

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Performance Measurements and Standards for Unbundled Network Elements and Interconnection |) | CC Docket No. 01-318 |
| |) | |
| Performance Measurements and Standards for Interstate Special Access Services |) | CC Docket No. 01-321 |

**COMMENTS OF FOCAL COMMUNICATIONS CORPORATION, PAC-WEST
TELECOMM, INC., AND US LEC CORP.**

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SUMMARY

Joint Commenters welcome the Commission's proposals to establish performance standards and penalties governing ILEC provisioning of interstate special access and UNEs. CLECs experience significant problems concerning timeliness and quality in preordering, ordering, installation, and repair for both interstate special access and UNEs that seriously hinder CLECs' ability to provide competitive local telecommunications services. The prospect of correcting these deficiencies in ILEC provisioning is a sufficient reason alone to adopt a strong federal program of performance standards and penalties governing ILEC provisioning of interstate special access and UNEs. Unfortunately, these provisioning failures are exacerbated by the current disparate regulatory treatment between interstate special access and UNEs.

Although the separate legal characterization of a facility as either interstate special access or a UNE is rooted in the Act, ILECs have recently embarked on creative new "regulatory arbitrage" schemes to manipulate these separate legal characterizations to their advantage. For example, some ILECs have undertaken to dramatically restrict the circumstances in which they will modify facilities in order to provide a UNE, even though this flatly contradicts the *Local Competition Order*. As explained in these comments, the Commission can, and should, establish metrics that define when ILECs must modify facilities in order to provide UNEs.

In addition, ILECs are claiming that UNEs may be provided on dramatically less favorable terms and conditions than interstate special access because interstate special access is a premium service. ILECs also for all practical purposes decline to permit conversion of interstate special access circuits to UNEs, even though the Commission has required them to do so. All of these initiatives are aimed, in effect, at reducing UNEs to second-class status and inducing CLECs to purchase the same functionality at higher prices.

Joint Commenters are not persuaded by ILECs recent near religious zeal to establish uniformity in some forms of regulation as an overriding goal of regulation, since this is no more than an effort on their part to obtain premature deregulation. Nonetheless, the Commission's metrics proceedings do provide an opportunity for the Commission to minimize opportunities for "regulatory arbitrage" by ILEC manipulation of provisioning of interstate special access and UNEs. In short, the Commission can end this opportunity by establishing the same performance standards and penalties for both UNEs and interstate special access. This is appropriate, not only because it will eliminate in one discrete area the opportunity for "regulatory arbitrage," but because the same facility is involved and because CLECs use both UNEs and interstate special access to provide competitive local service (as well as interstate service.) For this reason, Joint Commenters submit the same comments in both metrics proceedings. To the extent there is any substantial difference between UNE and special access metrics, this should be attributable primarily to the need for some supplementary metrics for some UNEs.

Of course, the Commission's authority to establish performance metrics for UNEs and interstate special access differs. These comments explain how the Commission may nonetheless achieve a uniformity in performance metrics and penalties for interstate special access and UNEs. In this connection, Joint Commenters endorse the industry proposals for performance standards for interstate special access and UNEs supported by ALTS.

The performance standards established by the Commission should define baseline performance standards that will apply in every state. States should be permitted to supplement these standards in ways that do not conflict with, or undermine, federal standards. However, it is critically important that federal standards be comprehensive, rigorous, and meaningful. Because

the federal performance standards may be the only operative standards in some states, weak federal performance standards would be worse than no federal standards at all.

Performance standards will not be meaningful without an associated program of self-effectuating payments to CLECs and fines. As the attached report from Economics and Technology, Inc. discusses, it is widespread in many industries for performance between two companies to be backed up with agreements for liquidated damages. The Commission should require, pursuant to Section 201 of the Act for interstate special access, and pursuant to Section 251(c)(3) for UNEs, that the terms and conditions under which interstate special access and UNEs are offered include an enforceable offer to pay liquidated damages for failure to meet federal performance standards. The Commission should require that ILECs negotiate the amount of liquidated damages for failure to meet UNE performance metrics pursuant to the state-supervised Section 252 negotiation/arbitration process. The Commission should also require that liquidated damages for failure to meet special access metrics should be the same as that for the comparable UNE service. Therefore, in effect, when negotiating liquidated damages for UNEs the parties will also be negotiating liquidated damages for interstate special access.

The Commission should also establish a streamlined process for forfeitures for failure to meet performance metrics. The Commission should establish that an ILEC report to the FCC of a failure to meet a performance metric constitutes a notice of apparent liability for forfeiture that the ILEC must pay unless it can justify within 15 days why it should not pay. As explained herein, the penalty for missing a metric under the statutory limitations for forfeitures would be more than \$1 million per month for each metric missed.

A critical feature of metrics will be how they are changed and refined over time. Once initial federal baseline metrics are established, the Commission should provide that parties may

negotiate revised or new metrics for UNEs pursuant to the Section 252 negotiation process.

Again, since performance standards for UNEs and special access should be the same for the same facility, the parties will, in effect, be negotiating performance standards for interstate special access when negotiating those for UNEs.

The Commission should require implementation of performance standards for UNEs and interstate special access on an MSA basis combined with a strong program of random and “for cause” audits paid for by ILECs.

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**COMMENTS OF FOCAL COMMUNICATIONS CORPORATION, PAC-WEST
TELECOMM, INC., AND US LEC CORP.**

Focal Communications Corporation, Pac-West Telecomm, Inc., and US LEC Corp. (collectively “Joint Commenters”), by undersigned counsel, hereby submit their comments in response to the Notices of Proposed Rulemaking (“NPRM”) in the above-captioned proceedings.¹

Focal Communications Corporation (“Focal”) is a competitive local exchange carrier (“CLEC”) headquartered in Chicago, Illinois. Focal provides facilities-based local exchange service in selected markets in California, Florida, Georgia, Illinois, Massachusetts, Michigan, New York, Ohio, Pennsylvania, Texas, and Washington, D.C. Pac-West Telecomm, Inc. (“Pac-West”) is a CLEC headquartered in Stockton, California. Pac-West provides facilities-based local exchange service in selected markets in Arizona, California, Colorado, Nevada, Utah, and

¹ *Performance Measures and Standards for Unbundled Network Elements and Interconnection*, CC Docket No. 01-318, FCC 01-331, Notice of Proposed Rulemaking, (rel. Nov. 19, 2001) (“*UNE Metrics NPRM*”); *Performance*

Washington. US LEC Corp. (“US LEC”), headquartered in Charlotte, North Carolina, provides facilities-based local exchange service in selected markets in Alabama, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Pennsylvania, South Carolina, Tennessee, Virginia, and Washington, D.C.

I. THESE PROCEEDINGS PROVIDE THE COMMISSION AN OPPORTUNITY TO PREVENT ILEC “REGULATORY ARBITRAGE”

The ability of incumbent local exchange carriers (“ILECs”) to defy their legal obligations without consequences has severely impaired the pace of local competition. As explained further below, one of the tactics ILECs have used to delay competitive entry in their markets is to force CLECs to purchase higher-priced special access circuits instead of unbundled network elements (“UNEs”) as inputs for the CLEC’s local exchange services. Adopting performance measurements, performance standards, and reporting requirements (together, “metrics”) and self-effectuating remedies for the provision of ILEC special access circuits is therefore critical to assist regulators and CLECs in monitoring ILECs’ provisioning of bottleneck facilities to their competitors.

Simply by virtue of the fact that special access circuits have existed for many more years than UNEs, ILECs have more experience provisioning them. Thus, some CLECs purchase special access circuits for use in provisioning their competitive local exchange services because ILECs generally have better, albeit still not satisfactory, ordering, provisioning, and maintenance procedures in place for special access circuits than for UNEs. Still other CLECs purchase special access circuits because the Commission limited the availability of, and placed restrictions on, ordering enhanced extended loops (“EELs”).

Measures and Standards for Interstate Special Access Services, CC Docket No. 01-321, FCC 01-339, Notice of

In this connection, during the past six years, ILECs have acted precisely as classic economics predicts monopolists will act when new entrants try to break their monopoly – raising one frivolous scheme after another in an effort to handicap their competitors. ILECs have used various excuses to escape their obligation to provide requesting carriers access to their bottleneck facilities altogether, or to force requesting carriers to purchase such facilities at much higher prices. First, ILECs argued that because the Commission’s definition of local loop did not specify capacity, they should only be required to provide two-wire copper pairs as UNEs.² After all, they argued, CLECs could buy higher capacity facilities as tariffed special access circuits.³ Once the Commission specifically defined UNE loop and UNE transport to include all capacities, the ILECs created new excuses, such as “no facilities available” or “no new construction.”⁴ As explained in more detail in Section VIII, *infra*, following adoption of the *UNE Remand Order*, many CLECs that tried to order high capacity loops were required to withdraw their orders due to a “no facilities available” condition alleged by the ILEC. Even as the ILECs artificially limited their facilities available for high capacity UNEs, they again offered CLECs the “opportunity” to purchase the same facilities at tariffed special access prices. In other instances, ILECs argued that a broadband UNE need not meet the same quality requirements as a special access circuit.⁵ Based on this argument, ILECs provisioned an inferior facility as a UNE, effectively forcing CLECs to purchase special access circuits in order to

Proposed Rulemaking, (rel. Nov. 19, 2001) (“*Special Access Metrics NPRM*”).

² See, e.g., *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) (“*Local Competition Order*”) at n. 784.

³ See, e.g., *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, ¶ 177 (1999) (“*UNE Remand Order*”) (rejecting US West’s position that facilities underlying private line and special access services should be excluded from the definition of an unbundled loop).

⁴ See Section VIII.A, *infra*.

⁵ Letter from Wayne Carnes, Regional Account Manager, BellSouth to Dan Yost of Allegiance Telecom, Inc., attachment to Reply Comments of Allegiance Telecom, Inc. in CC Docket 96-98 (submitted February 18, 2000) (stating that UNEs are more likely to experience service interruptions, are provided inferior maintenance, and have fewer service guarantees than special access services).

provide their customers the same quality of service the ILEC could itself provide. These practices create what amounts to a sophisticated shell game in which the CLEC is forced to choose between a quality circuit provisioned in a timely manner or one that is priced competitively but may never be provisioned.

Whether CLECs are forced to purchase special access due to ILECs' "no facilities available" or other schemes, or CLECs choose to purchase special access for other reasons, the bottom line is that CLECs rely on ILEC special access circuits to provide competitive local exchange services to their customers. Adopting metrics and remedies for UNEs but not special access would therefore create "regulatory arbitrage" opportunities for ILECs to focus their performance for the service subject to metrics and remedies that CLECs buy less of, while at the same time letting their performance slip for the service not subject to metrics and remedies that CLECs buy more of. This problem would be compounded if, contrary to Joint Commenters' recommendations (*see* Section VIII.E., *infra*), the Commission failed to adopt a metric to track ILEC efforts to push CLECs out of the service subject to metrics and remedies (*e.g.* UNEs) and into the service not subject to metrics (*e.g.*, special access). In short, adopting metrics and remedies for UNEs but not special access would permit ILECs to continue their discriminatory practices in an attempt to disadvantage their rivals in the local exchange market. In order to provide bright line rules to govern real world implementation of local competition, the Commission should therefore adopt metrics and remedies that apply to ILECs' special access circuits.

II. THE SAME METRICS AND PENALTIES FOR ALL ILEC BROADBAND ACCESS FACILITIES WOULD BEST PROMOTE THE DEVELOPMENT OF FACILITIES-BASED COMPETITION

The most important bottleneck facilities CLECs must obtain from ILECs in order to compete in the local exchange market are those between the CLEC's point of presence and the end user. When the CLEC's point of presence is a collocation space in the ILEC's central office, if the facility is purchased under an interconnection agreement, it is called a UNE loop, ordered using a Local Service Request ("LSR"), and priced at Total Element Long Run Incremental Cost ("TELRIC"). However, if the same facility is purchased from the ILEC's interstate access tariff, it is called a special access circuit, ordered using an Access Service Request ("ASR"), and priced at a "just and reasonable" rate.⁶ Similarly, when a CLEC needs a facility to transport its traffic from an ILEC central office to the CLEC's switch, that same facility can be called dedicated transport (priced at TELRIC) or an entrance facility (priced at a "just and reasonable" rate). As the Commission acknowledged in the *UNE Remand Order*, loop facilities underlie ILECs' private line and special access services.⁷ Thus regardless of its characterization for regulatory purposes, the form used to order it, or the price the ILEC charges for it, the underlying bottleneck facility is the same. Because they rely on the same facility, UNEs and special access circuits are interchangeable substitute inputs in competitive local exchange service. As the Commission has recognized,⁸ and as explained *supra*, in practice CLECs use both UNEs and special access circuits to provide competitive local voice and data services to their customers. In either case,

⁶ Since the issue of discriminatory pricing for an identical facility was not raised in either *Metrics NPRM*, Joint Commenters do not address it in these Comments.

