appropriate. Finally, in the event that the Commission declines to organize workshops, we seek comment on whether the Commission should devise other mechanisms for achieving these same purposes. If so, we request comment on what these mechanisms would be.

3. Periodic Review of the Measurements and Sunset Provisions

77. We ask parties to discuss the procedures and intervals for updating or refining national measures and standards. In particular, we seek comment on whether there should be an automatic periodic review of and, possibly, modification to any set of measurements and standards that we might adopt. Furthermore, we seek comment on what process should be used to modify the measurements and standards if it appears necessary after completion of our review of UNEs. We also request parties to comment on how the Commission should ensure that, over time, standards keep pace with industry needs and developments, address changes in incumbent anticompetitive behavior, and that performance and reporting requirements remain minimally burdensome. Specifically, we request comment on how we may draw upon the accumulated experience of and whether we should coordinate directly with the states in refining these measures over time. To address the potential concern that the Commission may be slow to adapt or discard outdated measures, we solicit advice on how our processes may be made more transparent and less cumbersome. For example, we encourage commenters to discuss whether the Common Carrier Bureau should hold a biennial conference or proceeding on the state of the measurements, standards and business rules followed by an expedited order containing any adjustments. On a related matter, we seek comment on whether the Common Carrier Bureau should be delegated the authority to modify business rules, the format and the media of the reports, as necessary. We also request comment on whether the Commission's review of any set of national performance measurements and standards that we may adopt should be coupled with the Commission's triennial review of UNEs.[113] Moreover, we ask commenters to weigh the burden on industry resources against the benefits of adaptability and burden minimization in discussing their preferred solutions to keeping the measurements and standards current.

78. As noted earlier, 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. At the same time, 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 facilities and 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.

79. 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

[113] *See UNE Remand Order*, 15 FCC Rcd 3766, para. 151 (stating that the Commission expects to reexamine its national list of UNEs every three years).

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. For example, we seek comment on whether a determination that the incumbent LEC is non-dominant or has achieved pricing flexibility with respect to certain facilities should be considered a trigger that would sunset these rules with respect to that carrier for those facilities. Similarly, for BOCs, we seek comment on whether these rules should sunset on or at a date certain after section 271 approval. We also seek comment on whether there are other, equally or more useful, indicators of when the marketplace is sufficiently competitive to warrant suspending national performance measurement and standard reporting requirements, including the status of service quality and nondiscriminatory performance. In this regard, we ask parties to discuss how such factors should be evaluated in the context of a sunset date. We also request comments on additional proposals parties may have on establishing a sunset date.

B. Reporting Procedures

80. Although performance measurements and standards may help foster competition, compliance with such requirements imposes certain burdens on incumbent LECs. We seek comment on how to balance our concurrent goal of eliminating discrimination with our goal of avoiding increases to the overall burdens imposed on incumbent LECs. As a general matter, we seek comment on whether the measurements discussed above appropriately balance these twin goals. Specifically, we seek comment on whether the difficulties in obtaining and collecting information for a particular measurement can be overcome without increasing overall burdens on incumbent LECs. We request that parties identify those measurements, if any, in which a substitute approach would capture similar information but would be less burdensome than the measurements listed above. We seek comment on whether additional measurements could be added without ultimately increasing the overall regulatory burdens or whether fewer measurements would capture sufficient information while imposing less burden on incumbent LECs. We also seek comment on whether incumbent LECs alone should gather the requisite information to calculate performance measurements or whether this responsibility should also fall on competing carriers. 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.

81. As noted above, the Commission requests comment on the expenses and other burdens that different categories of incumbent LECs will incur to comply with the requirements that we may adopt in this proceeding. More specifically, however, we also seek comment on the extent to which such compliance costs would be in addition to expenses already incurred by the carriers in complying with state reporting requirements. Moreover, we seek comment on whether these compliance costs would be largely an up-front, nonrecurring charge or whether there would be significant recurring expenses. Finally, commenters are asked to address what cost savings, if any, would result from a harmonization of federal and state measurements. Commenters should address with specificity how and when such harmonization would occur and why.

