comments at 6; AT&T Comments at 23; Allegiance Comments at 12; Joint KMC Comments at 13-15; Focal Comments at 2-5; Time Warner Comments at 2-13.

[42] @Link Joint Comments at 8-24; ASCENT Comments at 6-7; Allegiance Comments at 13; AT&T Comments at 15; BlueStar Comments at 4-6; CompTel Comments at 3-5; CoreComm Joint Comments at 2-3, 8; CTSI Joint Comments at 8-19; Covad Comments at 3, 5-7; DSL.net Comments at 4; Jato Comments at 3; McLeodUSA Comments at 1-2; Rhythms Comments at 5-6; WorldCom Comments at 4-7.

[43] CPI Comments at 2.

[44] *Id.* at 5-6.

[45] *Id.* at 3.

[46] CTSI Joint Comments at 4-17; DSL.net Comments at 22; @Link Comments at 8-24.

[47] Covad Comments at 11.

[48] These commenters present performance metrics already adopted by the Commission, an approach supported by several parties. @Link Joint Comments at 5-6; CoreComm Comments at 6-7; CTSI Joint Comments at 3; Prism Comments at 5-11.

Furthermore, the feasibility of the clarifications that ALTS and its supporters seek is apparent from the fact that for each of the performance guidelines sought in the petition, at least one ILEC already meets the guideline. For example, BellSouth is contractually committed to permitting the near-simultaneous provisioning of collocation and transmission facilities,[49] a practice that ALTS seeks to make ubiquitous. Another example is USWest's and SBC's assurances that they already provide a considerable amount of loop make-up information available to all CLECs;[50] these assurances indicate that CLEC access to crucial loop information is an attainable goal. The fact that these ILECs already provide what CLECs require is ample justification, based on both common sense and on existing Commission "best practices" policy,[51] for the Commission to hold that minimum federal guidelines for loop provisioning intervals, subloop access, loop information provisioning, and timely, cost-based loop de-conditioning are feasible. Given the fact that the local network has a fairly uniform structure throughout the country, and that the post-merger network is now largely controlled by only four companies, creating uniform normative standards for broadband provisioning is a logical progression in Commission policy.

Finally, just as federal provisioning guidelines are a necessary measure to ensuring meaningful competition in broadband services, so are clear penalties to ensure that these guidelines are followed.[52] As several commenters have urged the Commission, experience proves that even the best-formulated rule has little effect unless coupled with commercially meaningful pen-

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[49] BlueStar-BellSouth Interconnection Agreement, Section 6.4.1 (*see* ALTS Petition at 10 n.25).

[50] USWest Comments at 4-5; SBC Comments at 8-9.

[51] *E.g.*, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket 98-147, Memorandum Opinion and Order, FCC 99-48 ¶ 45 (rel. Mar. 31, 1999).

[52] *See* ALTS Petition at 31-32.

alties.[53] These penalties fall well within the Commission's Title V authority[54] and are in keeping with its right to impose penalties for ILEC "back-sliding" after Section 271 approval.[55] In addition, because these penalties would apply only where the ILECs fail in a quantifiable way to comply with clear provisioning guidelines, the ILECs should have no concern about the adoption of penalties so long as they continue to provide, as they contend that they do, nondiscriminatory access to broadband elements. Nor would such penalties be duplicative with state remedies, for there are few states that have adopted penalties and Commission practice would not permit intervention in a matter that is already before a state commission. The Commission therefore should adopt *prima facie* penalties in concert with the loop provisioning guidelines ALTS sets forth in order to provide the CLEC community with predictable remedies if ILEC poor provisioning continues to hinder their ability to serve customers.

CONCLUSION

The Commission should grant the ALTS petition for declaratory ruling and, in accordance with the vast weight of the comments in this proceeding, clarify, interpret and modify its rules governing crucial aspects of broadband loop provisioning. Among other things, the Commission should:

- Hold that Rule 51.319 requires ILECs to provide high-capacity loops, including DS-1 and DS-3 level loops, to any requesting CLEC on an unbundled and nondiscriminatory basis;
- Hold that Rule 51.319 requires ILECs to provide entire loops to CLECs providing integrated voice and data services over a shared line;
- Adopt maximum intervals for provisioning of UNE loops;

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[53] ASCENT Comments at 7; AT&T Comments at 24; Allegiance Comments at 17; CompTel Comments at 6-7; DSL.net Comments at 31-32; Jato Comments at 7-8; KMC Joint Comments at 20-21; NAS Comments at 17; Rhythms Comments at 11-12; WorldCom Comments at 4-7, 15.

[54] Allegiance Comments at 16-17; NAS Comments at 17 (suggesting a fine of $110,000 per penalty up to a maximum of $1.1 million, in accordance with statutory limits).

[55] KMC Joint Comments at 20-21. *See also* ALTS Petition at 31 n.89.

- Require ILECs to provide nondiscriminatory access to all subloops and subloop components, including intra-building wiring, wherever possible and in a manner that will support provision of multiple services over a shared line;
- Require ILECs to promptly establish reasonable rates for all subloops and subloop components, including intra-building wiring;
- Hold that ILECs must provision special access circuits, including information about the technical components about those circuits, within the same interval in which they provision these circuits for their own retail services;
- Determine a federal deadline by which all ILEC OSS interfaces must electronically provide all loop information to which the ILEC has access;
- Ensure that all loop de-conditioning charges and other recurring and non-recurring charges adhere to TELRIC principles; and
- Set *prima facie* federal penalties for ILEC failure to comply with these rules.

Only in this way can the Commission assure that the benefits of broadband communications services are competitively available to all Americans as soon as technically and economically feasible,

Respectfully submitted,

THE ASSOCIATION FOR LOCAL
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Dated: July 10, 2000