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

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| In the Matter of | ) | |
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| Performance Measurements and Standards for Interstate Special Access Services | ) | CC Docket No. 01-321 |
| | ) | |
| Petition of U S West, Inc., for a Declaratory Ruling Preempting State Commission Proceedings to Regulate U S West's Provision of Federally Tariffed Interstate Services] | ) | CC Docket No. 00-51 |
| | ) | |
| Petition of Association for Local Telecommunications Services for Declaratory Ruling | ) | CC Docket Nos. 98-147, 96-98, 98-141 |
| | ) | |
| Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended | ) | CC Docket No. 96-149 |
| | ) | |
| 2000 Biennial Regulatory Review - Telecommunications Service Quality Reporting Requirements | ) | CC Docket No. 00-229 |
| | ) | |
| AT&T Corp. Petition to Establish Performance Standards, Reporting Requirements, and Self-Executing Remedies Need to Ensure Compliance by ILECs with Their Statutory Obligations Regarding Special Access Services | ) | RM 10329 |

## NOTICE OF PROPOSED RULEMAKING

**Adopted:** November 16, 2001 **Released:** November 19, 2001

**Comment Date: 30 Days after Federal Register Publication of this Notice**
**Reply Date: 21 Days after Comment Date**

By the Commission:

# I. INTRODUCTION

1. In this Notice of Proposed Rulemaking (Notice) we seek comment on whether the Commission should adopt a select group of performance measurements and standards for evaluating incumbent local exchange carrier (incumbent LEC) performance in the provisioning of special access services.[1] Special access services are important in that they are used to connect an end user with a competitive LEC's or interexchange carrier's point of presence.[2] Numerous competitors have alleged that the incumbent LEC provisioning of these services is characterized by delay, poor quality, and discrimination.[3] In this Notice we seek comment

[1] In this Notice, we use the term "performance measurements" to refer to the data regarding an incumbent carrier's performance, such as the period of time it takes to order and provision a special access service. We use the term "performance standards" to refer to specific performance goals or benchmarks, such as a requirement that an incumbent LEC complete an order for a special access service loop within a specified period of time. Our use of the term performance standards also incorporates the concept of "business rules," which are the detailed specifications of the way data are to be collected, measured, and reported. References to "special access services" in this Notice are to interstate special access services only unless otherwise specified. Today we release a related Notice that seeks comment regarding application of similar measurements and standards to unbundled network elements (UNEs) and interconnection. *See Performance Measurements and Standards for Unbundled Network Elements and Interconnection Notice*, CC Docket No. 01-318, FCC No. 01-331 (*UNE Measurements and Standards Notice*).

[2] A point of presence (POP) is the physical point where an interexchange carrier connects its network with the incumbent LEC's network. *See, e.g., Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262, 14 FCC Rcd 14221, at para. 8 & n.9 (1999) (*Pricing Flexibility Order*), *aff'd sub nom. WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001); *BellSouth Petition for Phase I Pricing Flexibility for Switched Access Services*, Memorandum Opinion and Order, CCB/CPD No. 00-21, para. 17, 16 FCC Rcd 5040 (2001) (noting that special access services also connect end users to competitive LEC collocation facilities).

[3] Within recent months, one section 208 complaint concerning special access has been filed (Letter from Jennifer M. Kashatus, Kelley Drye & Warren (counsel for Cable & Wireless) to Alexander P. Starr, Enforcement Bureau, Federal Communications Commission (filed Sept. 4, 2001) (arguing that Verizon's special access provisioning: (i) is not done within the established installation dates; (ii) is unjust and unreasonable in violation of section 201(b) of the Act; and (iii) discriminates against Cable & Wireless in favor of Verizon's own retail operations in violation of sections 201, 251(g), and 272 of the Act) and a multitude of *ex partes* have been filed by competitors on the subject of special access: Letter from Lisa B. Smith, WorldCom, to Magalie Roman Salas, Secretary, Federal Communications Commission, (filed July 12, 2001) (*WorldCom July 12 Ex Parte*); Letter from Daniel Gonzalez, XO, to Magalie Roman Salas, Secretary, Federal Communications Commission (filed August 24, 2001) (*XO Ex Parte*); Letter from Lisa B. Smith, WorldCom, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 96-98 (filed Aug. 6, 2001) (*WorldCom August 6 Ex Parte*); Letter from Jonathan Lee, CompTel, to Magalie Roman Salas, Secretary, Federal Communications Commission (filed August 20, 2001) (*CompTel Ex Parte*); *AT&T Corp. Petition to Establish Performance Standards, Reporting Requirements, and Self-Executing Remedies Needed to Ensure Compliance by ILECs with their Statutory Obligations Regarding the Provision of Interstate Special Access Services*, RM 10329 (filed Oct. 30, 2001) (*AT&T Petition*). *See also, Proceeding on Motion of the Commission to Investigate Methods to Improve and Maintain High Quality Special Services Performance by Verizon New York Inc et al.*, Opinion and Order Modifying Special Services Guidelines for Verizon New York Inc., Conforming Tariff, and Requiring Additional Performance Reporting, State of New York Public Service Commission, Cases 00-C-2051, 92-C-0665 (June 15, 2001) at 6 (finding that Verizon provides special access services in a discriminatory manner).

regarding whether adoption of measurements and standards for special access services would assist the Commission in ensuring that these services are provisioned in a just, reasonable, and nondiscriminatory manner. Accordingly, as set forth below, we ask parties to comment on what, if any, measurements, standards, and reporting procedures should apply to the provisioning of these services. In addition, we seek comment on how such measures and standards would be implemented and enforced. Finally, we also seek comment on the most appropriate periodic review or sunset mechanism should we adopt special access measurements and standards.