82. As was also noted above, we seek comment on whether reporting measures in specific categories or ranges might cause adverse distortions in the incumbent LEC's performance (*e.g.*, if the Commission establishes a provisioning interval of three days, would that encourage the incumbent to use the full three days if it is currently performing this work in one or two days). Should such a change in performance occur, we request comments on whether behavior of this sort can and should be discouraged. Namely, we seek comment on the effect on competitors if these national measurements and standards encourage incumbents to direct resources away from areas in which they perform well (*e.g.*, provisioning a UNE in two days) to improve areas in which their performance is weaker. Finally, we seek comment on whether requiring performance reports for certain measurements may prompt an incumbent to discriminate in other categories. Thus, and as mentioned above,[114] we request comment on whether the Commission should require incumbents to collect data on other measurements for which there would be, for example, no associated, self-effectuating penalty for poor performance.

83. We seek comment on the appropriate geographic level of performance. In particular, we ask whether carriers should report data for each performance measurement based on state boundaries, LATA, metropolitan statistical areas, or some other relevant geographic area. We ask parties to explain how their recommendations support our ability to obtain meaningful results from the data collected while not increasing overall regulatory burdens on incumbent LECs. We also seek comment on whether a uniform geographic level of reporting should apply to all performance measurements, or whether it would be appropriate to require different levels of reporting for separate measurements.

84. If the Commission establishes national performance measurements and standards, it may be useful if, when a carrier reports the results of those performance measurements, it does so in a manner that permits a direct comparison of the access the incumbent LEC provides to competing carriers with the access the incumbent LEC provides to itself or its affiliates. Accordingly, consistent with the goal of not increasing carriers' overall regulatory burdens, we seek comment on whether an incumbent LEC should report separately on its performance as provided to: (1) its own retail customers; (2) any of its affiliates that provide local exchange or interexchange service; (3) competing carriers in the aggregate; and (4) individual competing carriers.[115] We note that information on the access provided to competing carriers in the aggregate may help an individual competing carrier determine whether it is receiving nondiscriminatory treatment vis-à-vis other competing carriers. We seek comment on these levels of reporting and ask whether fewer categories of reporting would equally detect instances

[114] *See* Section III.C, *supra*.

[115] Importantly, we also seek comment on whether any of the incumbent LEC-provided data should be kept confidential. *See, e.g., Bell Atlantic-GTE Merger Order*, 15 FCC Rcd at 14332, Appendix D, Attachment A, para. 1 (stating that, in addition to providing data to the CLEC at issue, Bell Atlantic-GTE shall also make available that CLEC-specific data, subject to protective agreements or agency confidentiality rules, to the Commission and state commissions).

of discrimination, or whether additional categories could be imposed without ultimately increasing carriers' overall regulatory burdens.

85. We seek comment on whether it is more appropriate to have data analysis results and the statistical score[116] reported, or rather whether it is more appropriate to provide the underlying data in sufficient detail for independent analysis. We seek comment on whether submitting the underlying data as opposed to the summary statistics will be less burdensome to the incumbents (as they might be required to perform less processing), allow for more flexible analysis, and lessen the incumbent LECs' ability to shift discriminatory behavior away from the specific activities being measured to those areas where the incumbents' performance is not measured. Again, we also seek comment on whether it would be appropriate to have the incumbent LECs collect data on a broader group of measures and thus retain the ability to report different measurements should the need arise.

86. We also seek comment regarding whether an incumbent LEC should provide reports to an individual competing carrier only upon request, in order to minimize unnecessary costs or burdens for incumbent LECs. We seek comment on whether this process will enable competing LECs to obtain readily the performance reports and data that they want without requiring incumbent LECs to prepare reports unnecessarily for carriers that do not want them. We also ask commenters to consider whether only those carriers that obtain services or facilities from the incumbent LEC through an interconnection agreement,[117] or under a statement of generally available terms,[118] should have the opportunity to receive reports. Commenters that believe that other groups of carriers, such as those considering whether to enter the market, should also receive reports should explain why the benefits of their receiving reports outweigh the costs to incumbent LECs.

87. In addition, we also seek comment on the reporting frequency and format for the data. Specifically, we seek comment on whether carriers should provide monthly, quarterly or annual reports. Commenters are requested to address the benefits and costs to all affected entities of their preferred approach. Additionally, we request comment on the form in which data should be presented readily to permit thorough statistical analysis.[119] We seek comment on whether aggregate statewide data should be made available publicly on company-maintained web sites and submitted to the Commission. Moreover, we seek comment on whether the data should be provided in a generally-available database or workbook media, rather than on paper, to facilitate analysis by recipients. Commenters should also explain how their response to these questions depends on the level of disaggregation of these performance reports.