⁷ *UNE Remand Order* at ¶ 177.

⁸ See, e.g., *Special Access Metrics NPRM* at ¶ 1 & n.2.

ILEC provisioning of these bottleneck facilities is “critically important to ensuring that competitive LECs can enter the market for local exchange services.”⁹

Although the ILECs’ intended goal has always been clear (to increase their rivals’ costs and earn higher profits at the same time), their gamesmanship in forcing CLECs to purchase special access circuits instead of UNEs exposes the plain truth that whether the facility is sold as a UNE or a special access circuit, CLECs use the facility as an essential input in their competitive local exchange offerings.¹⁰ Although CLECs can gather anecdotal evidence of ILECs’ intransigence, and the Commission and state commissions can evaluate such evidence on a case-by-case basis in enforcement proceedings, the most efficient and effective means to ensure that ILECs meet their statutory obligations is to subject them to the same metrics and self-effectuating remedies. Only through regular performance monitoring will regulators, CLECs, and ILECs be able to determine whether and how well ILECs are complying with their statutory duties to provide bottleneck facilities to their competitors. If the same metrics and remedies do not apply to the entire universe of ILEC bottleneck facilities, however, they will be virtually meaningless. Different metrics or remedies, with different business rules and different enforcement mechanisms, would make it more burdensome for both ILECs and CLECs to track and compare ILEC provisioning of the same bottleneck facility. Applying different metrics or remedies would also permit ILECs to continue to design the terms and conditions of both offerings to thwart competition, such as by imposing a “no facilities” policy for UNEs but not for special access. *See* Section VIII, *infra*. In short, different metrics or remedies for UNEs and special access would also permit ILECs to continue their discriminatory practices in an attempt to disadvantage their rivals in the local exchange market.

⁹ *UNE Metrics NPRM* at ¶ 1.

The grounds supporting adoption of national metrics and remedies for ILEC provisioning of bottleneck facilities do not vary based upon the regulatory characterization of the bottleneck facility. Because the Commission has broad authority pursuant to Sections 201, 202, 251, and 252 to adopt rules implementing the Act,¹¹ the statute clearly allows the Commission to adopt the same metrics and remedies for UNEs and special access. *See* Section III, *infra*. Adopting two new, divergent sets of rules governing ILEC provisioning of the same bottleneck facility depending upon whether it is characterized as a UNE or a special access circuit would be completely contrary to the Commission's goal of rationalizing its rules to remove arbitrary distinctions based upon outdated regulatory constructs. These proceedings present the Commission with a unique opportunity to begin implementing a more unified approach to regulation that it has identified as one of its main goals. For instance, in the *Intercarrier Compensation NPRM*, the Commission is exploring whether it is possible to unify its "complex system of intercarrier compensation regulations" that "treat different types of carriers and different types of services disparately, even though there may be no significant differences in the costs among carriers or services."¹² The instant proceedings present an even stronger case for unified regulation. First, regardless of whether the facility is characterized for regulatory purposes as a UNE or special access circuit, in each instance the ILEC is providing the same facility to the same type of carrier for the purchasing carrier's use in the same service. Second, unlike the *Intercarrier Compensation NPRM* in which the adoption of a unified regime would result in severe disruption to historical rules and to business plans and processes that relied on and incorporated such historical rules, in this proceeding the Commission is starting with a

¹⁰ *See, e.g.*, XO Communications Ex Parte at 5 (CC Docket No. 96-98, filed Dec. 17, 2001); PaeTec Communications Comments at 2-3 (CC Docket No. 01-323, filed Jan. 9, 2002).

¹¹ *See UNE Metrics NPRM* at ¶ 14; *Special Access Metrics NPRM* at ¶ 8.

largely clean slate. The Commission should not ignore this opportunity by adopting new regulations that vary based on an outmoded regulatory classification.

Although Joint Commenters do not agree that uniformity of regulation is appropriate in all circumstances, performance metrics and remedies for UNEs and special access provide a discrete opportunity to achieve more rational regulation. In fact, at least two state commissions have already taken steps to apply unified metrics in order to encourage facilities-based local competition. The New York Public Service Commission (“NY PSC”) relied on this commonality as part of the basis for ordering Verizon to improve its special services (New York’s term for special access) performance:

Because Verizon’s facilities are used by carriers as they are entering the market, including the local market, on a facilities basis, Verizon’s Special Services offerings are crucial for the development of facilities-based competition in the local market, and for the New York economy.¹³

The Public Utility Commission of Texas (“TX PUC”) similarly concluded that “to the extent a CLEC orders special access in lieu of UNEs, SWBT’s performance shall be measured as another level of disaggregation in all UNE measures.”¹⁴ Both Verizon and SWBT have objected to the NY PSC’s and TX PUC’s, respectively, adoption of metrics for interstate special access facilities. It is therefore critical that the Commission support these pioneering state commission efforts to promote facilities-based local competition regardless of whether the CLEC uses UNEs or special access as an input in its competitive local service. The Commission should adopt roughly the same metrics and remedies to govern provision of UNEs and special access. The

¹² *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, CC Docket No. 01-92, FCC 01-132, released April 27, 2001 (“*Intercarrier Compensation NPRM*”) at ¶ 5.

¹³ *Proceeding on Motion of the Commission to Investigate Methods to Improve and Maintain High Quality Special Services Performance by Verizon New York, Inc.*, Case No. 00-C-2051, Opinion and Order Modifying Special Services Guidelines for Verizon New York Inc., Conforming Tariff, and Requiring Additional Performance Reporting, Opinion 01-1, 10 (June 15, 2001).

Joint Commenters support adoption of the special access and UNE metrics proposed by competitive industry groups, including ALTS and others. These proposals are consistent with the Joint Commenters' views presented in these comments.

III. THE COMMISSION CAN AND SHOULD ESTABLISH STRONG PERFORMANCE STANDARDS GOVERNING INTERSTATE SPECIAL ACCESS AND UNES

A. The Commission Has Authority to Establish Strong Federal Performance Measurements and Standards Governing Both UNEs and Special Access

As the Commission has recognized in the *UNE Metrics NPRM*, it has the authority under Section 251 of the Communications Act to promulgate rules in order to carry out the provisions of the Telecommunications Act of 1996 ("Act") with respect to UNEs.¹⁵ The Commission may establish performance standards for interstate special access under Sections 201-205 of the Communications Act. Moreover, it is worth emphasizing that the addition of a broad remedial statute to the Communications Act regarding provisioning of wholesale bottleneck facilities enacted in the Telecommunications Act of 1996 did not detract from the Commission's existing authority under Section 201. It is a familiar canon of statutory construction that remedial statutes should be construed broadly in order to effectuate their remedial purposes.¹⁶ Provided that the Commission's action does not conflict with the requirements of Sections 251 and 252, the Commission is fully entitled to take action to protect competitors from anticompetitive conduct strictly pursuant to Section 201.¹⁷ Accordingly, there is no question that the Commission may establish performance standards for both special access and UNEs.

¹⁴ TX PUC Comments at 2 (CC Docket No. 01-321, filed Jan. 9, 2002) (citations omitted).

¹⁵ *UNE Metrics NPRM* at ¶ 14; *AT&T v. Iowa Util. Bd.*, 525 U.S. 366, 378 (1999).

¹⁶ *Tcherepin v. Knight*, 389 U.S. 332, 336 (1967).

¹⁷ *AT&T v. Iowa Util. Bd.*, 525 U.S. at 378.

In the *Special Access Metrics NPRM*, the Commission asked how the differences in the statutory language between the non-discrimination requirements in Section 251 and Section 202 should inform the standard by which the Commission evaluates ILEC special access provisioning.¹⁸ Even though the Commission's statutory authority to promulgate rules differs between interstate special access circuits and UNEs, the difference is not meaningful for the purposes of establishing performance metrics. Both Section 251, applicable to UNEs, and Sections 201-205, applicable to interstate special access circuits, support the requirement that ILECs provide reasonable and non-discriminatory access to UNEs and special access, respectively. These provisions, although different in some respects, are broad enough to require ILECs to provision interstate special access circuits to CLECs subject to the same standard that ILECs provide UNEs, as recommended in these comments.¹⁹

B. Performance Standards Are Necessary to Remedy Inadequate Provisioning

Joint Commenters cannot stress strongly enough that federal performance standards are necessary to address poor provisioning by ILECs. Focal, for example, has experienced and documented substandard performance by Verizon in provisioning interstate special access

¹⁸ *Special Access Metrics NPRM* ¶ 9.

¹⁹ The FCC noted that the nondiscrimination requirement of Section 251 could be interpreted as stricter than the nondiscrimination requirement of Section 202, with Section 251 requiring parity of performance between an ILEC and its competitors but Section 202 only requiring parity of performance between all ILEC customers. See *Special Access Metrics NPRM* at ¶ 9. However, *Computer III* precedent supports the FCC's use of Section 2(a) to impose reporting requirements on special access circuits that compare an ILEC's provisioning of such circuits to its own operations as well as to its customers. See *Amendment of Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 85-229, Report and Order, Phase I, 104 FCC 2d 958, ¶¶ 4, 192, 342 (1986) (subsequent history omitted) (relying on Section 2(a) and the FCC's "broad discretion in choosing the means by which we regulate" to replace structural separation requirements with nonstructural safeguards, including the requirements that AT&T and BOCs may not discriminate "in favor of their own enhanced services operations" and must file nondiscrimination reports); see also *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20, Further Notice of Proposed Rulemaking, FCC 98-8, ¶¶ 112-113 (rel. Jan. 30, 1998) (summarizing nondiscrimination procedures and reports BOCs and GTE provide in order to ensure they do not discriminate in favor of their own information services operations).

circuits in New York.²⁰ These failures include untimely FOCs (“firm order commitments”), failure to complete work by the date specified in the FOC, extensive delays in maintenance response times, and failure to provide CLECs with information about scheduled maintenance.²¹ Similarly, US LEC has documented persistent and repeated outages in special access services received from BellSouth.²² US LEC experienced a total of 388 outages between January and July 2001.²³

The need for federal metrics to correct poor provisioning is dramatically highlighted by ILECs in some cases simply ignoring existing state metrics. For example, BellSouth simply ignored the Georgia metric for average disconnect timeliness for local number portability instead of reporting to the Georgia Public Service Commission that the metric, in BellSouth’s opinion, did not provide meaningful data.²⁴ BellSouth also chose not to pay CLECs the required penalty payments, and instead placed amounts in escrow—all without Georgia PSC approval.

Accordingly, if for no other reason, the Commission should establish federal performance metrics for special access and UNEs to correct poor provisioning and police unlawful self-help by ILECs.

C. CLECs Are Dependent on ILEC Facilities for Provision of Competitive Services

The Commission should also establish performance standards for ILEC provisioning of UNEs and special access because CLECs do not have alternatives to ILEC facilities. Because of provisioning difficulties, Focal’s practice is to *always* use third-party facilities *wherever*

²⁰ Focal Communications Corporation of New York filed a Verified Complaint against Bell Atlantic-New York at the New York Public Service Commission on August 15, 2000, Docket No. 00-C-1390.

²¹ *Id.*

²² See Comments of US LEC, et al., CC Docket No. 01-277, filed Oct. 22, 2001.

²³ *Id.*

²⁴ *Id.* at 16.

possible, and this is true of most other CLECs as well. To facilitate this process with respect to loops, for example, Focal maintains a “master building list” that identifies buildings in Focal’s service areas that receive service from competitive facilities. However, Focal usually has no alternative but to purchase facilities from the incumbents.

Focal’s experience in Chicago, its largest market, is illustrative. Focal leases several thousand T-1 facilities in its Chicago region, most of which are loops serving end-users. A vast majority of this total is purchased from Ameritech. The remaining circuits are purchased from AT&T and WorldCom. Joint Commenters have similar figures for reliance on ILEC facilities.

There is one reason and one reason only for this reliance on the incumbents’ facilities: lack of competitive alternatives. Even for larger customers, there are still no ubiquitous, reliable third-party alternatives. Moreover, even when a competitive provider has facilities serving a target building, those facilities may still be unavailable to third-party CLECs. For example, the contracts that carriers sign with building owners often preclude third parties from gaining access. Also, competitive facilities are often constructed only to provide service to only one or a limited number of floors within a building, leaving other floors without competitive alternatives.

Nor are competitive alternatives for transport realistically available. While Joint Commenters purchase local fiber where it is available in the individual markets they serve, this fiber is not a substitute (nor was it ever intended to be) for the incumbent LECs’ transport which connects every single end office and tandem site. Because third parties are not constructing ubiquitous, duplicative local transport networks, competitors will require unbundled access to incumbent LEC local transport for the foreseeable future. This will be true even if, one day, every incumbent LEC central office has *some* competitive fiber collocated on premises. For example, Focal finds using one carrier to provide transport and a second carrier to provide loops

leads to accountability problems that make it difficult to resolve customer service inquiries.