## II. BACKGROUND

2. Several proceedings pending before the Commission relate to provisioning of special access services by the incumbent LEC. For purposes of administrative efficiency we incorporate the records of those proceedings in this one, and we briefly describe the proceedings below.

### A. U S WEST Petition

3. On December 15, 1999, U S WEST[4] petitioned the Commission to preempt certain special access proceedings AT&T brought before the state commissions in Arizona, Colorado, Minnesota, New Mexico, and Washington.[5] Specifically, in these proceedings, AT&T requested that the states establish standards and remedies for the provisioning of services ordered under U S WEST's federal interstate access tariffs.[6] Because the issues raised

[4] Although U S WEST now operates as Qwest Communications International, Inc., we nonetheless refer to "U S WEST" in this Notice because its petition was filed prior to completion of the U S WEST-Qwest merger. *See Qwest Communications International, Inc. and U S WEST, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 99-272, Memorandum Opinion and Order, FCC 00-91 (rel. Mar. 10, 2000).

[5] *See Petition of U S WEST, Inc., for a Declaratory Ruling Preempting State Commission Proceedings to Regulate U S WEST's Provision of Federally Tariffed Interstate Services*, CC Docket No. 00-51 (filed Dec. 15, 1999) (U S WEST Petition); *see also, Pleading Cycle Established for Comments on U S WEST Petition for Declaratory Ruling Preempting State Commission Proceedings to Regulate Provision of Federally Tariffed Interstate Service*, CC Docket No. 00-51, 15 FCC Rcd 5685 (2000).

[6] In the Minnesota proceeding, for example, AT&T alleged that U S WEST failed to build the facilities needed to serve AT&T, and that, in those facilities it did build, U S WEST discriminated in favor of itself and its affiliates and against AT&T. AT&T further alleged that U S WEST withheld critical information from AT&T when the network was at or near capacity. Letter from John W. Kure, Qwest, to Magalie Roman Salas, Secretary, Federal Communications Commission (filed Aug. 28, 2000), Exhibit A (*AT&T Communications of the Midwest, Inc., Against U S WEST Communications, Inc., Regarding Access Service*, Docket No. P-421/C-99-1183, *Order Finding Jurisdiction, Rejecting Claims for Relief, and Opening Investigation* at 2, Minnesota PUC Aug. 15, 2000 (*Minnesota PUC Order*)). AT&T sought injunctive relief, reporting requirements, damages, fines, and all other available remedies. *Minnesota PUC Order* at 3. We note that, in that order, the Minnesota Commission rejected AT&T's claims for relief, but found that it did have jurisdiction over the quality of intrastate access services whether provided under state or federal tariffs, and opened an investigation into whether it should develop wholesale access service quality standards for U S WEST. *See Minnesota PUC Order* at 4-17.

in the U S WEST petition are relevant to this proceeding, we terminate CC Docket No. 00-51 and incorporate by reference the record generated in that docket.

### B. ALTS Petition

4. On May 17, 2000, the Association for Local Telecommunications Services (ALTS) petitioned the Commission to take numerous steps relating to timely and nondiscriminatory provisioning of loops, and specifically requested the Commission to apply its nondiscrimination rules to ensure timely and efficient provisioning of special access circuits.[7] ALTS contends the Commission should establish, among other things, certain and quantifiable remedies, including self-executing monetary penalties, for noncompliance with provisioning rules.[8] Because the instant proceeding will address those issues, we incorporate by reference the portions of the record generated by the ALTS Petition that pertain to special access provisioning.[9]

### C. Special Access Requirements Under Section 272(e)

5. Section 272(e)(1) of the Communications Act of 1934, as amended (the Act), states that Bell Operating Companies (BOCs) "shall fulfill any requests from an unaffiliated entity for telephone exchange service and exchange access within a period no longer than the period in which it provides such telephone exchange service and exchange access to itself or to its affiliates."[10] On December 23, 1996, the Commission adopted the *Non-Accounting Safeguards Order and Further Notice* that sought comment relating to the appropriate implementation of this statutory requirement.[11] At that time the Commission sought comment on minimizing the burden of information disclosure; selecting appropriate service categories and units of measure; determining frequency of updates; setting levels of data aggregation; and

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[7] *Petition of Association for Local Telecommunications Services for Declaratory Ruling: Broadband Loop Provisioning, 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; *Application 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-48 DA 00-891, May 17, 2000 (ALTS Petition); *Pleading Cycle Established for Comments on ALTS Petition for Declaratory Ruling: Loop Provisioning*, CC Docket Nos. 98-147, 96-98, 98-141, NSD-L-00-48, DA 00-114, 15 FCC Rcd 18671 (2000).

[8] ALTS Petition at 31-2.