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[116] The "statistical score" is a general term referring to the numeric result of whichever statistical test is used.

[117] *See* 47 U.S.C. § 252(a)-(b).

[118] *See* 47 U.S.C. § 252(f).

[119] Consistent, monthly data, for example, might provide better information and permit more precise analysis than data reported at less frequent intervals.

88. We also recognize that states may have an interest in reviewing national performance reports. Depending on the competitive developments in their markets, states may want to monitor and compare the quality of access that incumbent LECs provide to competing carriers in their states and in others. Because we believe that states are in the best position to determine whether they need to review reports, we request comments regarding whether state officials would benefit from having the option to receive a copy of the reports mentioned in this Notice, upon request. In addressing this and other aspects of reporting procedures, commenters should address with specificity how the Commission can impose these procedures without ultimately increasing carriers' overall regulatory burdens.

C. Performance Evaluation and Statistical Issues

89. The application of statistical analysis to performance measurement data can be useful in determining whether an incumbent LEC is meeting the statutory requirements with respect to its provision of services and network elements to competitive LECs. Statistical analysis can help reveal the likelihood that reported differences in an incumbent LEC's performance toward its retail customers and competitive carriers are due to underlying differences in behavior rather than random chance.[120] As an initial matter, we seek comment on which statistical tests should be performed to determine whether observed differences in performance measurements between an incumbent LEC's own retail customers and competing carriers reflect significant differences in actual performance. We seek comment on whether specifying a preferred statistical methodology would assist us in evaluating an incumbent LEC's performance and, if so, what is that preferred statistical methodology. We also seek comment on whether we should adopt a uniform statistical methodology to assist the Commission in comparing the performance of incumbent LECs across regions.

90. We seek comment on the appropriate development, implementation and analysis of the results of the various statistical measures available. We seek comment on whether other analyses of the incumbent LEC's performance measurements, in addition to a comparison of averages, may be useful or necessary. To test for differences in variability of service to a LEC's customers, a statistical test of the equality of variances might be used. In addition, it might be desirable to apply a test that considers what percentage of the time a completion interval exceeds a specified threshold. While some performance measures have identifiable incumbent LEC retail analogues, others do not. Benchmarks have been established in some cases in the various states. We also seek comment on whether benchmark measures are appropriate and should be used where analogue measures are unavailable.

91. There are various well-known statistical tests that might be applicable and appropriately used in analyzing performance data. As indicated above, we seek comment on

[120] For example, in granting section 271 authority to Verizon for the state of New York, the Commission included an analysis of statistical measures, formulas, the implications of small sample size, and other specific data characteristics in analyzing Verizon's performance. *Bell Atlantic New York Order*, 15 FCC Rcd at 3553, 4182-91, Appendix B.

which statistical tests are the most appropriate to use, taking into consideration the specific measurement, data distribution, sample size and other characteristics inherent in the data. We seek comment as to the appropriate confidence level for calculations to determine discrimination, the appropriate minimum sample size and other necessary considerations regarding the tests. Commenters should also indicate whether they believe that any other assumptions associated with the suggested statistical methods may not be met by the performance measurement data, and what would be the appropriate statistical methodology in such instances. We also seek comment on other evaluation criteria that might be appropriate.[121] In addressing this and other aspects of evaluation and statistical issues, commenters should address with specificity how the Commission can address these issues without increasing carriers' overall regulatory burdens.

VI. PROCEDURAL MATTERS

A. Ex Parte Presentations

92. These matters shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[122] 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.[123] 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

93. Pursuant to sections 1.415 and 1.419 of the Commission's rules,[124] 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. 01-318. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.[125] 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

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[121] For example, a criterion might be the maximum number of repeating measurements failing the test, *e.g.*, no more than 0.25 percent of measurements should fail the test in two or more consecutive months. Another criterion might be that no extreme differences occur between the results for the incumbent LEC and for the competing carrier, *e.g.*, a difference greater than three standard deviations might be considered an extreme difference. We seek comment on these and other criteria.