Because Focal serves highly sophisticated customers with substantial telecommunications needs, these service problems are unacceptable and harm Focal's customer relationships.

Joint Commenters and other CLECs have extensively documented that CLECs do not have realistic alternatives to ILEC facilities available for provision of competitive services.²⁵

They have also pointed out the serious deficiencies and specious reasoning presented by ILECs purporting to show that competitors are not dependent on ILEC high capacity facilities.²⁶

Accordingly, the Commission should establish a strong program of federal performance standards and penalties for UNEs and special access because CLECs are dependent on ILEC facilities for provision of competitive services.

D. Performance Standards Are Necessary Safeguards Against Discrimination

Federal performance standards governing ILEC provisioning of UNEs and special access are fully justified as safeguards against discrimination. CLECs will be unable effectively to compete in the local telecommunications marketplace if ILECs provision services to their own customers more favorably than they make bottleneck facilities and services available to competitors. Therefore, federal rules can, and must, assure that ILEC provisioning of special access and UNEs to CLECs is on parity with its provisioning of special access and UNEs to itself, its affiliates, or its retail customers. As controllers of bottleneck facilities, if ILECs are permitted to discriminate against CLECs in quality or cost of service, there can be little hope for robust competition in the local markets. The objective level of quality or cost of service from the ILECs is less important to the Joint Commenters than the fact that CLECs obtain bottleneck

²⁵ See e.g. Comments of Focal Communications Corporation, et al, CC Docket No. 96-98, July 11, 2001.

²⁶ *Id.*

facilities from the ILEC on a performance level *equivalent* to the service it provides to itself. Once provisioning parity is established, ILECs and CLECs can compete on grounds that they *both* can control, including price, quality of service, customer support, and additional features.

Moreover, as a matter of efficient management, the ILEC should be using the same personnel, plant, and systems to provision wholesale services to itself that it uses to provision wholesale services to CLECs. There is no sound business reason whatsoever for separate wholesale processes or performance metrics, other than an attempt to shelter their illegal and anticompetitive behavior from review. Therefore, there is no legitimate reason why an ILEC should not use, and be subject to, the same performance standards that govern its provisioning to competitors. Accordingly, the Commission should establish performance metrics governing ILEC provisioning of UNEs and special access that will assure and require ILEC efficient management designed to achieve parity between the ILECs own operations and provisioning to competitors. In short, a uniform metric will help make ILECs indifferent to what is being ordered and by whom.

E. The Commission Should Establish National Performance Standards as a Baseline for States to Build Upon

Federal performance measurements and standards should establish baseline requirements and a framework that states must adhere to and that states may supplement in non-conflicting ways as appropriate. States would then be in the position to decide whether the national standards alone are sufficient to assure ILEC compliance with the Act, or whether additional standards and performance measurements are necessary given the performance of ILECs under their jurisdiction. Because circumstances could vary from state to state and from ILEC to ILEC, states should have the discretion to impose additional requirements on ILECs as needed.

Federal performance measurements should also be considered the mandatory minimum requirements that states must enforce, so that no state may issue less stringent performance standards. Upon the effective date of federal standards, all Tier 1 ILECs providing services to CLECs under Sections 251 and 252 would be required to comply with the reporting requirements and penalty provisions nationwide.²⁷ Any state measurements and standards less rigorous than the federal standards, or that conflict with the federal scheme, would be superseded by the federal requirements. Existing state standards more rigorous than the federal standards should not be effected by the adoption of the federal standards.

For this reason, it is important that federal performance standards and enforcement requirements be sufficiently rigorous and comprehensive so that non-compliance by the ILECs results in substantial penalties. Because some states as a practical matter may rely on the federal baseline standards without adding to them in any way, the federal standards may become the predominant performance metrics.

Rather than weak federal standards, it would be better for the Commission not to adopt any federal standards at all for UNEs. If the Commission does not adopt strong metrics governing interstate special access, it should make clear that states may and should do so. Having no baseline performance metrics would be better than having weak federal baseline performance metrics. If there is no federal framework in place, CLECs can still seek to have the states establish ILEC performance standards that will ensure compliance with the Act and promote local competition.²⁸

²⁷ In Section III.H, *infra*, Joint Commenters recommend that federal performance standards apply only to Tier 1 ILECs.

²⁸ In this connection, the Commission should also decline to assert exclusive enforcement authority over mixed jurisdiction special access facilities. *See* Section III.J, *infra*.

The Commission should encourage states that choose to supplement the federal standards to review those additional performance metrics and standards annually. It is also possible that new metrics will be necessary to properly assess ILEC performance. Further, each state's additional performance metrics can serve as benchmarks for other states to compare. A periodic examination could provide excellent opportunities for parties to present information derived from proceedings in other states to revise baseline performance metrics upward. Encouraging states to periodically review their supplemental performance standards would be beneficial to ILECs and CLECs.

F. The Commission Should Use Existing State Performance Standards as a Model for Federal Baseline Performance Standards

In the *UNE Metrics NPRM*, the Commission asks how best to build on the states' pioneering efforts in developing national performance measurements and standards.²⁹ Although federal performance standards should establish a baseline, the Commission should nonetheless seek to minimize any disruption to existing state metrics by adoption of federal standards. The Commission not only should recognize the important work that states have performed to date on the issue of performance measurements, but it should use the performance standards already established in the states as a model for strong federal performance metrics and standards. Building upon existing state performance standards would also have the benefit of leaving existing standards, and carriers' expectations under those standards, largely undisturbed, to the extent they meet or exceed, and are otherwise consistent with, the federal standards. This approach would promote the goal of regulatory certainty.

²⁹ *UNE Metrics NPRM* at ¶ 15.

This approach of maintaining the existing state standards that do not conflict with the new federal standards must include the remedies already ordered by the states. Some states, such as California, are considering ILEC performance incentives that, if adopted, should not be preempted by the federal regime. As a matter of federal policy, the Commission should declare that different kinds of remedies or incentives for compliance that may be in addition to liquidated damages do not conflict with the federal scheme adopted in this proceeding, and therefore may continue undisturbed.

G. National Standards Could Reduce Burdens on ILECs

The Commission also seeks comment on whether the adoption of national performance measurements and standards could ease regulatory burdens on ILECs by minimizing inconsistency or redundancy between and among state and federal requirements.³⁰ While easing regulatory burdens on ILECs may be appropriate, in the above-captioned proceedings the Commission should be concerned primarily about establishing performance measurements and standards that detect and enforce ILEC compliance with statutory obligations regarding local competition. A regime of strong federal performance measurements and standards that constitutes a baseline that states may supplement as necessary will serve to harmonize varying state regimes and federal regimes and produce the most reasonable overall regulatory burden for ILECs. Thus, instead of compliance with several or numerous state requirements, ILECs, for the most part, need comply with federal provisioning standards. A reduction of burdens on ILECs, however, is most likely to be achieved if baseline standards are set high enough so that most states do not feel compelled to establish supplementary requirements.

³⁰ *UNE Metrics NPRM* at ¶ 16-19.

H. Metrics Should Apply Only to Tier 1 ILECs

Joint Commenters propose that the national performance measurements and standards adopted in this proceeding apply only to Tier 1 ILECs.³¹ CLEC market entry has occurred predominantly in those markets controlled by the largest ILECs. Large markets present the best opportunities for CLECs because the potential customer base justifies the enormous start-up costs associated with new market entry. By limiting application of the national performance metrics to only Tier 1 ILECs, the Commission would achieve the maximum benefit by addressing the carriers providing the most service to CLECs without imposing unnecessary regulatory burdens on ILECs in smaller markets. Further, Tier 1 ILECs are already subject to reporting requirements not imposed on carriers that do not satisfy the revenue criteria to be Tier 1 ILECs.³²

I. A State-Federal Task Force Could Facilitate Exchange of Information After Adoption of Initial Metrics

The Commission also asks whether it should establish a joint federal-state task force regarding performance measurements.³³ A joint task force could be useful as a forum for exchange of information for the Commission and for the various state commissions, but it should not be a precondition for adoption of a federal regime of mandatory baseline rules. Joint Commenters are very concerned about the likely delay caused by reliance on a federal-state task force for this purpose. States can participate in fashioning federal metrics by filing comments in this proceeding. Further, it is likely that many states will simply implement the federal regime

³¹ Tier 1 ILECs are companies having annual revenues of \$100 million or more from regulated telecommunications operations for a sustained period of time. See *Commission Requirements for Cost Support Material to be Filed with 1990 Annual Access Tariffs*, Order, 5 FCC Rcd 1364 (Com. Car. Bur. 1990).

³² See, e.g., *Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities*, 2 FCC Rcd 1298 (1987), *modified on recon.*, 2 FCC Rcd 6383 (1987), *modified on further recon.*, 3 FCC Rcd 6701 (1988), *aff'd sub nom. Southwestern Bell Corp. v. FCC*, 896 F.2d 1378 (D.C. Cir. 1990).

and go no further. After adoption of initial federal baseline rules, a joint task force may be useful to assess the strengths of supplemental state requirements, and to provide advice to the Commission and to the states regarding the types of additional information that has been shown to provide the most utility in assessing ILEC compliance with statutory obligations.

J. States May Enforce Provisioning of Mixed Jurisdiction Special Access Services

In the *Special Access Metrics NPRM*, the Commission asked for comment regarding the appropriate role for state commissions in enforcing national performance measurements for interstate special access services.³⁴ As noted, CLECs purchase special access circuits from interstate tariffs in order to provide local exchange loops to end users. CLECs have been compelled to take this approach for a variety of reasons.³⁵ ILEC recalcitrance to comply with statutory obligations has the perverse benefit of enabling it to sell the same loop out of the higher priced special access tariff. Because special access circuits are substitutes for UNE loops, state commissions should have enforcement authority for interstate special access provisioning.

The Commission should determine that it retains enforcement authority over interstate special access facilities, but declines to assert exclusive enforcement authority over mixed jurisdiction special access facilities. As long as a particular special access circuit may be used to provide mixed jurisdiction services, the Commission should permit states to enforce federal special access performance standards. Permitting states to enforce federal special access metrics would not undermine or threaten the federal objectives of ensuring that special access circuits are provided in compliance with the Communications Act, and, in fact, would help achieve the

³³ *UNE Metrics NPRM* at ¶ 20.

³⁴ *Special Access Metrics NPRM* at ¶ 11.

federal goal of acceptable provisioning by LECs of interstate special access. In this connection, the 10% rule that assigns responsibility to the Commission for special access circuits with more than 10% interstate traffic is essentially a rule of administrative convenience.³⁶ The rule does not bar states from enforcing federal metrics that apply to circuits that also carry intrastate traffic. It is appropriate for the states to enforce federal metrics governing the provision of mixed-jurisdiction special access circuits because doing so would promote the Commission's objective of promoting local competition.

The Commission should also provide that CLECs may seek enforcement of federal metrics governing interstate special access at either the FCC or at state commissions. This approach will assure that CLECs may obtain enforcement of federal metrics where a state declines to enforce these rules.

IV. ENFORCEMENT MECHANISMS ARE A CRITICAL COMPONENT OF NATIONAL PERFORMANCE METRICS

In order for any set of performance metrics to be meaningful, it must include provisions for enforcement of the metrics. The enforcement scheme must include penalties of a sufficient magnitude to ensure ILEC compliance with the performance standards. In order to maximize the deterrent effect of the new performance standards, the enforcement scheme should include both a streamlined forfeiture penalty component and an automatic, self-executing compensation component (including liquidated damages provisions), to facilitate the efficient and speedy recovery of damages suffered by carriers as a result of ILEC discrimination and substandard performance.

³⁵ See Section I, *supra*.

The Commission's development of strong enforcement mechanisms for special access and UNE performance standards should be informed by the overall history/trend of ILEC substandard performance in the context of Section 271 proceedings and merger proceedings at the state and Federal level. For example, in the context of Section 271 proceedings at the state level, some ILECs have been subject to various performance assurance plans ("PAPs"), and have been required to provide payments or billing credits for failures to meet the standards.³⁷ Given that these ILECs continue to provide payments or billing credits to CLECs for failures to meet the PAPs, rather than improving service in order to comply with the PAPs, it appears that these ILECs view noncompliance as a "cost of doing business." Similarly, in the context of the Commission's merger approvals and Section 271 authorizations, some ILECs have been required to pay fines for violations of the reporting requirements, yet such fines have not changed their overall performance.³⁸

Experience has shown that if the risk of, and amount of, penalties and damages are not substantial enough to deter ILEC noncompliance, the ILECs may in fact view substandard performance as a smart business decision, particularly given the competitive advantages that ILECs can secure as a result of such noncompliance. Thus, it is clear that a strong federal

³⁶ *MTS and WATS Markets Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, 4 FCC Rcd 5660, 5661 (1989) (citing "administrative simplicity" as a key benefit of the 10% rule).