[9] *See also, UNE Measurements and Standards Notice*, paras. 10-11 (incorporating the portions of the ALTS Petition that pertain to UNEs.).

[10] 47 U.S.C. § 272(e)(1).

[11] *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-149, 11 FCC Rcd 21905, at 22079-86, paras. 362-82 (1996) (*Non-Accounting Safeguards Order and Further Notice*).

coordinating with other reporting requirements.[12] Because the issues raised in the *Non-Accounting Safeguards Order and Further Notice* are relevant to this proceeding, we incorporate the record into this proceeding.

### D. 2000 Biennial Review Service Quality Reporting Requirements Notice

6. On November 9, 2000, the Commission adopted the *Biennial Review Service Quality Reporting Requirements Notice* that sought comment on measures to streamline and reform the existing service quality requirements contained in our Automated Reporting Management Information System (ARMIS).[13] In the *Biennial Review Service Quality Reporting Requirements Notice* the Commission proposed to eliminate most of the current report categories, and limit reporting to the areas that the Commission believed are of particular interest to consumers.[14] Among the current ARMIS requirements set forth for comment are four installation interval measurements and two repair interval measurements that apply to special access services.[15] Because these issues are relevant to this proceeding, we incorporate any portion of the record generated by the *Biennial Review Service Quality Reporting Requirements Notice* that addresses special access reporting requirements into this proceeding.

### E. AT&T Petition

7. On October 30, 2001, AT&T petitioned us to conduct a rulemaking to regulate the provisioning of interstate special access services by incumbent LECs.[16] AT&T states that interexchange carriers and competitive LECs have a "desperate need" for the incumbents' special access services, which the incumbents have "a statutory obligation to provide . . . in a just, reasonable, and nondiscriminatory manner."[17] According to AT&T, incumbent LECs discriminate in favor of themselves and their retail customers in provisioning these services, and subject their carrier-customers to poor quality and delays. AT&T petitions us to adopt performance standards, reporting requirements, and self-executing remedies to address these alleged deficiencies.[18] We will address AT&T's claims and requested relief in this proceeding.

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[12] *Id.*, 11 FCC Rcd at 22081-86, paras. 369-382.

[13] *2000 Biennial Regulatory Review – Telecommunications Service Quality Reporting Requirements*, Notice of Proposed Rulemaking, CC Docket. No. 00-229, 15 FCC Rcd 22113 (2000) (*Biennial Review Service Quality Reporting Requirements Notice*). ARMIS is an automated system established by the Commission in 1987 for collecting financial and operating data needed to administer the accounting, joint cost, separations, rate base disallowance, and access charge rules. See *Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies*, Report and Order, 2 FCC Rcd 5770 (1987), recon., 3 FCC Rcd 6375 (1988).

[14] *Biennial Review Service Quality Reporting Requirements Notice*, 15 FCC Rcd at 22118-19, para. 15.

[15] *Id.*, 15 FCC Rcd at 22130, Appendix A: Current ARMIS Requirements, Table I.

[16] *AT&T Petition.*

[17] *Id.* at 1.

[18] *Id.*

## III. JURISDICTION AND ENFORCEMENT

### A. Jurisdiction

8. The Commission has broad authority to establish national performance measurements and standards for special access services pursuant to sections 201 and 202 of the Act.[19] Section 201(b) of the Act requires, among other things, that the practices of all common carriers providing interstate services be just and reasonable, and the Commission previously has applied the requirements of section 201 to special access services.[20] Section 202(a) of the Act makes it "unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, . . . facilities, or services for or in connection with like communication service . . . by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person."[21]

9. We seek comment on how the differences in statutory language between the nondiscrimination requirements in section 251, on one hand, and section 202 on the other, should inform the standard by which we evaluate an incumbent LEC's special access provisioning. For example, in the *Local Competition Order* the Commission noted that the nondiscrimination requirement in section 251(c)(2) is not qualified by the "unjust or unreasonable" language of section 202(a), and therefore concluded that Congress intended the term "nondiscriminatory" in section 251 to signify a more stringent standard than the phrase "unjust and unreasonable discrimination" in section 202 of the 1934 Act.[22] Given this, the Commission interpreted section 251's nondiscrimination requirement to require parity of performance between an incumbent LEC and its competitors.

10. Section 272(e)(1) provides additional authority for the Commission to apply measures, standards, and reporting requirements to the provisioning of interstate special access services by BOCs.[23] The Commission previously found that performance requirements would be useful in implementing section 272(e)(1), stating that, "[t]he statute imposes a specific performance standard on the BOCs and, . . . absent Commission action, the information

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[19] 47 U.S.C. §§ 201, 202.

[20] *See, e.g., Investigation of Access and Divestiture Related Tariffs; MTS and WATS Market Structure*, 98 F.C.C. 2d 730, 736-37, paras. 13, 14 (1984).

[21] 47 U.S.C. § 202(a).

[22] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499, 15612, para. 217 (1996) (*Local Competition Order*).