[122] 47 C.F.R. §§ 1.200 *et seq.*

[123] *See* 47 C.F.R. § 1.1206(b)(2).

[124] 47 C.F.R. §§ 1.415, 1.419.

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

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. 01-318. 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.

94. 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 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. 01-318), 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.

95. 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.

96. 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.[126] 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

97. This Notice contains a proposed information collection. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collection(s) 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 notification of action is due 60 days from date of publication of

[126] *See* 47 C.F.R. § 1.49.

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.

D. Initial Regulatory Flexibility Analysis

98. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[127] 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 VI.B. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[128] In addition, the Notice will be published in the Federal Register.[129]

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

99. In this Notice, the Commission seeks comment on whether it should adopt a limited number of measurements and standards for evaluating incumbent local exchange carrier performance with respect to pre-ordering, ordering, provisioning, repair, and maintenance functions that are critical for competitive carriers 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 UNEs, interconnection trunks and collocation 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 the most appropriate periodic review or sunset mechanism should we adopt a set of measurements and standards.

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[127] 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).

[128] *See* 5 U.S.C. § 603(a).

[129] *Id.*

2. Legal Basis

100. The legal basis for any action that may be taken pursuant to the Notice is contained in sections 1, 2, 4, 201, 202, 251, 252 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 201, 202, 251, 252 and 303(r).

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

101. 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.[130] 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.[131] 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).[132]

102. 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."[133] 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.[134] 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.

103. *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)

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[130] *Id.*, §§ 603(b)(3), 604(a)(3).

[131] *Id.*, § 601(3).

[132] *Id.*, § 632.

[133] *Id.*, § 601(3).

[134] 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., Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket, 96-98, First Report and Order, 11 FCC Rcd 15499, 16144-45 (1996).

companies.[135] 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.[136] According to our most recent data, there are 1,335 incumbent LECs.[137] Additionally, it appears that 1,037 of these entities have 1,500 or fewer employees although we are uncertain whether all of these carriers are independently owned and operated.[138]

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

104. The Notice acknowledges that the reporting requirements may require incumbent LECs 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, as noted below, the Commission already requires several BOCs to file such performance reports.[139] Moreover, many states require certain carriers to report their performance with respect to similar, if not identical, measurements and standards. To date, states where the BOC has received section 271 approval have reporting requirements that are more extensive than those contemplated in this Notice. Therefore, we expect that any proposal we may adopt pursuant to this Notice will not substantially increase existing reporting, recordkeeping or other compliance requirements. Finally, the Notice requests comment on how national performance measurements and standards could serve to minimize inconsistent or redundant state and federal requirements, and thereby not increase incumbent LECs' overall regulatory burdens.[140]

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

105. 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 than design,

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[135] 13 C.F.R. § 121.201, NAICS codes 51331, 51333, and 51334.

[136] 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*).

[137] *Carrier Locator* at Figure 1.

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

[139] *See* Section VI.D.6, *infra*.

[140] *See* Section III.B, *supra*.

standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[141]

106. A key objective of this proceeding is to adopt performance measurements and reporting requirements that will not ultimately increase the overall regulatory burdens on carriers, particularly small entities. As explained in detail, a primary goal in considering whether to establish national performance measurements and standards is whether such requirements can serve to rationalize the multiple regulatory requirements imposed on carriers.[142] Additionally, the Notice expressly seeks comment on how adopted rules should be modified to take into account any particular concerns of small, midsized or rural incumbent LECs. The Notice also requests comment on how measurements could be tailored to address the unique characteristics of the areas in which these carriers are located.[143] 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

107. A modest amount of duplication, overlap, or conflict may exist between the measurements offered for comment in this Notice and the measurements that certain BOCs report as part of their merger conditions.[144] This Notice requests comment on whether and how federal performance requirements could be harmonized and possibly streamlined through the adoption of national measurements and standards, expressly mentioning the Commission's Merger Orders.[145] Again, a goal of this proceeding is to minimize inconsistent or redundant federal requirements.

VII. ORDERING CLAUSES

108. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 2, 4, 201, 202, 251, 252 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 201, 202, 251, 252 and 303(r), a NOTICE OF PROPOSED RULEMAKING IS ADOPTED.