³⁷ See, e.g., New York Public Service Commission Cases 97-C-0271 and 99-C-0949, Bell Atlantic-New York – Performance Assurance Plan Proceeding, Order Adopting the Amended Performance Assurance Plan and Amended Change Control Plan, (issued Nov. 3, 1999); Florida Public Service Commission Order No. PSC-011-1819-FOF-TP, Docket No. 000121-TP (issued Sept. 10, 2001).

³⁸ For example, the FCC fined SBC \$88,000 for violating the performance reporting requirements set forth in the SBC/Ameritech Merger Order. See *SBC Communications, Inc. Order of Forfeiture*, DA-680 (rel. March 15, 2001), affirmed by Order on Review, FCC 01-184 (rel. May 29, 2001). The FCC also proposed to fine SBC \$2.52 million for its filing of inaccurate information in the Kansas/Oklahoma section 271 proceeding. See *SBC Communications, Inc. Notice of Apparent Liability for Forfeiture*, FCC 01-308 (rel. Oct. 16, 2001). Most recently, the FCC issued a Notice of Apparent Liability on January 16, 2002 regarding a \$6,000,000 penalty for SBC's noncompliance with the merger conditions. See, *SBC Communications, Inc. Apparent Liability for Forfeiture*, FCC 02-7, File No. EB-01-IH-0030 (rel. Jan. 18, 2002).

enforcement component is necessary in order to discourage discriminatory performance and to promote ILEC compliance with the UNE and special access performance metrics.

A. The Commission Should Establish a Regime of Self-Executing Liquidated Damages in Order to Compensate CLECs and Avoid or Limit the Need for Complaints

CLECs incur substantial damages as a result of ILEC discriminatory behavior and poor performance in their provision of UNEs and special access services to CLECs, including intangible damages such as loss of reputation. However, the types of billing credits that ILECs have been required to provide for non-compliance with performance standards in other contexts are far too low and completely inadequate to compensate CLECs for damages that result from ILEC non-compliance. Billing credits also have proved to be far too low to deter ILEC noncompliance, given that the ILECs' overall performance has not changed.

The Commission should therefore establish self-executing remedies that will require the ILECs to compensate CLECs for the damages that result from ILEC sub-standard performance, in order to deter continued ILEC non-compliance, as well as to avoid or limit the number of complaint proceedings.³⁹ Such self-executing remedies should include liquidated damages provisions that ILECs must include both in interconnection agreements and in corresponding special access tariff provisions or contracts for special access. Such self-executing remedies should be an integral component of the Commission's performance standards (along with forfeiture penalties) in order to enhance the deterrent effect of the rules. This approach can help assure that paying penalties is not cheaper for the ILEC than complying with the law and the Commission's rules.

³⁹ To the extent that such self-executing remedies may not be sufficient to deter ILEC noncompliance with the performance standards and/or are not sufficient to compensate the CLECs for the damages that result from the

1. The Commission Should Require Tier 1 ILECs to Include Liquidated Damages Provisions in Interconnection Agreements, Special Access Contracts and in Special Access Tariffs

Just as the special access and UNE metrics should be the same, there should not be any difference between the Commission's treatment for enforcement purposes of special access provisioning requirements and its enforcement of UNE or interconnection provisioning requirements. The ILECs' provisioning of UNEs and special access services is governed by a reasonableness standard, pursuant to Section 251(c)(3) for UNEs, and pursuant to Section 201 for special access services. Thus, the Commission should rule that it is unreasonable for the ILECs not to provide for liquidated damages, both in interconnection agreements and in special access contracts and special access tariffs, and should require them to pay such damages when they violate the standards.

The Commission has recognized the utility of incorporating liquidated damages clauses into negotiated or arbitrated agreements.⁴⁰ However, the Commission should go a step further and establish by rule in these proceedings that Tier 1 ILECs must negotiate liquidated damages provisions with CLECs as part of their interconnection agreements, and special access contracts for comparable services. The Commission also should require the ILECs to revise their special access tariffs to include provisions reflecting that the liquidated damages provisions set forth in

ILECs' failure to meet the standards, the Commission also should establish expedited complaint procedures (under the rocket docket) as an additional avenue of recourse.

⁴⁰ See *First Report and Order and Further Notice of Proposed Rulemaking in the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 11 FCC Rcd 21905 (1996). In discussing the reporting requirements already present in the Act, which may mitigate the need for additional Commission-imposed requirements, the Commission stated that, "For example, competitive telecommunications carriers, on their own initiative, could seek to incorporate certain performance and quality standards into their negotiated or arbitrated interconnection agreements to ensure the BOCs satisfy their obligation to provide service in a nondiscriminatory manner." *Id.* at ¶ 326. The FCC also noted that "competing carriers, in order to ensure they have a recourse for anticompetitive behavior by BOCs, may seek to include liquidated damage clauses, dispute resolution mechanisms, and other common commercial arrangements into their negotiated or arbitrated agreements." *Id.* at n. 863.

CLECs' interconnection agreements with the ILECs apply equally to the ILECs' provisioning of special access services under the ILECs' special access tariffs.

2. Liquidated Damages Provisions in Interconnection Agreements Have Been Approved By State Commissions in Arbitration Proceedings and Have Been Upheld By Courts

Liquidated damages provisions are commonly used in commercial contracts in order to provide the contracting parties with certainty regarding the extent of liability for damages under their commercial contracts. The establishment of liquidated damages up front when negotiating commercial contracts can be particularly useful in cases where the extent of damages caused by breach of contract are difficult to ascertain. Attached hereto as Exhibit 8 is the Affidavit of Lee L. Selwyn and Scott C. Lundquist of Economics and Technology, Inc. ("ETI"), which outlines some of the many business contexts in which liquidated damages are commonly used, and how liquidated damages provisions could be implemented for ILEC provision of wholesale services to CLECs.

Liquidated damages in interconnection agreements have been required by numerous state commissions, and such liquidated damages provisions in interconnection agreements have been upheld by reviewing courts. For example, the United States District Court for the District of Colorado dismissed US West's argument that the requirement to include liquidated damages and penalty provisions in its interconnection agreements with AT&T and MCI exceeded the authority of the Colorado Public Utilities Commission under the Act. The court emphasized that liquidated damages and penalties provisions in interconnection agreements are "certainly within

the required scope of the COPUC's authority in that it is designed to provide new entrants with a fair and meaningful opportunity to enter the local exchange market."⁴¹

Similarly, the United States District Court for the Eastern District of Michigan upheld benchmarks and liquidated damages/penalties in an arbitrated interconnection agreement between US West and MCI, stating that such penalties do not violate the Act and are enforceable.⁴² The United States District Court for the District of Oregon also has upheld liquidated damages provisions in interconnection agreements.⁴³

While the state commissions in numerous jurisdictions have supported the CLECs' right to negotiate self-effectuating remedies in interconnection agreements, and state courts have affirmed these state commission rulings, other state commissions have been (or may be) reluctant to require the inclusion of self-effectuating remedy provisions in interconnection agreements

⁴¹ *US West Comms., Inc. v. Hix*, 57 F.Supp.2d 1112, 1121-1122 (D.Colo. 1999).

⁴² *MCI Telecomms. Corp. v. Michigan Bell Tel. Co. d/b/a Ameritech Michigan, Inc.*, 79 F.Supp.2d 768, 775-76 (E.D.Mich. 1999). Specifically, the Michigan Court upheld as reasonable credits reflecting the installation and monthly fees for the interconnection, network elements, or resale service at issue, as well as a penalty of \$25,000 per day for each impermissible delay not specific to an individual customer (*i.e.*, for violations of a benchmark for service requested by MCI to serve multiple customers).

⁴³ *See, e.g., US West Comms., Inc. v. TCG Oregon*, 31 F.Supp.2d 828, 837-838 (D.Or. 1998). In upholding the liquidated damages provision in TCG's interconnection agreement with U S West, the Oregon court noted some of the critical reasons for which such liquidated damages are not only appropriate, but necessary:

Inadequate service can be fatal to a new local exchange carrier such as TCG. If prospective customers try TCG service only to discover that they cannot reliably obtain a dial tone, that calls are disconnected in the middle of a conversation, or that service orders are not timely filled, then those customers will probably switch back to U.S. West and turn a deaf ear to future entreaties from TCG. Adverse publicity will also deter other prospective customers from considering TCG. Even assuming the problems are eventually resolved, that may not be soon enough to save TCG. Moreover, damages in such cases can be difficult to quantify and prove, and it would require years (and considerable expense) to litigate such claims. A further concern is that U.S. West stands to gain financially if customers become dissatisfied with TCG's local service, hence U.S. West is operating under a conflict of interest. Under the totality of the circumstances, including the PUC's extensive experience in overseeing U.S. West service in Oregon, the PUC could reasonably conclude that enforceable performance standards, *i.e.*, those with teeth are necessary and proper. . . . The PUC also could reasonably have concluded that the liquidated damages clause would help to minimize litigation. US West disagrees with these premises, but the question before this court is not whether the PUC is correct but simply whether the PUC could reasonably have come to such a conclusion (it could), and whether the liquidated damages provision violates the Act (it does not).

Id. at 837.

absent direction from the Commission.⁴⁴ Thus, in light of the difficulties that CLECs have encountered when attempting to include negotiated liquidated damages provisions in interconnection agreements, and given the ILECs' propensity to fight all Commission rules and any such liquidated damages provisions every step of the way, the Commission should establish by rule in these proceedings that Tier 1 ILECs are required to include liquidated damages provisions in interconnection agreements, and that such liquidated damages provisions will apply equally to the ILECs' provision of special access services to CLECs. The Commission also should consider establishing guidelines for liquidated damages provisions that ILECs and

⁴⁴ For example, in an appeal of a Florida Public Service Commission ruling that it did not have authority to require inclusion of liquidated damages provisions in an interconnection agreement, the United States District Court for the Northern District of Florida ruled that liquidated damages was an "open issue" that the Florida Commission was required to arbitrate, and that the Florida Commission does have the authority to require the inclusion of liquidated damages. *MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.*, 112 F.Supp.2d 1286, 1297-1298 (N.D.Fla. 2000). In the MCI arbitration proceeding, the Florida Commission had ruled that it lacked authority to arbitrate liquidated damages provisions because it believed that the Telecommunications Act only authorized arbitration on the items enumerated in Sections 251 and 252 of the Act. The Florida Commission also had concluded that it had no authority under state law to require a compensation mechanism of the type at issue, because this would require the Florida Commission to make an award of damages, contrary to state law precedent. The court rejected the Florida Commission's "narrow reading" of the Telecommunications Act's arbitration provisions. *Id.* at 1297. The court also rejected the Florida Commission's argument that it was precluded by state law from adopting a compensation mechanism, finding that (1) a compensation provision in an arbitrated agreement would not necessarily require enforcement by the Florida Commission (instead such a provision could be self-executing or could be enforceable in court, to the extent necessary,) and (2) if a compensation provision is required by the Telecommunications Act and can be adopted without imposing an unconstitutional burden on the Florida Commission, then the Telecommunications Act, as the "supreme law of the land," would trump any contrary Florida provision. *Id.* at 1298. On remand and in subsequent arbitration proceedings, the Florida Commission ruled that, notwithstanding the court's decision in *MCI Telecommunications Corp. v. BellSouth*, nothing in the Act or in the FCC's rules requires the Florida Commission to include liquidated damages provisions. *Petition by MCI Metro Access Transmission Services LLC for Arbitration of Certain Terms and Conditions of a Proposed Agreement with BellSouth Telecommunications, Inc.*, Docket No. 000649-TP, Final Order on Arbitration, Order No. PSC-01-0824-FOF-TP at 170-73 (issued March 20, 2001). Specifically, the Florida Commission found that liquidated damages is not an enumerated item under Sections 251 and 252 of the Act, and that the record in the WorldCom arbitration proceeding did not support a finding that a liquidated damages provision is required to implement an enumerated item under Sections 251 and 252 of the Act. *Id.* at 172-73. Similarly, upon review of the Kentucky Public Service Commission's decision not to adopt a set of performance standards, reporting requirements and penalty provisions proposed by MCI in an arbitration proceeding with BellSouth, the United States District Court for the Eastern District of Kentucky ruled that, "[a]lthough a state commission may decide to impose such standards and mechanisms, this Court will not conclude that silence on the part of Congress implies that it is the duty of a state commission to include such provisions in an interconnection agreement." *MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.*, 40 F. Supp. 2d 416, 428 (E.D.Ky. 1999).

CLECs could follow in negotiating liquidated damages as described in the Affidavit from Selwyn and Lundquist of Economics and Technology, Inc. attached as Exhibit 8.

B. FCC Forfeiture Penalties

The Commission has authority under section 503(b) of the Act to impose forfeiture penalties for willful or repeated violations of its rules. The Commission's authority to impose forfeiture penalties is potentially one of the best tools to deter ILEC discriminatory performance and noncompliance with the performance standards, so long as the specter of forfeiture penalties is genuine and immediate, and the forfeiture penalty amounts are set as high as possible so as not to be considered a "cost of doing business."