[23] 47 U.S.C. § 272(e): "A Bell operating company and an affiliate that is subject to the requirements of section 251(c) of this title (1) shall fulfill any requests from an unaffiliated entity for telephone exchange service and exchange access within a period no longer than the period in which it provides such telephone exchange service and exchange access to itself or to its affiliates." *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Remand, CC Docket No. 98-147, 15 FCC Rcd 385, 406, para. 45 (1999) (stating that special access services are included within the broader category of exchange access services).

necessary to detect violations of this requirement will be unavailable to unaffiliated entities."[24] Does the fact that section 272(e)(1) applies only when a BOC has an operational section 272 affiliate (and refers only to the BOC's treatment of that affiliate in comparison to competitors) affect our decision to use section 272(e)(1) as a basis for authority to adopt special access performance metrics?[25]

11. We seek comment on the extent to which state commissions could play a role regarding interstate special access services.[26] Competitive carriers have turned to the state commissions for assistance in resolving special access services disputes; however, several states have determined that they lack authority to regulate the incumbent's provisioning of such services.[27] Incumbents, too, have questioned the authority of states to regulate special access provisioning to the extent that these services are taken pursuant to a federal tariff.[28] To be sure, state commissions have jurisdiction over intrastate special access services. We seek comment on how, if the Commission were to adopt special access measures and standards, the state commissions might participate in enforcing these requirements. Parties are asked to comment on what they consider an appropriate role for the states, taking into account both policy considerations and legal constraints, and including applicable limitations on delegations of authority to the states.

### B. Enforcement

12. We seek comment as to whether and to what extent the Commission should exercise the full panoply of enforcement mechanisms available to it under the Act to enforce any national measurements and standards we might adopt. For example, the Commission could

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[24] *Non-Accounting Safeguards Further Notice*, 11 FCC Rcd at 22020, para. 242.

[25] *Application of Verizon New England, Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, Memorandum Opinion and Order, CC Docket No. 01-9, FCC 01-130, para. 230 (rel. Apr. 16, 2001).

[26] We note that special access services taken pursuant to a federal tariff may also carry intrastate traffic. *See, e.g., Minnesota PUC Order*. *But see* U S WEST Petition at 6-15 (requesting that the Commission preempt state regulation of federally-tariffed access services because the Act and legal doctrine require uniform performance under the terms of the federal tariff).

[27] *See, e.g.*, Letter from Maureen O. Helmer, State of New York Department of Public Service, to Chairman Michael K. Powell, FCC (May 22, 2001) (*State of New York May 22 Letter*); *Investigation by the Department of Telecommunications and Energy on its own motion pursuant to G.L. c. 159, §§ 12 and 16, into Verizon New England Inc. d/b/a Verizon Massachusetts' Provision of Special Access Services*, D.T.E. 01-34, at 14 (Aug. 9, 2001) (*Massachusetts DTE Order*) (finding that over 99 percent of special access services Verizon Massachusetts provisioned in 2000 were ordered under the federal tariff, that the Commission has exclusive jurisdiction over the terms and conditions contained in federal tariffs, and that mixed interstate/intrastate special access services with more than ten percent interstate traffic is tariffed at the federal level).

[28] The states have taken various positions. *See, e.g., State of New York May 22 Letter*; *Massachusetts DTE Order*; and *Minnesota PUC Order*.

impose monetary forfeitures pursuant to section 503(b) of the Act for failure to comply with the measurements and standards.[29] We seek comment on whether the Commission should establish specific enforcement policies or guidelines for responding to violations of any national measurements and standards we might adopt. For instance, commenters are requested to address whether we should establish base forfeiture amounts for violations of any rules adopted in this proceeding, and if so, what the appropriate amounts should be.[30] Given the importance of compliance with these rules in encouraging competition and avoiding scenarios where forfeitures are merely a cost of doing business,[31] we seek comment on whether the base forfeiture amount should be the statutory maximum.[32] We also seek comment on the lawfulness and feasibility of adopting a self-effectuating liquidated damages rule similar to those that have been adopted by some states, where failure to comply with the standards would result in automatic payments to competitors.[33] In this regard, we ask for comment on how such a system would work, *e.g.*, what would trigger the payments, who would be eligible for such payments, and what would be the amount of the payments.[34] We also ask commenters to discuss whether considerations exist that would cause our enforcement of special access provisioning requirements to differ from our enforcement of UNE or interconnection provisioning requirements. Finally, we solicit comment regarding how our section 205 authority to prescribe just and reasonable charges may bear upon our enforcement of the provisioning of special access services.[35]

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[29] 47 U.S.C. § 503(b).

[30] *See CompTel Ex Parte* at 1-2 and *AT&T Petition* at 25-35 (suggesting adoption of both fines and forfeitures payable to the U.S. Treasury and damages payable to injured carriers).

[31] The Commission has made clear that certain companies, such as the incumbent LECs, should expect higher forfeitures such that the amounts are not considered merely an affordable cost of doing business. *See The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, at 17100, para. 27 (1997), *recon. denied*, 15 FCC Rcd 303 (1999). In 2000, SBC had operating revenues of $51.4 billion, with an operating income of $10.7 billion. SBC Telecommunications, Inc., 2000 Annual Report at 4 (2001).

[32] Section 503(b)(2)(B) authorizes the Commission to assess a forfeiture of up to $120,000 for each violation, or each day of a continuing violation, up to a statutory minimum of $1,200,000 for a single act or failure to act. 47 U.S.C. § 503(b)(2)(B).