109. IT IS FURTHER ORDERED that CC Docket No. 98-56 IS HEREBY TERMINATED.

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[141] 5 U.S.C. § 603(c).

[142] *See* Section III.B, *supra.*

[143] *See* Section III.D, *infra.*

[144] *See, e.g., SBC/Ameritech Merger Order*, 14 FCC Rcd at 14964, Appendix C, Attachment A; *Bell Atlantic-GTE Merger Order*, 15 FCC Rcd 14332, Appendix D, Attachment A.

[145] *See* Section III.B, *supra.*

110. 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

SEPARATE STATEMENT OF CHAIRMAN MICHAEL K. POWELL

Re: *Notice of Proposed Rulemaking, Performance Measures and Standards for Unbundled Network Elements and Interconnection et al., CC Docket Nos. 01-318 et al.*

With the adoption of this important *Notice,* the Commission begins a second phase in its implementation of the local competition provisions of the Telecommunications of 1996. In so doing, we also continue to carry out the agenda I recently outlined, in which the Commission will debate and resolve key questions in the five areas of: (1) Broadband Deployment; (2) Competition Policy; (3) Spectrum Allocation Policy; (4) Re-examination of the Foundations of Media Regulation; and (5) Homeland Security.

Since the Act was passed, we all have been engaged – before the Commission, in the states and in the courts – in an initial effort to effectuate the intent of Congress as embodied in the Act's local competition requirements. Girded primarily (sometimes solely) by the wisdom of forward-thinking state commissions, the Commission embarked in earnest on its journey to deliver on the Act's promise of competition, deregulation and innovation in the local market. But even as the Commission has shown progress in completing that journey, we have found little light along our path. In the absence of real experience about the difficulties of substituting market forces for regulation, we sometimes stumbled. At times, we even fell.

We now begin to reassess and improve upon our hard-earned knowledge with the clarity of hindsight and practical understanding of how complex and intractable is the task of promoting local competition. This "Local Competition Phase II" will begin with this proceeding regarding national performance requirements, and continue on with examinations of our unbundling regime and an inquiry regarding whether and how we can, consistent with the Act, use deregulation to pursue the statute's goal of facilitating broadband deployment to all Americans.

As the leading edge of Phase II, our decision to seek comment on whether to adopt national performance requirements evidences what I hope will be some of the hallmarks of this more mature stage in our regulatory efforts. First, it demonstrates that the Commission remains committed to considering adoption of new federal requirements if they can be legitimately derived from the 1996 Act and are targeted to address the most essential competitive concerns.

Second, at the same time, this *Notice* recognizes that more is not necessarily better with respect to the number and scope of our requirements. If we have learned anything from the Commission's regulatory, enforcement and legal battles over the last five years, it is that we can expect carriers to defend themselves in countless formal and informal ways against what they perceive to be overly aggressive statutory interpretations. The public loses in several ways under such interpretations, as they sacrifice long-term, meaningful competition in favor of easy market entry, while also ensuring that the "pro-competitive" interpretation ties the Commission and parties up in litigation for years at a time. Just as importantly, such interpretations may drain critical resources away from carriers' efforts to bring consumers new products and services and

to invest in existing and newer technologies and infrastructures. Rather than piling on a panoply of duplicative regulations on all potential performance issues, this *Notice* seeks comment on a few key requirements with the hope that these will become a model by which performance requirements used at the state and federal levels may be streamlined. In light of the attendant regulatory burdens, I firmly believe that the requirements we propose here are those that will generate real competitive choices in the long run.

Third, this *Notice* recognizes that, where we are justified in imposing the burdens associated with new regulation, setting out clear expectations should enhance enforcement efforts. Such expectations tell carriers what behavior satisfies the broad statutory requirements, and what behavior falls short. This approach, coupled with due restraint regarding the scope of new rules, ensures that carriers will know ahead of time how to conduct themselves on matters most crucial to meaningful competition, without also subjecting carriers to burdens in less leveraged areas. In these other areas, regulators can continue to police the statutory requirements, as we have over the last several years, using less intrusive methods such as adjudication.