1. The Baseline for Forfeiture Penalties Should be Set at the Maximum Statutory Amounts

Consistent with its policy of protecting the public interest and ensuring the availability of reliable, affordable communications, the Commission should establish the maximum statutory amounts set forth under Section 503(b)(1)(B) as the baseline forfeiture amounts for failure to meet the performance standards and/or failure to provide parity of performance, as applicable.⁴⁵ Assessment of the maximum statutory penalties is appropriate in the context of performance standards given the size of Tier 1 ILECs, their exclusive control of critical bottleneck facilities, and ILECs' continued history of discriminatory treatment in their provision of UNEs and special access services to CLECs. Maximum penalties will also be necessary in order to maximize the potential deterrent effect of performance standards. The need for substantial penalties is particularly acute in light of the goals of the Act and the precarious state of the fledgling local

⁴⁵ As adjusted for inflation by the Debt Collection Improvement Act of 1996 ("DCIA"), 28 U.S.C. 2461, the maximum statutory penalty amounts under Section 503(b)(1)(B) are set at \$120,000 per violation or each day of a

competition market six years after adoption of the Act, as well as the ILECs' history of noncompliance with performance standards in other contexts such as Section 271 proceedings and merger proceedings.

The Commission has recognized in prior proceedings that in order to promote compliance and deter noncompliance, penalty amounts must take into account the size of the carrier so that the penalties are not simply absorbed by the carrier as a "cost of doing business."⁴⁶ Moreover, the Congress also has explicitly recognized that if the maximum penalties are not sufficiently high, they will not serve as an effective deterrent for large carriers.⁴⁷

In the Forfeiture Guidelines proceeding, the Commission established general guidelines for Section 503 forfeitures.⁴⁸ There, the Commission established baseline forfeiture penalty amounts along with upward adjustment criteria to take into account: (1) egregious misconduct; (2) ability to pay/relative disincentive; (3) intentional violation; (4) substantial harm; (5) prior violations of any FCC requirements; (6) substantial economic gain; and (7) repeated or continuous violation.⁴⁹ In light of the history of ILEC non-compliance in the context of Section

continuing violation, with a maximum of \$1,200,000 for any single act or failure to act. See 47 C.F.R. Section 1.80(b)(5)(iii).

⁴⁶ See The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines ("*Forfeiture Guidelines*"), 12 FCC Rcd. 17087 at 17100, ¶ 27 (1997), *recon. denied*, 15 FCC Rcd. 303 (1999).

⁴⁷ See *id.* at ¶ 19, discussing the legislative history of Section 503 of the Act and quoting Congress' reasons for increasing the Commission's forfeiture authority. (According to Congress, as stated in Sen. Rep. No. 580, 95th Cong. 1st Sess.3 (1978), reprinted in 1978 USCCAN 109, 111 "The maximum amount of forfeitures permitted for single and multiple violations is unrealistically low to be an effective deterrent for highly profitable communications entities or to provide sufficient penalty to warrant the Attorney General's or the various U.S. district attorneys' attention for prosecuting forfeitures within the Federal district courts." When increasing the FCC's forfeiture authority in 1989, Congress reiterated that the forfeiture penalties should "serve as both a meaningful sanction to the wrongdoers and a deterrent to others." See H.R. Conf. Rep. 386, at 434 (1989).

⁴⁸ *Forfeiture Guidelines* at Appendix A.

⁴⁹ *Id.* In its Forfeiture Guidelines proceeding, the Commission established baseline penalty amounts for particular types of violations, which took into account the disparity between the size and types of carriers, along with general upward and downward penalty assessment criteria. *Id.* However the Commission reiterated that the ILECs should expect penalty assessments that are far greater than the established baseline amounts for rule violations, in light of the ILECs' size and ability to pay, so that such penalty amounts are not considered by the ILEC to be a "cost of doing business." *Id.* at ¶ 24. In this case, since the FCC does not need to set penalties for carriers other than the Tier 1 ILECs, the FCC should set the baseline forfeiture penalty amounts at the statutory maximum. However, as is

271 proceedings and merger proceedings, many, if not all of these criteria suggest maximum forfeitures in the context of violations of the UNE and special access performance standards. In fact, the list of upward adjustment criteria that the Commission developed in its Section 503 forfeiture guidelines is practically tailor-made to describe the reasons for which the violations of the performance standards occur in the first instance.

Given that most if not all of these criteria are met in the case of violations of the Commission's performance standards, and to ensure that ILECs do not view the penalties simply as a "cost of doing business," the Commission should set the baseline penalty at the maximum statutory amounts.

In addition, the Commission should require that penalties may not be recovered in rates for regulated or other services. Instead, the Commission should require that forfeitures be paid "below the line" so that penalties directly affect profits. For both price cap and rate-of-return ILECs, this could help assure that penalties are not a "cost of doing business."

2. The Commission Should Establish that Each Month is a Separate Reporting Requirement Subject to Separate Penalties; Maximum Forfeiture Penalties Should be Assessed Separately for Each Metric (or Sub-Metric, Where Sub-Metrics Are Established)

As discussed above, the Commission should establish that violations of the performance standards are subject to the maximum statutory penalty amounts pursuant to section 503(b)(2)(B).⁵⁰ In addition, the maximum statutory forfeiture penalties should be assessed

the case under the general Forfeiture Guidelines, the Commission then would have the discretion to apply downward adjustment criteria if warranted. For example, if an ILEC has a history of overall compliance, or an inability to pay, the FCC could adjust the maximum penalty downward if warranted in a particular case.

⁵⁰ As adjusted for inflation pursuant to the Debt Collection Improvement Act of 1996 ("DCIA"), 28 U.S.C. 2461, Section 503(b)(2)(B) provides for forfeiture penalties of up to \$120,000 per violation or each day of a continuing violation, with a maximum of \$1,200,000 for any single act or failure to act.

separately based on violations of each metric (or for each sub-metric, where sub-metrics are established) in each separate reporting period.

In order to maximize the deterrent effect of potential penalties, the Commission also should establish that the reporting requirement for each month is a separate requirement, and that each day within each reporting period is a separate event subject to the Commission's forfeiture authority, so that a continuing violation of the performance standard is established by the fact of the reported non-compliance during a particular reporting month. (Once a violation of the performance standard(s) occurs, each day of the month should count as a separate violation.)⁵¹ Accordingly, if a Tier 1 ILEC does not meet the standard for a particular metric or sub-metric for the reporting month, the ILEC should be subject to a separate penalty of \$1,200,000 for non-compliance with each metric or sub-metric for the reporting month. A separate monthly penalty of \$1,200,000 should be assessed for each violated metric or sub-metric, for each separate reporting period in which such non-compliance occurs.

For example, an ILEC that violates three of the performance standards (metrics or sub-metrics) in January would automatically be subject to a separate penalty of \$1,200,000 per violated metric or sub-metric (\$3,600,000 for non-compliance with three separate metrics or sub-metrics) for that reporting period. If the ILEC violates the same three performance standard (metrics or sub-metrics) in February, the ILEC would be subject to another \$3,600,000 penalty (\$1,200,000 per metric or sub-metric) for these new violations within the new reporting period, and so on. For each and every reporting period in which an ILEC fails to comply with the

⁵¹ That is, violations of individual performance metrics or sub-metrics in each separate reporting period should be considered *de facto* a showing that a continuing violation occurred for each such metric or sub-metric within the reporting period, subjecting the ILEC to the maximum penalty of \$1,200,000 for such failure to comply with the performance standard for each such reporting period in which non-compliance occurs.

interstate access or UNE performance standards, the ILEC should be subject to separate penalties in the amount of \$1,200,000 per metric or sub-metric, per reporting period.

By structuring forfeiture penalty assessments in this manner, and by establishing the maximum statutory penalty amounts as a baseline, the Commission will maximize the deterrent effect of the forfeiture penalties so that they are less easily absorbed by the ILECs as a “cost of doing business.” As both the Commission and the Congress have reiterated, the goal of deterring ILEC noncompliance would be severely undermined if forfeiture penalty amounts are not sufficiently high.⁵² An immediate fine of \$1,200,000 per metric or sub-metric, per reporting period, should give the ILECs some incentive to fix the problem(s) underlying the sub-standard performance immediately, before the next reporting periods. The Joint Commenters are not making these proposals in order to inflict financial damage to ILECs. These penalties are intended to compel ILECs to comply with their statutory obligations and thereby avoid paying any penalties. Joint Commenters seek performance of the ILECs’ obligations under the Act and the Commission’s rules. In the best possible world the ILECs would pay no penalties because they already would be meeting their statutory and administrative requirements.

3. The Commission Should Establish a Self-Executing Mechanism For Assessing Maximum Forfeiture Penalties Based on ILEC Reported Data that Reflects Non-Compliance With the Performance Standards

The ILECs will be far less likely to comply with the performance standards if there is not an immediate threat of forfeiture penalty assessments for each monthly reporting period. Thus, liability for performance failures should be “presumptive,” and the assessment of associated forfeiture penalties should be automatic and self-executing upon the ILECs’ reporting of performance data that reflects sub-standard and/or discriminatorily poor service.

Accordingly, the Commission should adopt rules in this proceeding to establish that, immediately upon an ILEC's reporting of non-compliance for any metric or sub-metric for a particular month, the reporting of such violation(s) of the performance standards itself constitutes notice of apparent liability ("NAL") for forfeiture under Section 503. Specifically, as part of the performance standards rules, the Commission should create a standard reporting form that ILECs must use to report their performance, and the form should include language to the effect that the report form itself constitutes written notice of a separate forfeiture penalty of \$1,200,000 for each missed metric or sub-metric, for each reporting period, to the extent an ILEC reports non-compliance with any metric or sub-metric for the reporting month. The Commission should establish by rule that the standard reporting form, to be completed and signed by the ILEC, along with the related documentation provided by the ILEC, constitutes written notice of apparent liability for the forfeiture penalties under Section 503.

The standard reporting form also should clearly indicate that, upon an ILEC's reporting of its non-compliance with the performance standards, thereby constituting a written NAL, the procedural requirements set forth in the forfeiture penalty rules under Section 1.80 of the Commission's rules would apply.⁵³ (That is, the ILEC would have a "reasonable period" of time, for example, 15 days from the date of the reported noncompliance, to pay the forfeiture or to show, in writing, accompanied by detailed factual statements and pertinent documentation and affidavits, why a forfeiture penalty should not be imposed or should be reduced.) Given ILEC conduct in the past in similar circumstances, it is likely that ILECs will always contest such

⁵² See n. 44 and n. 45, *supra*.

⁵³ 47 C.F.R. § 1.80.

penalty assessments. Therefore, the Commission also should establish rules delineating and limiting the types of specific, narrow defenses available to ILECs in this context.⁵⁴

C. The Commission Should Establish A Streamlined Process And Procedural Rules to Govern Section 208 Complaints Regarding ILEC Non-Compliance With Performance Standards

In addition to streamlined procedures for forfeiture penalty assessments and the establishment of self-executing remedies as a means of deterring ILEC non-compliance with the performance standards, the Commission should establish a streamlined process and procedural rules to govern Section 208 complaints regarding ILEC non-compliance with the UNE and special access performance standards. Specifically, the Commission should establish a rule whereby all complaints against ILECs regarding failure to meet the performance standards will be processed under the “rocket docket” rules.⁵⁵ If the rules do not provide for a speedy process in this regard, the ILECs will have opportunity to create delays and exploit the formal complaint process, with the knowledge that with each day that passes, the injured parties will be losing additional significant commercial opportunities as a result of the ILEC’s poor service quality and/or discriminatory treatment.

The Commission also should establish a rule that when a Tier 1 ILEC reports data showing its failure to meet the metrics or its failure to deliver parity of performance, such information will be considered rebuttable *prima facie* evidence of a violation of the Commission’s rules in a Section 208 complaint proceeding. By establishing such a rule, the

⁵⁴ Only limited types of defenses should be established for non-compliance that occurs in narrowly defined periods of emergency, catastrophe, natural disaster, severe storm or other events affecting large numbers of end-users. However, the FCC should recognize by rule that force majeure events such as these should not affect the ILECs’ service to CLECs any differently than they affect the ILECs services to its affiliates and/or its own retail customers.

⁵⁵ *Implementation of the Telecommunications Act of 1996; Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, 13 FCC Rcd 17018 (1998), *clarified on recon.* 16 FCC Rcd 5681 (2001).

Commission would streamline the process by establishing the facts necessary for a CLEC to meet its burden of proof that the ILEC has violated the metrics rules. Such a rule also would streamline the dispute process and allow the Commission to address complaints more quickly by minimizing disputes about definition of a violation, the evidence required to establish a violation, and the legal consequences of a violation.