[33] The Commission has experience of its own overseeing self-executing performance assurance plans. *See, e.g., Application of GTE Corporation and Bell Atlantic Corporation for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd 14032, 14334, Appendix D, Attachment A, paras. 8-16 (2000) (*Bell Atlantic-GTE Merger Order*) (establishing a voluntary payment scheme under the Bell Atlantic-GTE merger conditions).

[34] *See* ALTS Petition at 31-2.

[35] 47 U.S.C. § 205; *see AT&T Petition* at 30-1 (arguing that, under section 205, if the Commission finds a tariff to be unlawful, it may avail itself of, among others, its investigative authority, its complaint-resolution authority, and its authority to issue a declaratory ruling.)

## IV. PERFORMANCE MEASUREMENTS AND STANDARDS

13. As an initial matter, we seek comment on whether the Commission should adopt interstate special access measures and standards at this juncture. It is critical that we assess the benefits and burdens that such performance monitoring may impose. With respect to benefits, the adoption of performance metrics would provide greater transparency of the incumbent LECs' special access provisioning processes. In addition, regular performance reporting should provide a disincentive to the incumbents to engage in any discriminatory activities with respect to these services. On the other hand, reporting requirements could impose significant implementation and reporting costs and other burdens on carriers. We seek comment on how the Commission should weigh these benefits and burdens.

14. In evaluating the benefits and burdens of such additional regulation, we must also consider whether such regulation is necessary in light of the current marketplace conditions. Numerous competitors, competing LECs and interexchange carriers alike, assert that the incumbent LECs, in particular the BOCs, currently enjoy tremendous market power in the provision of special access services, that the provisioning of such services is generally poor, and that, in most cases, there are not adequate alternative providers of these services.[36] The incumbents, on the other hand, maintain that special access services are competitively provided, and that measurements and standards could reduce customer choice or otherwise distort the competitive operation of the marketplace.[37] Moreover, they contend that adoption of performance requirements would be inconsistent with the Commission's *Pricing Flexibility Order* that grants incumbents the flexibility to set their own special access prices under certain circumstances. In the *Pricing Flexibility Order*, the Commission permitted incumbents special access pricing flexibility upon satisfying certain competitive thresholds; at the same time, it did not go so far as to find that incumbents do not have market power with respect to these services.[38] We seek comment on how the deregulatory treatment of special access services in the *Pricing Flexibility Order* relates to the potential imposition of special access performance measures and standards. We ask parties to comment on whether the competitive threshold tests that are relevant to a finding of pricing flexibility may also be relevant to the need for

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[36] *See, e.g.*, ALTS Petition; *AT&T Petition*; *WorldCom July 12 Ex Parte; XO Ex Parte*; *WorldCom August 6 Ex Parte; CompTel Ex Parte.*

[37] *See, e.g.*, Letter from Brian J. Benison, SBC Telecommunications Inc., to Magalie Roman Salas, Secretary, Federal Communications Commission (filed Aug. 17, 2001) (*SBC Ex Parte*); Letter from William W. Jordan, BellSouth, to Magalie Roman Salas, Secretary, Federal Communications Commission (filed Aug. 22, 2001) (*BellSouth Ex Parte*). *But see* Letter from Lisa B. Smith, WorldCom, to Magalie Roman Salas, Secretary, Federal Communications Commission, (filed Sept. 17, 2001); Letter from Thomas S. Jones, Counsel for Time Warner, to Magalie Roman Salas, Secretary, Federal Communications Commission (filed Sept. 28, 2001).

[38] We note that the Commission recognized the possibility that incumbent LECs with pricing flexibility may still have the incentive and ability to discriminate by "deter[ing] efficient entry or engaging in exclusionary pricing behavior." *Pricing Flexibility Order*, 14 FCC Rcd at 14225, para. 3. We further note that the *Pricing Flexibility Order* does not grant incumbent LECs all the regulatory relief afforded to non-dominant carriers, that relief is limited to certain services and certain areas, and that incumbent LECs are still required to file generally available tariffs. *Id.*, 14 FCC Rcd at 14300, para. 151.

performance measurements. For example, should the Commission refrain from requiring performance measurements on those portions of the special access circuit that have received pricing flexibility?

### A. Scope

15. We seek comment on whether any performance measurements, standards, and reporting requirements that we adopt for special access services should apply to incumbent carriers only, or should also apply to competitive providers of such services.[39] Assuming they should apply only to incumbent LECs, we ask whether all incumbent LECs should be subject to any special access measurements and standards that we may adopt or whether such regulations should only apply to some subset of incumbent LECs. In particular, we request commenters to address whether performance measurements and standards for special access provisioning would impose disproportionate costs or burdens on small, rural, or midsized incumbent LECs. We ask commenters that advocate inclusion of small, rural, or midsized incumbent LECs to also discuss how the rules should be modified to take into account these carriers' resources and concerns.[40] We seek comment on whether any burden resulting from performance measurements, standards, and reporting requirements relating to special access provisioning would be justified for all carriers, regardless of any particular carrier's size. For example, we recognize that the reporting obligations may require carriers to modify existing computer systems to collect the necessary data, and that there may be a certain level of expense involved in generating performance measurements and statistical analyses.[41]

### B. Specific Measurements and Standards

16. Although we do not here propose specific measures and standards for special access provisioning, we draw commenters' attention to several documents that contain detailed examples or proposals, and invite comment regarding the degree that these may be appropriate models for special access services. First, we note that state commissions in New York and Texas have developed, in conjunction with the incumbent and competitive carriers, a set of comprehensive measures for reporting of performance in various areas, including special access.[42] Second, we have received detailed proposals for special access provisioning measurements and standards from requesting carriers, and we encourage commenters to give

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[39] *See, e.g., SBC Ex Parte*, at 5 (stating if the Commission adopts performance measurements for incumbent LEC special access services, those measures should also apply to competitive LECs' services).