Fourth, this *Notice* acknowledges what has been apparent for some time: that facilities-based competition is the mode of market entry most likely to foster simultaneously and sustainably the Act's mandates of competition, deregulation and innovation. Certainly, the Act and the Commission's rules continue to require incumbent LECs to permit non-facilities-based entry: these are statutory requirements that we are duty-bound to implement at this time. Yet the Act has never required the imposition of performance requirements regarding its core interconnection and unbundling obligations. Thus, the decision whether and where the Commission will impose such requirements is squarely a matter for our discretion, informed as I believe it must be by the detriment to carriers and the public generally of the regulatory burdens associated with such requirements.

It is for these reasons, and to express my pleasure with the Commission's initiation of this "Phase II" of our ongoing mission to facilitate competition, that I wholeheartedly support this *Notice*. I look forward, in particular, to hearing from and working with my state colleagues on these substantial issues.

SEPARATE STATEMENT OF COMMISSIONER MICHAEL J. COPPS

Re: Performance Measurements and Standards for Unbundled Network Elements and Interconnection

I support launching this proceeding to consider national performance standards and penalties. Uniform national standards have the potential to promote regulatory efficiency, allow benchmarking and comparisons among carriers operating in different States, and reduce the administrative burdens of myriad different requirements. I noted the benefits of uniform standards just last month in a dissenting statement to the *Accounting Further Notice* in which the Commission concluded that it should eliminate a uniform national accounting system and instead move to a patchwork of State regulations.

For the effort we launch today to succeed, however, we must work closely with our State colleagues. Many States have already established performance metrics and penalties. We should draw on their experience and work cooperatively to implement measurements that will provide the information we need and the State commissions need to carry out our statutory obligations.

Finally, I would have preferred to also seek comment in this notice on performance standards on the provisioning of special access services. The need for performance measurements may be even more urgent for these services. Whereas numerous States have adopted standards for network elements and interconnection, several States have indicated that they lack jurisdiction over interstate services. One State Commission, New York, has expressed concern about the provisioning of these services, and its Chair has asked the FCC to deal with this issue or delegate authority to the States so they can address any problems.

I believe it would have made sense to consider all of these performance measurement issues together. The same facilities are used to provide special access services and unbundled network elements. Competitors often secure loops, transport, and combinations of network elements through special access tariffs in lieu of using network elements. Indeed, a significant portion of local competition is provided over special access circuits. Given that these services are not only an integral part of interexchange services, but are also used by competitors to provide local services, it would have been logical in terms of resources, efficiency, and common sense to consider these issues together.

Nevertheless, I vote for this notice with the understanding that the Commission will issue another notice in the near future to consider performance standards for the provisioning of special access services. I urge the Commission to move forward with this notice in the near future and to consider the issues in tandem.

SEPARATE STATEMENT OF COMMISSIONER KEVIN J. MARTIN

Re: *Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, Notice of Proposed Rulemaking

I am very pleased to join in approving this item, which sets in motion a proceeding to establish national measures to evaluate the performance of ILECs in provisioning facilities to CLECs. Such performance measures further the ability of facilities-based CLECs to gain meaningful access to essential facilities controlled by ILECs, such as the local loop, and combine those facilities with their own equipment to provide service. They are thus crucial to promoting facilities-based competition.

As I have stated, the promotion of facilities-based competition should be a fundamental priority of this Commission. The goal of the Telecommunications Act of 1996 was to establish an environment that promotes meaningful competition and allows for deregulation. To get to true deregulation, however, we need facilities-based competition. Without such competition, we will always need a regulatory body to set wholesale and retail prices.

As I have also made clear, however, this proceeding addresses only one piece of the puzzle. While we should ensure that CLECs gain access to ILEC facilities that are truly essential, we must also reexamine what these essential facilities are. In particular, the Commission ought to inquire how the necessary and impair standard, which is used to determine what elements must be unbundled, should apply to elements that are readily available from CLECs and to new facilities and infrastructure being built by the ILECs. Poor decisions on these issues may stifle facilities deployment, by reducing incentives for both ILECs and CLECs to invest in new equipment. I thus look forward to exploring these issues in the very near future and continuing our goal of making meaningful facilities-based competition a reality.

APPENDIX:
NATIONAL PERFORMANCE MEASUREMENTS

Metric Number: Name:	
Definition:	
Exclusions:	
Business Rules:	
Levels of Disaggregation:	
Calculation:	**Report Structure/Geography:**
Benchmark/Parity Performance Standard:	
Impact on Carriers' Regulatory Burden:	