V. THE COMMISSION MUST ENSURE THE INTEGRITY OF PERFORMANCE METRICS REPORTS

For the performance metrics rules to be meaningful and effective, the Commission must adopt procedures that ensure the validity of the underlying data collected by ILECs to produce performance metrics reports as well as the reports themselves. The Commission must also have the ability to penalize violators of the Commission's rules relating to reporting requirements in a manner that discourages noncompliance. The Commission must take an active role in ensuring the accuracy of performance metrics reports and in establishing a comprehensive auditing system.

A. The Commission Should Establish Methods to Ensure Data Validation and Require Submission of the Data Gathered and Generated by National Performance Metrics Reports

The Commission seeks comment on methods it could adopt to ensure the reliability of all data gathered and stored in connection with national performance metrics.⁵⁶ The data generated by any national performance metrics reports will only be meaningful if it is valid, accurate, and reproducible. The raw data underlying performance metrics should be stored in a secure, stable and auditable file, outside of the control of the reporting ILEC. In order to accomplish this task,

⁵⁶*UNE Metrics NPRM*, at ¶73.

the Commission should mandate the type of electronic format for such reports and should require ILECs to submit the reports to the Commission. While the Joint Commenters do not recommend that the Commission itself audit data underlying national performance metrics reports,⁵⁷ the Commission should act as the central repository for such data.

B. The Commission Should Establish a Comprehensive Auditing System Coupled with Penalties

The Commission requests comment whether audit procedures would further ensure that both regulators and interested parties may rely on ILEC-generated and reported data.⁵⁸

Establishing a comprehensive auditing program in connection with national performance metrics is a necessary tool in ensuring the accuracy and validity of ILEC reported data. However, auditing procedures must be coupled with penalties large enough to discourage the submission of inaccurate information. If implemented with an effective penalty scheme, audits would assure the integrity of the Commission's performance metrics.

Any regulatory procedures put in place to ensure the validity of reported data will likely have the added benefit of conserving regulatory and industry resources in the long run. If either the Commission or CLECs are not confident that ILEC reported data is accurate, the Commission and carriers alike will waste significant resources analyzing data integrity. The Commission should establish safeguards from the outset in order to avoid having to do so at a later date.

⁵⁷ See *infra*, Section V.B.1.

1. The Commission Should Require ILECs to Employ Third Party Firms to Engage in “For Cause” and “Random Audits” Paid for by ILECs

The Joint Commenters recommend that the Commission require ILECs to employ independent third party firms to engage in audits of ILEC data. The Commission has neither the time nor the resources to implement an effective auditing program. In order to implement an auditing system that will sufficiently deter inaccurate reporting, the threat of an audit must be real. Third party auditing firms should have access to all reported data in order to engage in comparisons and other activities. The Commission would review the results of the audits and assess penalties where needed.

In implementing the most effective and efficient means to audit ILEC-reported data, the Joint Commenters recommend that the Commission utilize “for cause” and random audits. The Commission or a third party firm would initiate a “for cause” audit if there were reason to believe that the information supplied by ILECs in connection with reporting requirements was inaccurate or misleading. Information providing a basis for initiating such an audit may be drawn from a number of sources. An auditor may assess information submitted by a carrier through the application of statistical techniques to reported data,⁵⁹ or by comparing reported data to historical trends or information developed at the state level. “For cause” audits could also be triggered if one ILEC’s performance metrics is clearly out of the range of a similarly situated ILEC.

The Commission should also utilize random audits. Random audits, implemented in tandem with “for cause” audits, would result in greater ILEC compliance than using either method alone. Random audits would subject ILECs to audits at some unknown time,

⁵⁸ *UNE Metrics NPRM*, at ¶74

⁵⁹ See Exhibit 8, Selwyn and Lundquist at ¶¶ 36-47 for a discussion of statistical analysis of reported data.

encouraging compliance with the performance metrics reporting requirements. Using random audits in conjunction with “for cause” audits would help to ensure the integrity of ILEC reported data.

Finally, the Commission should also permit CLECs, if they choose, to audit ILEC data underlying the performance reporting. CLECs that choose to closely monitor ILEC provisioning and that establish their own performance reporting would then be able through audits to identify any deficiencies in ILEC reporting.

2. The Commission Need Not Audit the Records of CLECs

ILECs, not CLECs, possess market power. It is ILEC behavior that requires government regulation, not CLECs. Consequently, CLECs should not be subject to national performance reporting. The Act is premised on the idea that federal and state regulators can and should promote competition by requiring ILECs to provide inputs to CLECs so that new market entrants may compete with monopoly providers of telecommunications services.⁶⁰ Section 251(c) of the Act defines the inputs that ILECs are to make available to CLECs.⁶¹ Since this same section is explicitly limited to ILECs, it follows that ILECs alone should be required to maintain records in connection with any Commission-established national performance measurements. To the extent that CLECs choose to maintain such records, the party conducting ILEC audits should establish a means for electronic delivery of such reports in order to minimize the burdens of comparing ILEC records with the records of affected competitors. However, there is no reason to either require CLECs to maintain national performance metrics reports, or to audit such reports.

⁶⁰ *UNE Metrics NPRM*, at ¶2.

⁶¹ 47 U.S.C. § 251.

3. Posting on Web Sites is Not an Adequate Substitute for Audits

The Commission suggested that instead of adopting an auditing system, incumbents would post their raw data on an accessible web site, allowing CLECs to use their own internal data to check directly the accuracy of portions of the ILECs data.⁶² For a number of reasons, the Joint Commenters strongly oppose the adoption of any system that would require enforcement by CLECs or that would be less formalized than the system discussed above. CLECs simply do not have the resources to constantly monitor ILEC compliance with every provision of the Act. Such a system would require a great deal of time and expense incurred by parties that can least afford it. Most importantly, monopoly power requires counterbalancing by government regulation. Any method that requires a segment of the industry that possesses little more than a 5% share of the telecommunications services market to enforce rules established for the dominant provider is doomed to fail. For these reasons, the Commission should instead implement a comprehensive program of reports to the Commission and auditing program in order to promote integrity in the proposed performance metrics reporting system.

VI. THE COMMISSION SHOULD NOT CONSIDER A SUNSET PROVISION FOR NATIONAL PERFORMANCE METRICS REPORTING REQUIREMENTS OR FOR AN AUDITING PROGRAM

In attempting to reduce the regulatory burdens associated with national performance metrics reporting requirements, the Commission requests comment on whether it should establish a sunset date on which the proposed reporting requirements would cease to apply to ILECs.⁶³ The Joint Commenters recommend that the Commission not adopt a sunset period for the proposed reporting requirements under any circumstances at this time. The Commission

⁶² *UNE Metrics NPRM*, at ¶74.

⁶³ *Id.*, at ¶¶ 78-79.

should not consider a sunset for performance measurements reports until the industry and the Commission have gained more experience with this program. After the ILECs have demonstrated compliance with the national performance measurement reporting requirements and competition has taken a firm hold in the local exchange market, the Commission may revisit the issue of whether there is still a need for reporting requirements. However, at this time, it is impossible to know how long reporting requirements are needed to promote a competitive telecommunications market in accordance with the Act.

The Commission should also not premise any sunset date on Section 271 approval or any other perceived threshold.⁶⁴ Conforming to the requirements of Section 271 of the Act is but one step in ILECs opening local exchange markets to competition. National performance measurements will assist CLECs in competing for market share in the local exchange market that is completely dominated by ILECs. Joint Commenters submit that establishing any sunset date at this time would be premature.

The Commission also seeks comment on whether any adopted auditing procedures should sunset.⁶⁵ Presumably, the Commission could continue to require performance metrics reports, but discontinue an auditing program by establishing a sunset date applicable only to the auditing program. It would be premature to adopt any sunset period for a comprehensive auditing program at this time. The Commission should not establish a time limit on auditing procedures until it has gained experience and assembled and evaluated enough information to determine whether ILECs are reporting accurate data. It is only after ILECs are consistently submitting reporting data that precisely reflect their performance measurements that the Commission should even consider a sunset for a comprehensive auditing program.

⁶⁴ *Id.*, at ¶79.

VII. THE COMMISSION SHOULD ADOPT REPORTING PROCEDURES THAT ALLOW FOR EFFECTIVE AND EFFICIENT ANALYSIS BY THE COMMISSION AND THE INDUSTRY

In establishing reporting procedures for the Commission and the industry, the Commission should implement reporting requirements that permit meaningful analysis. Performance metrics reports must provide enough data to the Commission and the industry to allow in-depth review of ILEC adherence to the requirements of the Act. Reports must also provide data in a timely fashion. As with performance metrics generally, the Commission should seek to build upon state requirements as it establishes reporting requirements so as to minimize disruption to existing state reporting requirements.

A. ILECs Should Report Performance Metrics on an MSA Basis

The Commission asked for comment as to whether ILECs should report data for each performance measurement based on state boundaries, LATAs, metropolitan statistical areas (“MSAs”), or some other relevant geographic area.⁶⁵ In adopting national performance metrics, the Commission should require ILECs to report such data on an MSA basis. Reports submitted at the MSA level are superior to the other proposed geographical areas for a number of reasons. If performance metrics reports were submitted on the basis of state boundaries, the performance reports could vary wildly in terms of both the geographic area and population base to which they applied. As a result, reports based on state boundaries would be of limited usefulness because they would not provide the Commission and the industry with sufficient detail to evaluate ILEC performance. ILECs could provide excellent performance in one portion of the state, terrible

⁶⁵ *Id.*, at ¶74.

performance in another, but still meet the requisite standards. While LATA-based performance metrics reports would address the lack of specificity problem associated with state boundary reports, performance metrics reports submitted on a LATA-basis could suffer from the fact that LATAs are arbitrary boundaries. LATAs were established to roughly correspond to area codes existing at the time of the AT&T divestiture in 1984. Since that time, area codes have proliferated and the demographics of the United States have changed dramatically. MSA-based performance metrics reports will allow the Commission and the industry to analyze ILECs' performance on the basis of a smaller area that will leave less room for manipulation by ILECs. MSA are also well-defined areas that will facilitate compliance.

B. ILECs Should Segregate Performance Metrics Reports Based on the Customer Served

The Commission is requesting comment on whether ILECs should provide separate performance metrics reports based on the type of customer served.⁶⁷ ILECs should be required to report separately on its performance as it is related to: (1) its own retail customers; (2) any affiliates that provide local or interexchange service; (3) competing carriers in the aggregate; and (4) individual competing carriers. In order to restrain the abuse of monopoly power, the Commission should require these separate reports; otherwise it will be very easy for ILECs to distort the results of performance metrics reports. Without such separate reports, the Commission and the industry will be unable to uncover preferential or discriminatory behavior.

⁶⁶ *Id.*, at ¶83.

C. ILECs Should Provide Both Reports and Underlying Data to Any Requesting Carrier on a Monthly Basis and Maintain Such Reports on a Web Site

In connection with the type of reports that ILECs should submit, the Commission seeks comment on whether ILECs should provide the numeric result of the relevant report or the underlying data.⁶⁷ The Commission should require ILECs to provide both data analysis results and the statistical score as well as the underlying data in sufficient detail so as to allow independent analysis. The provision of data analysis results and statistical score will allow the Commission and the industry to efficiently evaluate the results of the performance metrics reports. Rather than having to compile such reports, the Commission and the industry will have the benefit of the report itself.

However, ILECs should also be required to submit the underlying data that produced the report. The production of underlying data has numerous advantages. The Commission and the industry will be able to check the validity of the reports through the availability of the raw data on which the reports are based. Further, access to the raw data will allow the Commission and the industry to customize reports to address differing needs. It is only through the submission of both reports and the data used to generate the reports that the Commission and the industry can effectively evaluate the performance of ILECs.

The Commission is also seeking comment as to what parties should have access to performance metrics reports.⁶⁸ All information submitted by ILECs in connection with the performance metrics reports should be made widely available on an aggregated basis to the industry at large. Performance metrics reports should not be limited to those carriers that obtain

⁶⁷ *Id.*, at ¶84.

⁶⁸ *Id.*, at ¶85.

⁶⁹ *Id.*, at ¶¶83, 88.

services or facilities from the ILEC through an interconnection agreement or Statement of Generally Available Terms.⁷⁰ New market entrants will require the data contained in performance metrics reports in order to evaluate new opportunities. Further, existing CLECs may want to compare data from markets in which they operate to markets where they do not, in order to evaluate the performance of the ILEC from which they receive UNEs. Similarly, state commissions also require access to all performance metrics reports so that they can effectively evaluate the data submitted by the ILECs that operate in their states.

In connection with producing performance metrics reports, the Commission is seeking comment on how frequently reports should be produced and how such reports should be made available.⁷¹ The Joint Commenters suggest that ILECs make such reports available on a monthly basis. The efficient provisioning of UNEs in a timely manner is essential to a competitive market. If ILECs are not conforming to the requirements of the Act, the Commission must have the ability to modify their behavior as rapidly as possible. Quarterly or yearly reports would allow ILECs to fail to meet the standards adopted by the Commission for a substantial period of time without consequence.