[40] *See* Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*

[41] *AT&T Petition* at 26.

[42] *Proceeding on Motion of the Commission to Review Service Quality Standards for Telephone Companies*, Order Adopting Revisions to Inter-Carrier Service Quality Guidelines, Case 97-C-0139 (December 15, 2000); *New York State Carrier-to-Carrier Guidelines Performance Standards and Reports*, NYPSC Case 97-C-0139 (Jan. 2001); *Texas Performance Remedy Plan and Performance Measurement, Attachment 17 to Texas 271 Agreement (Version 2.0)* (Aug. 2001). To facilitate access by commenters these documents have been filed in the docket of the instant proceeding, CC Docket. No. 01-321.

these proposals thoughtful consideration.[43] Third, we have offered for comment performance measurements and standards for UNEs and interconnection and we seek comment on whether the same or similar measurements and standards should apply to provisioning of both high-capacity loops and special access circuits.[44] We seek comment on whether these proposals are useful or whether there are other proposed measurements and standards the Commission should take into consideration.

## C. Implementation

### 1. General Issues

17. We seek comment regarding the implementation of performance measures and standards for special access provisioning. Specifically, we ask commenters to discuss the same issues that apply in the context of performance measures and standards for UNEs and interconnection, namely (1) How may we best ensure that reported data are sufficiently accurate to form the basis for an enforcement action? (2) Should penalties be imposed if data inaccuracies are detected?[45] (3) How may we ensure the valid and accurate implementation of business rules and exclusions? (4) What auditing procedures, if any, are reasonable? (5) Would industry workshops under the direction of regulators be useful, and if so, should we adopt safeguards against delay and stalemate?[46]

18. In addition, we solicit comment on appropriate reporting procedures that may help foster competition while avoiding increases on the overall burdens imposed on incumbent

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[43] *WorldCom Aug. 6 Ex Parte*, Attachment 2. WorldCom proposes these special access measurements: FOC Receipt, FOC Receipt Past Due, Offered Versus Requested Due Date, On Time Performance To FOC Due Date, Days Late (When FOC Due Date Missed), Average Intervals – Requested/Offered/Installation, Past Due Circuits, New Installation Trouble Report Rate, Failure Rate, Mean Time To Restore, Repeat Trouble Report Rate; Letter from A. Renée Callahan, Time Warner Telecom, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 96-98 (filed July 16, 2001). Time Warner proposes these special access measurements: Provisioning On Time Performance – Met Commitments, Average Delay Days On Missed Installation Orders, Installation Quality, Order Conformation Timeliness, Percent Missed Appointments Due To A Lack Of Facilities, Trouble Duration Intervals, Reject/Query Timeliness, Completed With Specified Interval, Open Orders On Hold Status (Backlog), Percent Jeopardies, Customer Trouble Report Rate, Repeat Trouble Reports; *XO Ex Parte*, Attachments 1, 2. XO proposes these special access measurements: Number Provisioned On Time, Percent Provisioned On Time, Average Number Of Days Past Due, Average Pending Past Due, Average Interval Between ASR Sent And FOC Received. To facilitate access by commenters these documents have been filed in the docket of the instant proceeding, CC Docket. No. 01-321.

[44] *UNE Measurements and Standards Notice*, Section IV.B.

[45] In this regard, we note that section 412 of the Act provides that statistics, tables, and figures contained in the annual or other reports of carriers and other persons made to the Commission under the provisions of this Act shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings. 47 U.S.C. § 412.

[46] We discuss these and related concerns in greater detail in the *UNE Measurements and Standards Notice*, paras. 73-6.

LECs. For example, would the nature of costs associated with reporting be mostly recurring or nonrecurring in nature, and what cost savings, if any, would result from harmonization of federal and state measurements?[47] We also seek comment on whether incumbent LECs alone should be responsible for collecting data on incumbent LEC performance, or whether these responsibilities should also fall on competing carriers.[48] In addition, assuming measurements are required, should the Commission establish an alternative reporting program or use the Commission's existing ARMIS reporting program?[49] We also seek comment regarding the development, implementation, and analysis of the results of statistical measures that might be applicable and appropriately used in analyzing performance data.[50] As a general matter, we believe that the implementation issues and concerns surrounding national performance measures and standards for UNEs and interconnection will apply in the same degree to special access provisioning measures and standards, but we invite discussion of instances where other concerns arise, or a different emphasis would be appropriate.