The performance metrics reports data should be made publicly available on a company-maintained web site and additionally should be submitted to the Commission. Easy access to performance metrics data will allow the industry to review and analyze the results in a timely fashion. The data must be made available in a usable format and historical records should be maintained for at least ten years. BellSouth's state performance metrics for Georgia are only maintained on the PMAP site for a short period of time, effectively limiting CLEC use of the information to measure and document trends in BellSouth's performance.

⁷⁰ Individual CLECs should be able to obtain data from the ILEC regarding ILEC provisioning to them on an

VIII. UNE METRICS SHOULD ADDRESS ILECS' UNLAWFUL REFUSAL TO PROVISION HIGH CAPACITY LOOPS AND TRANSPORT UNES BY ASSERTING "LACK OF FACILITIES" WHERE ATTACHED ELECTRONICS MUST BE AUGMENTED, MODIFIED OR REARRANGED TO FULFILL CLEC UNE ORDERS

In the *UNE Metrics NPRM*, the Commission requested comments on "how 'lack of facilities' should be defined" and "on whether the frequency within which [CLECs] receive 'lack of facilities' responses from [ILECs] may be captured better in an ordering performance measurement" as opposed to a measure of installation quality and "what that measurement would be."⁷² In requesting comments on this topic, the Commission has astutely identified an emerging and contentious issue between ILECs and their CLEC customers. Recently, some ILECs have systematically failed to abide by the Act, this Commission's rules and orders, and their interconnection agreements regarding their obligation to provide unbundled high capacity local loops and interoffice transport to CLECs in a reasonable and nondiscriminatory manner.

For example, Verizon adopted policies and practices in May 2001 under which it increasingly refuses to fill CLEC orders for high capacity loop and transport UNEs purportedly because "no facilities" are available. Verizon invokes the "no facilities" response to evade its unbundling obligations under Section 251(c)(3) of the Act whenever it must augment, modify or rearrange the attached electronics to fulfill a CLEC UNE order.⁷³ In sharp contrast to its treatment of CLEC UNE orders, however, Verizon will augment, modify or reconfigure the electronics to complete an order for its special access customers, and DS-n and T-1 customers,

individual basis. Such CLEC-specific data should be considered proprietary and confidential.

⁷¹ *Id.*, at ¶¶87.

⁷² *Id.* at ¶ 60 and n.89

⁷³ Exhibit 2, Virginia No Facilities Case No. PUC010166, Verizon's Response to Staff's First Set, Response to Request No. 9, Attachment 4, Verizon OSP HICAP FLASH message (Redacted), Document No. 2001-00256-OSP, "Unbundled Orders where NO facilities exist," at pages 4-5 (effective May 10, 2001, revised Aug. 24, 2001) ("Exhibit 2, OSP HICAP FLASH") ("The following 'no facilities reasons' will be documented as an Alert in the

rather than reject that order for “lack of facilities.”⁷⁴ Verizon’s policies and practices regarding “no facilities” are unreasonable, discriminatory and violate, *inter alia*, Section 251(c)(3) of the Act. Moreover, Verizon’s “no facilities” policies are highly anti-competitive and impede consumer choice for one of the fastest growing segments of the market – high capacity services. Further, the systematic efforts of Verizon and other ILECs⁷⁵ to evade their unbundling obligations by asserting “lack of facilities” or “no facilities” is discriminatory to the extent they augment, modify or rearrange such electronics for their own retail units (for provisioning to end-user and access service customers) while refusing to provide such electronics to requesting CLECs. There is no justification for this disparate treatment because ILEC services, such as special access circuits and T-1 exchange access circuits, often employ the same types of facilities as do high capacity UNE circuits.

Accordingly, the Commission should adopt an ordering performance measure and associated business rules to measure the frequency with which ILECs provide a response of “no facilities” or “lack of facilities” to CLEC UNE orders. ILEC treatment of UNE orders should be measured against a performance standard of strict parity between the ILEC’s treatment of orders for its special access and exchange access services and facilities at non-TELRIC prices, and UNE orders with respect to the “lack of facilities” performance measure. Further, the Commission should establish a precise definition of “no facilities” in order to define when ILECs may lawfully decline to provision UNEs based on an assertion of “no facilities.” A precise definition of “no facilities” is necessary in order to preclude ILECs from manipulating

Remarks section of your SR. The reasons are as follows: 1. No Repeater Shelf in the CO/Customer Location/RT. 2. No Apparatus/Doubler Case, 3. Need to place Fiber or Multiplexer, 4. Need to turn up shelf on Multiplexer . . .”).

⁷⁴ Exhibit 5 (Redacted), VA SCC Case No. PUC010166, Verizon Virginia, Inc. Responses to Broadslate Networks of Virginia, Inc. First Set of Interrogatories, Response to No. 16, subparts a and b.

performance measures relating to UNEs by excluding CLEC UNE orders that are rejected due to “no facilities.”

A. Some ILECs Reject Upwards of 60% of CLEC UNE Orders for “No Facilities”

The frequency with which the ILECs employ the “lack of facilities” ruse to evade their obligation to provide high capacity UNEs is difficult to ascertain because the ILECs control the relevant information and are loathe to provide this data to requesting CLECs. Nevertheless, recent non-proprietary data provided by Verizon in a proceeding before the Virginia State Corporation Commission indicates that incidence of CLEC UNE orders rejected for “no facilities” has increased dramatically to levels that severely undermine the ability of CLECs to compete in the market for high capacity services.

For example, Verizon’s data shows that it did not reject a single DS-1 UNE loop order in Virginia for no equipment and/or “no facilities” available during the period of January 2001 through April 2001.⁷⁶ However, around May 10, 2001, Verizon implemented new policies and practices, including training practices, relating to its treatment of CLEC orders for DS-1, DS-3, and OC-n loop and transport UNEs.⁷⁷ As a result of Verizon’s implementation of these policies and practices, Broadslate, Alltel, Cavalier and other CLECs experienced an immediate and significant increase in the percentage of DS-1 UNE orders rejected by Verizon in Virginia from

⁷⁵A number of ILECs apparently have comparable or worse “no facilities” policies. *See*, Letter from XO Communications, Inc. to Magalie Roman Salas, CC Docket No. 96-98, filed Aug. 24, 201, p. 7, concerning Qwest and Verizon “no facilities” policies.

⁷⁶Petition of Broadslate Networks of Virginia, Inc. for Declaratory Judgment Interpreting Interconnection Agreement with Verizon Virginia, Inc. (f/k/a Bell Atlantic – Virginia, Inc.) and Directing Verizon to Provision Unbundled Network Elements In Accordance with the Telecommunications Act of 1996, Case No. PUC010166, (Aug. 2, 2001) (“Virginia No Facilities Case No. 010166”), Verizon’s Responses to Interrogatories and Requests for Production of Documents by the Staff of the State Corporation Commission (First Set), Response to Request No. 2, at Attachment One (hereinafter “Exhibit 1, Attachment One”).

⁷⁷Exhibit 2, OSP HICAP FLASH, at pages 1, 5-6.

approximately zero percent to a peak of approximately 60 percent in August 2001.⁷⁸ Alltel, for example, reports that the percentage of DS-1 UNE orders rejected by Verizon has reached 54.8 percent of recent orders.⁷⁹ Other carriers including Focal, Adelphia Business Solutions, Inc., Madison River Communications, LLC, Mpower Communications Corp., and Network Plus, Inc. have also experienced a great increase in the instances in which Verizon refuses to provide broadband loops based on no facilities.⁸⁰ Most importantly, Verizon's own data confirms the experience of these CLECs. Specifically, Verizon's data demonstrates that the number of DS-1 UNE loop orders rejected for "no facilities" increased dramatically starting in May 2001 and reached a peak in August 2001 when Verizon-Virginia rejected 63 DS-1 UNE loop orders out of a total of 105 orders for a rejection rate of 60%.⁸¹

In light of the dramatic increase in the rejection rate for UNE orders, it is self-evident that Verizon implemented new practices and procedures relating to DS-1, DS-3 loops and other UNEs in May 2001 that resulted in a dramatic increase in the rejection rate for UNE orders. In fact, the increased rejection rate is a direct result of "new and revised Process Standards" issued by Verizon to its Outside Plant Engineering Group on May 10, 2001, in an "OSP HICAP FLASH" message.⁸² This message provides that CLEC orders for high capacity loop and transport UNEs should henceforth be rejected by Verizon's provisioning personnel for any of the following six reasons: No Repeater Shelf in the CO/Customer Location/RT, No Apparatus/Doubler Case, Need to place Fiber or Multiplexer, No Riser Cable or buried drop

⁷⁸See, Exhibit 1, Attachment One.

⁷⁹*Petition of 360 Communications Company of Charlottesville d/b/a Alltel For Injunction Against Verizon Virginia, Inc. (f/k/a Bell Atlantic – Virginia, Inc.) for Violations of Interconnection Agreement*, Case No. PUC010176, at 3 (Aug. 16, 2001).

⁸⁰Exhibit 3, Letter to Dorothy Attwood, Chief, Common Carrier Bureau, FCC, dated September 28, 2001.

⁸¹Exhibit 1, Attachment One.

⁸²Exhibit 2, OSP HICAP FLASH, at 1, 5-6.

wire, and Copper cable defective no spares available – would need to place new cable (fiber/copper).⁸³

In addition to the OSP HICAP FLASH message provided to its provisioning personnel, Verizon released a letter on July 24, 2001 (attached hereto as Exhibit 4) to CLECs purporting to address concerns expressed by a “number of carriers” that Verizon had changed its policies regarding Verizon’s provisioning of DS-1 and DS-3 UNEs. In its July 24, 2001 letter, Verizon maintains that it “will provide unbundled DS1 and DS3 facilities (loops or IOF) to requesting CLECs where existing facilities are currently *available*.”⁸⁴ Verizon announces a new policy in its letter, however, stating that it has no legal obligation to augment, modify or reconfigure the DS1/DS3 electronics attached to available wire or fiber facilities to fill a CLEC order for an unbundled DS1/DS3 network element.⁸⁵ Further, Verizon states in the letter, that it “will reject an order for an unbundled DS1/DS3 network element where (i) *it does not have the common equipment in the central office, at the end user’s location, or outside plant facility needed to provide a DS1/DS3 network element, or (ii) there is no available wire or fiber facility between the central office and the end user.*”⁸⁶ Verizon has elaborated on this policy, stating that it will not deploy new multiplexers, reconfigure a multiplexer, or deploy a new apparatus case to fill a CLEC UNE order.⁸⁷

Further, Verizon admits that beginning in “late Spring 2001, Verizon undertook efforts to re-educate its provisioning personnel . . . with respect to the provisioning of DS-1 and DS-3

⁸³ *Id.*, at pages 5-6.

⁸⁴ Exhibit 4, Verizon Letter, “DS1 and DS3 Unbundled Network Elements Policy,” dated July 24, 2001, at 1 (“Exhibit 4, Verizon July 24, 2001 Letter”) (emphasis added).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Exhibit 7, Answer and Affirmative Defenses of Verizon Virginia, Inc. to Petition of Broadslate Networks of Virginia, Inc. For Declaratory Judgment, Case No. PUC010166, at 4 (“Verizon’s Answer”); Exhibit 2, OSP HICAP FLASH, at 1, 5-6.

UNE loops.”⁸⁸ Verizon states that after its provisioning personnel “were properly educated” last spring, “those personnel began more consistently to follow” Verizon’s policy, which caused the increase in the number of DS-1 UNE service requests rejected for no facilities to rapidly increase from zero, during January through April 2001, to approximately 31% in June 2001, 47.5% in July 2001, and a peak of 60% in August 2001.⁸⁹ While Verizon attempts to characterize its action as a mere “reiteration”⁹⁰ of its policy, its actions have resulted in a significant decline in the availability to CLECs of DS-1 and DS-3 UNEs that is properly viewed as a dramatic and unlawful shift in Verizon’s UNE provisioning and training policies.

Verizon policy toward CLEC UNE orders is clearly discriminatory because if high capacity facilities are need to fill an order received by Verizon for special access, T-1 exchange access or other services and facilities at non-TELRIC prices, then, generally, Verizon will modify, reconfigure or augment the electronics to provide the facility. In fact, Verizon states that to fill such orders it “generally will undertake to construct the facilities required to provide service at tariffed rates (including any special construction rates).”⁹¹ Further, Verizon will modify, reconfigure or augment the electronics to provide the facility if the CLEC orders the service at much higher prices through the special access tariffs or other Verizon tariffs.⁹² Additionally, Verizon admits that with respect to facilities ordered pursuant to Verizon’s retail tariffs in Virginia:

Verizon VA does not reject orders for Flexpath T-1 exchange access lines/trunks/transport facilities [and/or T-1 Special Access facilities] due to a lack of facilities. If Verizon determines that

⁸⁸ Exhibit 6, VA SCC Case No. PUC010166, Verizon’s Responses to Staff’s Second Set, Response to Request No. 13.