### 2. Sunset Requirements

19. Although the establishment of a set of performance measurements may bring benefits to competitive carriers as well as to incumbent LECs by establishing an objective standard by which an incumbent's compliance with its statutory obligations can be evaluated on a regular basis, we do not seek to impose unnecessary regulations on a marketplace if competition is working or where less intrusive mechanisms, such as enforcement, are adequate to achieve the statutory purposes of the Act. Rather, we contemplate that at such time as the services discussed herein are routinely provisioned in a nondiscriminatory and just and reasonable manner, the Commission will suspend any reporting requirements that have become unnecessary.

20. Accordingly, we seek comment on whether the Commission should establish a sunset date on which the proposed reporting requirements would cease to apply to incumbent LECs. In particular, we ask parties to comment on whether the reporting requirements should sunset on a date certain, such as in two, three or four years, or whether the Commission should establish a specific trigger event. Similarly, for BOCs, we seek comment on whether these rules should sunset on or at a date certain after section 271 approval.[51] We also seek comment

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[47] *UNE Measurements and Standards Notice*, paras. 80-8.

[48] Namely, we request comment on whether competitive LECs collect their own data on incumbent LEC performance, whether they share that data with incumbent LECs and regulators, and the extent to which competitive LEC-gathered data are, or should be, used in the calculation of performance measurements.

[49] Currently, only 52 out of over 1300 incumbent LECs are required to file ARMIS reports on an annual basis. *2000 Biennial Regulatory Review of the Accounting Requirements and ARMIS Reporting Requirements for Incumbent Local Exchange Carriers: Phase 2*, Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 00-199, FCC 01-305, para. 15 n.21 (rel. Nov. 5, 2001).

[50] *UNE Measurements and Standards Notice*, paras. 89- 91.

[51] We note, however, that the requirements set forth in section 272(e) do not sunset. *See* 47 U.S.C. § 272(f)(2).

on whether there are other, equally or more useful, indicators of when the marketplace is sufficiently competitive to warrant eliminating special access performance measurement and standard reporting requirements. We also request comments on additional proposals parties may have on establishing a sunset date.

## V. PROCEDURAL MATTERS

### A. Ex Parte Presentations

21. These matters shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[52] Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.[53] Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules.

### B. Comment Filing Procedures

22. Pursuant to sections 1.415 and 1.419 of the Commission's rules,[54] interested parties may file comments within 30 days after publication of this Notice in the Federal Register and may file reply comments within 21 days after the date for filing comments. All filings should refer to CC Docket No. 01-321. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.[55] Comments filed through ECFS can be sent as an electronic file via the Internet to http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, postal service mailing address, and the applicable docket number, which in this instance is CC Docket No. 01-321. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message: "get form<your e-mail address>." A sample form and directions will be sent in reply.

23. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to Janice Myles, Policy & Program Planning Division, Common Carrier Bureau, Federal Communications Commission, 445 12th Street S.W., Washington, D.C. 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using Microsoft Word or compatible software. The diskette

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[52] 47 C.F.R. §§ 1.200 *et seq.*

[53] *See* 47 C.F.R. § 1.1206(b)(2).

[54] 47 C.F.R. §§ 1.415, 1.419.

[55] *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the docket number, in this case, CC Docket No. 01-321), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase: "Disk Copy—Not and Original." Each diskette should contain only one party's pleading, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, Qualex International, Portals II, 445 12th Street S.W., CY-B402, Washington, D.C. 20554.

24. Regardless of whether parties choose to file electronically or by paper, parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, Qualex International, Portals II, 445 12th Street S.W., CY-B402, Washington, D.C. 20554 (telephone 202-863-2893; facsimile 202-863-2898) or via e-mail at qualexint@aol.com.

25. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with section 1.48 and all other applicable sections of the Commission's rules.[56] We direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to utilize a table of contents, regardless of the length of their submission. We also strongly encourage that parties track the organization set forth in the Notice in order to facilitate our internal review process.

### C. Initial Paperwork Reduction Act Analysis

26. This Notice contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this Notice, as required by the Paperwork Reduction Act of 1995, Public Law No. 104-13. Public and agency comments are due at the same time as other comments on this Notice; OMB comments are due 60 days from date of publication of this Notice in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

[56] *See* 47 C.F.R. § 1.49.

### D. Initial Regulatory Flexibility Analysis

27. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[57] the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Notice. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Notice provided above in Section V.B. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[58] In addition, the Notice will be published in the Federal Register.[59]

#### 1. Need for, and Objectives of, the Proposed Rules

28. In this Notice, the Commission seeks comment on whether it should adopt a limited number of measurements and standards for evaluating incumbent LEC performance with respect to provisioning of special access services that competitive carriers use to compete for end-user customers. We seek comment on the use and scope of any performance requirements and, as a threshold matter, on how to balance competitors' concerns about poor provisioning of such services with the incumbent LECs' concern about the number and cost of state and federal measurements and standards. Moreover, we seek comment on whether these are problems for which intervention in the form of national measurements and standards is more beneficial than harmful, and expect that the comments we receive in response to this Notice will inform our decision. In addition, we seek comment on how these standards may benefit the industry in general by increasing the uniformity of expectations and creating clear, predictable, and enforceable standards. Finally, we seek comment on what the most appropriate periodic review or sunset mechanism should be if we adopt a set of measurements and standards.