⁸⁹ *Id.*

⁹⁰ Exhibit 7, Verizon’s Answer, at 3; Exhibit 6, Verizon’s Responses to Staff’s Second Set, Response to Request No. 13.

⁹¹ Exhibit 7, Verizon Answer, at ¶ 21.

⁹² *Id.*

there are no facilities available for these orders, they will build the facilities and complete the order.⁹³

B. Verizon’s “No Facilities” Position Is Based Upon An Erroneous Reading of the Eighth Circuit’s Decision Regarding the Commission’s Superior Network Rules

In support of their position on “no facilities,” Verizon and other ILECs argue that requiring ILECs to augment, modify, or rearrange electronics to fill UNE orders is inconsistent with the decision of the United States Court of Appeals for the Eighth Circuit that “CLECs may not force an ILEC to construct a superior quality network on their behalf.”⁹⁴ Verizon misconstrues the Eighth Circuit’s holding. In the decision relied upon by the ILECs, the Eighth Circuit struck down Commission superior quality rules 51.305(a)(4) and 51.311(c)⁹⁵ that required ILECs upon request to provide UNEs and access to UNEs that is “superior in quality to” that which the ILEC provides to itself.⁹⁶ The ILECs, however, conveniently ignore that the Eighth Circuit specifically held:

Although we strike down the Commission’s rules requiring [ILECs] to alter substantially their networks in order to provide superior quality interconnection and unbundled access, we endorse the Commission’s statement that ‘the obligations imposed by sections 251(c)(2) and 251(c)(3) *include modifications to [ILEC] facilities* to the extent necessary to accommodate interconnection or access to network elements.’⁹⁷

In short, requiring ILECs to perform minor modifications to their existing networks to fill CLEC UNE orders (such as adding line cards, multiplexers, and other electronics) is entirely consistent with the Eighth Circuit’s holding that “Section 251(c)(3) implicitly requires unbundled access

⁹³ Exhibit 5 (Redacted), Verizon Virginia, Inc. Responses to Broadslate Networks of Virginia, Inc. First Set of Interrogatories, Response to No. 16, subparts a and b.

⁹⁴ Exhibit 7, Verizon’s Answer, at 5.

⁹⁵ 47 C.F.R. § 51.311(c) and 51.305(a)(4) (1998).

⁹⁶ *Iowa Utilities Board v. AT&T*, 120 F.3d 753, 812-813 (8th Cir. 1997), *appealed on other grounds*, 119 S.Ct. 721 (1999).

⁹⁷ *Id.* at 813 (emphasis added).

only to an [ILEC's] existing network – not a yet unbuilt superior one.”⁹⁸ CLECs are not requesting a “superior network” by requesting that the ILEC augment, modify, or rearrange attached electronics. Rather, CLECs are requesting that Verizon provide unbundled access to the same network that ILECs provide to their own special access, T-1, DS-n and other customers. CLECs request that Verizon undertake only the placement, augmentation, modification and replacement of facilities that is routine in the existing network, not that Verizon build a new, superior network.

Moreover, “network” as used by the Supreme Court means the type of technology and facilities that the ILEC actually currently deploys and when and how it ordinarily deploys them in the aggregate. Thus, the existing network includes the types of electronics that ILECs ordinarily attach to loops, even if not attached to particular loops, and it does not constitute provision of a new network to attach routine electronics to a loop. Therefore, whatever application the Eight Circuit’s no “superior network” limitation may have, it does not justify Verizon’s specific policy of declining to provide as loop UNEs what it provides to its own customers as part of its existing network.

C. The ILECs Have Not Established a Lawful Basis for Their “No Facilities” Policy Under Commission Orders

In the few instances where an ILEC has attempted to articulate a lawful basis for its “no facilities” policy, it has grossly mischaracterized and otherwise misapplied the *Local Competition Order*, and the *UNE Remand Order*.⁹⁹ For example, Verizon contends that the Commission’s rules requiring line conditioning do not require it to install electronics and other equipment necessary to provide DS1 and DS3 loop UNEs because line conditioning involves

⁹⁸ *Id.*

removal of equipment, whereas CLECs are requesting that Verizon add equipment, including electronics. Regardless, of whether the current line conditioning rules invalidate Verizon's "no facilities" policy, which they do, there is absolutely no meaningful legal distinction under Section 251(c)(3) between ILECs removing or adding equipment. Significantly, there is no language in the Act that would so dramatically alter ILEC obligations to provide UNEs depending on whether the ILEC is adding or removing equipment. The point is that ILECs must affirmatively take the steps necessary to provide for CLECs as UNEs the same functionality that they use for their own special access, exchange access, T-1 and other customers whether these affirmative steps involve additions to, or removal of equipment from, the loop. In fact, the Commission underscored in the *Local Competition Order* that Verizon was required to provide requesting CLECs with unbundled DS-1 capable loops, including attached electronics.

Specifically, the Commission concluded:

The local loop element should be defined as a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the network interface device at the customer premises. This definition includes, for example, two-wire and four-wire analog voice-grade loops, and two-wire and four-wire loops that are *conditioned* to transmit the digital signals needed to provide services such as ISDN, ADSL, HDSL, and *DS-1-level signals*.¹⁰⁰

In its *Local Competition Order*, the Commission then addressed the requirement for incumbent LECs, such as Verizon to take affirmative steps to condition existing loop facilities to carry such digital signals:

Our definition of loops will in some instances require the incumbent LEC to take affirmative steps to condition existing loop facilities to enable requesting carriers to provide services not currently provided over such facilities. For example, if a competitor seeks to provide a digital loop functionality, such as

⁹⁹ *UNE Remand Order*, at ¶ 167.

¹⁰⁰ *Local Competition Order*, at ¶ 380 (emphasis added).

ADSL, and the loop is not currently conditioned to carry digital signals, but it is technically feasible to condition the facility, the incumbent LEC must condition the loop to permit the transmission of digital signals. Thus, we reject Bell South's position that requesting carriers "take the LEC networks as they find them" with respect to unbundled network elements. As discussed above, *some modification of the incumbent LEC facilities, such as loop conditioning, is encompassed within the duty imposed by section 251(c)(3).*¹⁰¹

The Commission confirmed the ILEC's obligation to condition facilities, including attaching the needed electronics, once again in the *UNE Remand Order*:

In order to secure access to the loop's full functions and capabilities, we require the incumbent LECs to condition loops. This broad approach accords with section 3(29) of the Act, which defines network elements to include their "features, functions, and capabilities."¹⁰²

Thus, Verizon's obligations under Section 251(c)(3) are not defined by whether Verizon technicians remove equipment from, or add it to, the loop. Further, the loop conditioning rules represent a recognition by the Commission that ILECs have an affirmative obligation to take steps to provide as network elements the same functionality that they provide to their own retail subscribers.

D. The Commission May Require ILECs to Modify And Attach Electronics UNEs

For the reasons explained above, Verizon has not provided any lawful basis for its cramped view of its unbundling obligations. More than that, however, the Commission may, pursuant to Section 251(c)(3) require ILECs to attach electronics and take other affirmative steps, such as reconfiguration and installation of multiplexers and equipment cases, in order to provide DS1 and DS3 loops and other UNEs. Section 251(c)(3) requires that ILECs provide

¹⁰¹ *Id.*, at ¶ 382.

¹⁰² *UNE Remand Order*, at ¶ 167.

UNEs on “conditions that are just and reasonable.” In the recent *Collocation Remand Order*, the Commission found that the comparable provision in Section 251(c)(6) provided the Commission substantial authority to impose conditions on ILECs provision of collocation, including provision of cross-connection between collocated CLECs even though this was not directly “necessary” for interconnection or access to UNEs.¹⁰³ Similarly, the Commission may require ILECs to perform routine enhancements to loops, such as attachment of electronics, as a reasonable condition of provision of loops and other UNEs. Indeed, the requirement under Section 251(c)(3) that ILECs provide UNEs on reasonable terms and conditions provides a deep font of authority for the Commission to assure that ILECs do not unreasonably restrict the availability of UNEs in ways that effectively prevent CLECs from providing competitive services.

Section 251(c)(3) also requires that ILECs provide UNEs on nondiscriminatory terms and conditions. Simply stated, it constitutes a fundamental discrimination against CLECs for ILECs to routinely provide network capabilities to their own special access, exchange access, T-1, DS-n and other customers while refusing to do so for CLECs as UNEs. Moreover, as explained below, this significantly harms CLECs, as well as thwarting the pro-competitive goals of the Act. CLECs will not be able effectively to compete in the local marketplace if they are not able to provide service to customers on comparable terms as the ILEC because the ILEC will not provide as UNEs the same functionality that it provides to its own retail customers. Accordingly, the Commission may under Section 251(c)(3) require ILECs to provide enhancements to loops that they provide to their own special access, exchange access, T-1, DS-n and other customers in order to assure non-discriminatory provision of UNEs.

¹⁰³ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 16 FCC Rcd 15435 (2001) ¶¶ 80-84, (“*Collocation Remand Order*”).

E. The Commission Should Adopt Performance Measures Sufficient To Preclude ILECs From Evading Their UNE Obligations And Discriminating Against CLECs

The “no facilities” policy of Verizon and other ILECs appears to reflect a growing trend among ILECs to escape or unreasonably limit their obligation to modify existing loops as part of their provision of unbundled access to loops even when they perform the same modifications for their own special access, exchange access, T-1, DS-n and other customers (at non-TELRIC prices).¹⁰⁴ In order to quash this unreasonable and discriminatory practice in the future, the Commission should declare that ILECs must provide CLECs with unbundled broadband loops and transport in all circumstances in which they would provide the same functionality to their own special access, exchange access, T-1, DS-n and other customers. In addition, the Commission should adopt a performance measure and business rules to ensure strict parity between the treatment of UNE orders and special access, exchange access, DS-n, and T-1 orders regarding the lack of facilities.

Further, the Commission should establish a precise definition of “no facilities” in order to define when ILECs may lawfully decline to provision UNEs based on an assertion of “no facilities.” A precise definition of “no facilities” is necessary in order to preclude ILECs from manipulating performance measures relating to UNEs by excluding CLEC UNE orders that are rejected due to the vague assertion of “no facilities” from the measurement. For example, at present, Verizon often contacts CLECs and requests that they cancel UNE orders that are denied for “no facilities” and suggests that CLEC resubmit the orders as orders for special access circuits or other functionally equivalent services. Under this practice, Verizon is able to avoid

¹⁰⁴ A number of ILECs apparently have comparable or worse “no facilities” policies. See Letter from XO Communications, Inc. to Magalie Roman Salas, CC Docket No. 96-98, filed August 24, 2001, p. 7, concerning Qwest and Verizon “no facilities” policies.

providing a Firm Order Confirmation (“FOC”) (*i.e.*, projected provisioning deadline) for the original order regardless as to whether Verizon has a lawful basis for refusing the order in the first instance. By excluding orders rejected for “no facilities,” ILECs may be able to reject sixty (60) percent or more of all CLEC DS-1 UNE or other UNE orders, while misleadingly demonstrating strong performance regarding a FOC Timeliness performance measure that measures “the amount of time it takes them to send a notice confirming whether an order placed by a [CLEC] has been accepted and indicating the date on which the requested service will be provisioned.”¹⁰⁵ Absent a precise definition of “no facilities,” any performance measure that purports to measure the “percentage of [CLEC] orders that were provisioned on or before the scheduled due date (Percentage On Time Performance)”¹⁰⁶ would be also be misleading because an ILEC, such as Verizon, could reject upwards of sixty (60) percent of CLEC UNE orders and still show strong Percentage On Time Performance by wholly excluding UNE orders rejected because the ILEC refuses to augment, modify, or rearrange the attached electronics. The most appropriate definition of “no facilities” would preclude an ILEC from rejecting a CLEC order because it was necessary to augment, modify, or rearrange the attached electronics.

ILEC practices regarding “no facilities” are best captured in an ordering performance metric that measures actual ILEC performance against a performance standard of strict parity between ILEC provisioning of UNEs and ILEC provisioning of equivalent special access, exchange access, T-1, DS-n and other services and facilities provided by ILECs at non-TELRIC rates to customers. A strict parity measurement would require ILECs to collect data regarding their rejection rate due to no facilities for orders for these equivalent facilities and UNE orders and compare two rejection rates.

¹⁰⁵ *UNE Metrics NPRM*, at ¶ 39.

IX. CONCLUSION

For the foregoing reasons, the Commission should adopt national performance measurements and standards for unbundled network elements and interstate special access circuits as proposed herein.

Respectfully submitted,

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¹⁰⁶ *Id.*, at ¶ 48.