#### 2. Legal Basis

29. The legal basis for any action that may be taken pursuant to the Notice is contained in sections 1, 2, 4, 201, 202, 205, 206, 207, 209, 218, 272, 303(r), 403 and 503(b)of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 201, 202, 205, 206, 207, 209, 218, 272, 303(r), 403 and 503(b).

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[57] 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[58] *See* 5 U.S.C. § 603(a).

[59] *Id.*

### 3. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

30. The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that will be affected by any rules.[60] The Regulatory Flexibility Act defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small business concern" under section 3 of the Small Business Act.[61] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[62]

31. We have included small incumbent LECs in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[63] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[64] We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on FCC analyses and determinations in other, non-RFA contexts.

32. *Local Exchange Carriers.* Neither the Commission nor the SBA has developed a definition for small LECs. The closest applicable definition for these carrier-types under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.[65] The most reliable source of information regarding the number of LECs nationwide appears to be the data that we collect annually in connection with the Telecommunications Relay Service.[66] According to our most recent data, there are 1,335

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[60] *Id.*, §§ 603(b)(3), 604(a)(3).

[61] *Id.*, § 601(3).

[62] *Id.*, § 632.

[63] *Id.*, § 601(3).

[64] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b). Since 1996, out of an abundance of caution, the Commission has included small incumbent LECs in its regulatory flexibility analyses. *See, e.g., Local Competition Order*, 11 FCC Rcd 16144-45 (1996).

[65] 13 C.F.R. § 121.201, NAICS codes 51331, 51333, and 51334.

[66] 47 C.F.R. § 64.601 *et seq.*; *Carrier Locator: Interstate Service Providers*, FCC Common Carrier Bureau, Industry Analysis Division (rel. Oct. 2000) (*Carrier Locator*).

incumbent LECs.[67] Additionally, it appears that 1,037 of these entities have 1,500 or fewer employees although we are uncertain that all of these carriers may not be independently owned and operated.[68]

### 4. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

33. With respect to reporting and recordkeeping, the Notice acknowledges that incumbent LECs may be required to modify existing computer systems to collect the necessary data and that there may be a certain level of expense involved in generating performance measurements and statistical analyses. However, the costs of such reporting and recordkeeping to some carriers may be mitigated because both the Commission and state commissions already require certain carriers to file similar performance reports. For example, certain large incumbent LECs currently report, on an annual basis, performance data pertaining to special access provisioning and repair service.[69] Moreover, two large incumbent LECs provide, on a quarterly basis, special access performance data as part of their commitments in various Merger Orders. These performance reports are largely identical to the ARMIS reporting requirements noted above.[70] In addition, the Notice requests comment on how the Commission should weigh the benefits and burdens that may result from special access performance measurements and standards in determining whether to establish such requirements.

### 5. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

34. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather

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[67] *Carrier Locator* at Figure 1. The total for competitive LECs includes competitive access providers and competitive LECs.

[68] Trends in Telephone Service Report, Federal Communications Commission, Industry Analysis Division, Common Carrier Bureau, at 5-5 (August 2001).

[69] *See* 47 CFR § 43.21(g) (requiring mandatory price cap incumbent LECs to file annual service quality reports). These reports are part of the ARMIS program. Specifically, the special access provisioning and repair performance data are contained in Table I of ARMIS Report No. 43-05, CC Docket No. 86-182.

[70] *See, 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 and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, 14 FCC Rcd 14712, 15040, Appendix C, para. 63 (1999); *Bell Atlantic-GTE Merger Order*, 15 FCC Rcd 14332, Appendix D, para. 53.

than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[71]

35. An objective of this proceeding is to assess whether the benefits of establishing special access performance measurements outweigh any associated burdens, and whether such burdens would disproportionately affect small entities. Toward that end, the Notice seeks comment on how adopted rules should be modified to take into account any particular concerns of small, midsized or rural incumbent LECs.[72] In addition, the Notice requests comment on replacing existing special access service quality reporting requirements with any that may be adopted here. Finally, we seek comment on whether, as an alternative, small entities should file reports less frequently than larger incumbent LECs and whether the Commission should delay the implementation of any new reporting requirements for small entities

### 6. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

36. It is possible that some amount of duplication, overlap, or conflict may exist between any special access performance measurements that might be established in this proceeding and those measurements currently reported through the Commission's ARMIS reporting program and pursuant to the Commission's Merger Orders.[73] However, the Notice requests comment on whether any cost savings will be achieved from the harmonization of federal (and state) measurements if the Commission establishes special access performance measurements and standards requirements.[74]

## VI. ORDERING CLAUSES

37. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 2, 4, 201, 202, 205, 206, 207, 209, 218, 272, 303(r), 403 and 503(b)of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 201, 202, 205, 206, 207, 209, 218, 272, 303(r), 403 and 503(b) a NOTICE OF PROPOSED RULEMAKING IS ADOPTED.

38. IT IS FURTHER ORDERED that CC Docket No. 00-51 IS HEREBY TERMINATED.

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[71] 5 U.S.C. § 603(c).

[72] *See* Section IV.A, *supra.*

[73] *See* Section II.D, *supra; see also,* para. 33 n. 69, *supra.*

[74] *See* Section IV.C, *supra.*

39. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this Notice, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary