

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

In the Matter of)
)
Performance Measurements and Standards for) CC Docket No. 01-318
Unbundled Network Elements and Interconnection)
)

**COMMENTS OF BUSINESS TELECOM, INC.,
CAVALIER TELEPHONE, LLC, DSLnet COMMUNICATIONS, L.L.C.,
NETWORK TELEPHONE CO., AND RCN TELECOM SERVICES, INC.**

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Summary

Notwithstanding the unbundling obligations placed on ILECs under the Communications Act of 1934, as amended (“Act”) and the FCC’s rules, CLECs have experienced significant problems with ILECs’ implementation of these obligations. ILECs have hindered CLECs’ ability to incorporate UNEs into their local service offerings by providing untimely and inferior quality preordering, ordering, installation, and repair services for UNEs and by refusing to comply with their statutory and regulatory obligations. Because CLECs must rely on ILECs for the bottleneck facilities necessary to reach end users, these problems seriously hinder CLECs’ ability to provide competitive local telecommunications services. Adopting federal performance metrics and remedies should therefore increase ILECs’ incentives to meet their obligations and promote competition in local markets.

It is critically important that federal metrics be comprehensive, rigorous, and meaningful. The FCC should therefore require metrics for UNEs combined with a strong program of random and “for cause” audits paid for by ILECs and streamlined, self-effectuating remedies, including both liquidated damages paid to CLECs and forfeitures paid to the US Treasury. To ensure the effectiveness of the metrics, the baseline forfeitures should be set at the maximum statutory amount and the report of a metric violation should itself constitute a Notice of Apparent Liability to which an ILEC must respond. Furthermore, complaints based on violations of the performance metrics should automatically qualify for “rocket docket” status and an ILEC’s report of a missed metric should constitute *prima facie* evidence of a rule violation.

Performance metrics must also be structured to ensure ILECs do not satisfy the metrics by manipulating their data in an attempt to improve performance results. For instance, ILECs could mask poor provisioning performance by inappropriately excluding certain orders from their reports. The forced purchase of special access services instead of UNEs is an increasingly contentious issue that is severely delaying turn-up of CLEC service to new customers and/or increasing CLECs’ costs, sometimes by more than seven times the cost of the UNE to which the

CLEC is entitled but does not always receive. For example, some ILECs have systematically failed to abide by the Act, the FCC'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. Others have refused to provide CLECs the cost-based transport to which they are entitled to use for interconnection of the parties' networks. In both cases, ILECs are effectively forcing CLECs to purchase more expensive special access services. It is therefore critical that the FCC performance metrics address these issues and subject the ILECs to penalties for failing to meet their obligations.

Another critical feature of metrics will be how they are changed and refined over time. Once initial federal baseline metrics are established, FCC rules should require parties to negotiate revised or new metrics for UNEs pursuant to the Section 252 negotiation/arbitration process. Because they require an inordinate amount of time and money to participate in, the FCC should not require workshops, but should revisit the federal performance metrics and remedies periodically, in conjunction with its triennial UNE reviews. State commissions should also be permitted to supplement the federal metrics in ways that do not conflict with, or undermine, federal rules. Many states have made great strides in developing and/or adopting performance metrics and remedies and the FCC should not preempt their pioneering efforts to implement local competition using such means.

The industry and regulators alike need performance metrics in order to determine whether ILECs are meeting their unbundling obligations. Similarly, CLECs and regulators need self-effectuating remedies sufficient to induce ILEC compliance with their unbundling obligations. Together, performance metrics and remedies will save the industry and regulators thousands of hours and millions of dollars by freeing up resources that are currently devoted to pursuing disputes and litigation rather than to opening local markets to competition for the benefit of consumers. The FCC should therefore move swiftly to adopt federal baseline performance metrics and remedies.

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Business Telecom, Inc. (“BTI”), Cavalier Telephone, LLC (“Cavalier”), DSLnet Communications, L.L.C. (“DSLnet”), Network Telephone Co. (“Network Telephone”), and RCN Telecom Services, Inc. (“RCN”) (together, “Joint CLECs”), submit these comments in response to the *NPRM*.¹ In these Comments, Joint CLECs urge the FCC to adopt performance measurements, performance standards, and reporting requirements (together, “performance metrics”) and self-effectuating remedies for ILEC provisioning of unbundled network elements (“UNEs”) that will facilitate and promote better implementation of the FCC’s unbundling rules.

BTI is a facilities-based integrated communications provider offering voice and data communications services to primarily small and medium-sized business customers in the Southeast. BTI is based in North Carolina and was founded in 1983.

Headquartered in Richmond, Virginia, Cavalier is a facilities-based competitive local exchange carrier (“CLEC”). Cavalier offers full-service telecommunications products in Delaware, the District of Columbia, Maryland, New Jersey, Pennsylvania, and Virginia.

Based in New Haven, Connecticut, DSLnet is a high-speed data communications and Internet access provider which uses digital subscriber line (“DSL”) technology to provide high-speed Internet access solutions to small- and medium-sized businesses throughout the United States. DSLnet was established in 1998 and has installed equipment in over 375 cities.

¹ *In the Matter of 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) (“*NPRM*”).

Network Telephone is a competitive local exchange carrier that provides telecommunications services primarily to small- and medium-sized businesses. Network Telephone operates in the Southeast region and specializes in the provision of high-speed DSL services. Network Telephone also offers local and long-distance telephone services.

RCN is the largest facilities-based competitive provider of bundled phone, cable television and high-speed Internet services to the most densely populated markets in the United States. RCN has more than one million customer connections and provides service in the Boston, New York, Philadelphia, Chicago, San Francisco and Washington, D.C. metropolitan markets. RCN offers telecommunications services primarily in the Northeast and Mid-Atlantic regions. RCN is based in Princeton, New Jersey.

I. THE FCC SHOULD ADOPT FEDERAL METRICS AND PENALTIES FOR ILEC PROVISIONING OF UNES (NPRM SECTION III)

Notwithstanding the unbundling obligations placed on ILECs under the Communications Act of 1934, as amended (“Act”) and the FCC’s rules, CLECs have experienced significant problems with ILECs’ implementation of these obligations. ILECs have hindered CLECs’ ability to incorporate UNEs into their local service offerings by providing untimely and inferior quality preordering, ordering, installation, and repair services for UNEs. Because CLECs must rely on ILECs for the bottleneck facilities necessary to reach end users, these problems seriously hinder CLECs’ ability to provide competitive local telecommunications services. The industry and regulators alike need performance metrics in order to determine whether ILECs are meeting their unbundling obligations. Similarly, CLECs and regulators need self-effectuating remedies sufficient to induce ILEC compliance with their unbundling obligations. Although many states have adopted, or are considering, performance metrics and remedies, a federal baseline is needed to fill gaps where state commissions do not act. Together, state and federal performance metrics and remedies will save the industry and regulators thousands of hours and millions of dollars by freeing up resources that are currently devoted to pursuing disputes and litigation rather than to opening local markets to competition for the benefit of consumers.

The performance metrics established by the FCC in this proceeding should become a baseline that will apply in every state. States should be permitted to supplement these metrics in ways that do not conflict with, or undermine, federal metrics. However, it is critically important that metrics be comprehensive, rigorous, and meaningful. For instance, the FCC should require metrics for UNEs on a Metropolitan Statistical Area (“MSA”) basis combined with a strong program of random and “for cause” audits paid for by ILECs. Because the federal performance metrics for UNEs may be the only operative standards in some states, weak federal performance metrics would be worse than none at all.

Nor will performance metrics be meaningful without an associated program of self-effectuating remedies, including both liquidated damages paid to CLECs and forfeitures paid to the US Treasury. Pursuant to Section 251(c)(3), the FCC should determine that the terms and conditions under which UNEs are offered include an enforceable offer to pay liquidated damages for failure to meet federal performance metrics. ILECs should be required to negotiate the amount of liquidated damages for failure to meet UNE performance metrics pursuant to the state-supervised Section 252 negotiation/arbitration process.

The FCC should also establish a streamlined process for forfeitures for ILECs’ failure to meet performance metrics. An ILEC report to the FCC of a failure to meet a performance metric should constitute a notice of apparent liability for forfeiture that the ILEC must pay unless it can justify within 15 days why it should not pay.

A critical feature of metrics will be how they are changed and refined over time. Once initial federal baseline metrics are established, FCC rules should require parties to negotiate revised or new metrics for UNEs pursuant to the Section 252 negotiation/arbitration process. Because they require an inordinate amount of time and money to participate in, the FCC should not require workshops, but should revisit the federal performance metrics and remedies periodically, in conjunction with its triennial UNE reviews.

II. ENFORCEMENT MECHANISMS ARE A CRITICAL COMPONENT OF NATIONAL PERFORMANCE METRICS (NPRM SECTION III.C)

In order to promote the goals of the Telecommunications Act of 1996 (“1996 Act”), and specifically in order to achieve the local service competition that Congress intended, the FCC should adopt performance metrics and enforcement mechanisms to deter poor performance and discriminatory behavior in the ILECs’ provision of UNEs to CLECs. The enforcement scheme must include penalties of a sufficient magnitude to ensure ILEC compliance. 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.

The need for strong enforcement mechanisms is demonstrated by the history of ILEC substandard performance exposed during Section 271 and merger proceedings at the state and federal level. For example, ILECs subject to Performance Assurance Plans (“PAPs”) adopted during the Section 271 process continue to provide billing credits or payments to CLECs for failures to meet the PAPs, rather than improving service.² These ILECs clearly view noncompliance as a “cost of doing business.” Similarly, ILECs have been required to pay fines under the FCC’s merger requirements, yet the payment of such fines has not changed these ILECs’ overall performance.³ Thus, it is clear that a strong enforcement component is necessary

² 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).

³ 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). Most recently, the FCC issued a Notice of

in order to discourage discriminatory performance and to promote ILEC compliance with the UNE performance metrics. The adoption of enforcement mechanisms will assist the FCC to ensure that UNEs are provided in a just, reasonable, and nondiscriminatory manner. Joint CLECs specific recommendations are set forth below.

A. FCC Forfeiture Penalties

Section 503(b) of the Act provides the FCC authority to impose forfeiture penalties for willful or repeated violations of its rules. This authority is one of the best tools to deter ILEC discriminatory performance and noncompliance with performance metrics, so long as the specter of forfeiture is genuine and immediate, and the amounts cannot simply be absorbed by the ILECs as a “cost of doing business.”

1. The Baseline Forfeiture Should Be the Maximum Statutory Amount

The FCC 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 metrics and/or failure to provide parity of performance.⁴ 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 to CLECs. Both the FCC and Congress have recognized 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

Apparent Liability for a six million dollar fine on January 16, 2002 regarding 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).

⁴ 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 continuing violation, with a maximum of \$1,200,000 for any single act or failure to act. See 47 C.F.R. § 1.80(b)(5)(iii).

“cost of doing business.”⁵ Maximum penalties will maximize the deterrent effect of the performance metrics.

In the *Forfeiture Guidelines Proceeding*, the FCC established general guidelines for Section 503 forfeitures.⁶ There, the FCC 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.⁷ In light of the history of ILEC non-compliance in the context of Section 271 proceedings and merger proceedings, many, if not all of these criteria suggest maximum forfeitures in the context of violations of the UNE performance metrics. The list of upward adjustment criteria developed in the forfeiture guidelines closely parallels the reasons for which the ILECs will provide discriminatorily poor service to CLECs, and thus violate the performance metrics. Since most if not all of these criteria will be met in the case of violations of the FCC’s performance metrics, the FCC should set the baseline penalty at the maximum statutory amounts. Maximum penalties would also lessen the likelihood that ILECs would view the penalties as simply a “cost of doing business.”

⁵ See *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd. 17087 at 17100, ¶ 27 (1997) (“*Forfeiture Guidelines*”), recon. denied, 15 FCC Rcd. 303 (1999); H.R. Conf. Rep. 386, at 434 (1989) (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”).

⁶ *Forfeiture Guidelines* at Appendix A.

⁷ In its *Forfeiture Guidelines* proceeding, the FCC warned that 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.” *Forfeiture Guidelines* at ¶ 24. Because Joint CLECs recommend that the FCC set penalties only for Tier 1 ILECs, the FCC should set the baseline forfeiture penalty amounts at the statutory maximum and exercise its discretion, where appropriate, to apply downward adjustment criteria in specific circumstances. For example, if an ILEC has a history of overall compliance and misses only a single metric, the FCC could adjust the maximum penalty downward.

2. *Maximum Forfeiture Penalties Should be Assessed Separately for Each Metric and Each Month*

Having set the maximum statutory penalty amounts available pursuant to section 503(b)(2)(B) as the responses to violations of the performance metric, these penalties should be assessed 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 requirement to meet the metric each month should constitute a single violation subject to the FCC'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, until the ILEC's performance report shows compliance with the standard(s), each month following the non-compliant monthly period should count as a separate violation.)⁸ 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 in each MSA for the reporting month. A separate monthly penalty of \$1,200,000 should be assessed for each violated metric or sub-metric in each MSA, for each separate reporting period in which such non-compliance occurs.

Assessing separate penalties for each MSA metric failure is especially important given the size and geographic breadth of the remaining Regional Bell Operating Companies ("RBOCs"). The recent notice of apparent liability against SBC provides a case in point; although SBC appears to be meeting its obligations to provide CLECs in Texas with shared transport, the Enforcement Bureau has found that it is not meeting that obligation in the former Ameritech states.⁹ Such disparate treatment between states and regions are increasingly common

⁸ 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.

⁹ See *SBC Communications, Inc. Apparent Liability for Forfeiture*, FCC 02-7, File No. EB-01-IH-0030, ¶ 16 (rel. Jan. 18, 2002).

and have frustrated the implementation of new and/or revised federal regulatory and legislative requirements. The RBOCs are not adequately educating their regional personnel to ensure that rule changes are implemented uniformly and consistently and, as a result, may be meeting their unbundling obligations in some states, but not others. Therefore, in addition to forfeitures for missed metrics, where performance reports show that RBOC performance varies significantly from state to state or region to region, the FCC should require the RBOC to provide proof and documentation of its efforts to train and educate regional personnel on implementation of the RBOC's unbundling obligations.

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 close of the next reporting period. As both the FCC and the Congress have reiterated, the goal of deterring ILEC noncompliance would be severely undermined if forfeiture penalty amounts are not sufficiently high.

3. Forfeitures Should Be Self-Executing

A rapid and efficient enforcement mechanism will be critical to compel ILEC compliance with the performance metrics. The ILECs will be far less likely to comply 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 substandard and/or discriminatory service. For example, upon an ILEC's reporting of non-compliance for any metric or sub-metric for a particular month, the reporting of the violation(s) itself should be considered a notice of apparent liability for forfeiture under Section 503. Specifically, as part of the performance metrics rules, the FCC should create a standard reporting form that ILECs must use to report their performance. To the extent that the ILEC reports a violation on this form, the form itself would constitute the written notice of apparent liability, automatically triggering the procedural requirements under Section 1.80 of the

FCC's rules.¹⁰ The ILEC would have 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. The FCC also should establish rules delineating and limiting the types of specific, narrow defenses available to ILECs that violate performance metrics rules.¹¹

B. The FCC Should Adopt Rules for Self-Executing Liquidated Damages

As a result of ILEC discriminatory behavior and inadequate performance in provisioning UNEs to CLECs, CLECs suffer substantial damages including lost profits, out-of-pocket expenses, and intangible damages such as loss of reputation. The billing credits for interruptions in service that ILECs have, in some instances, been required to provide as a result of their substandard performance are completely inadequate to compensate CLECs for such damages or encourage future, proficient performance. Furthermore, because the end user views the CLEC as the service provider, a failure by the ILEC is attributed to the CLEC, and billing credits do nothing to compensate CLECs for the potential damage to their reputation based on these failures. To address these problems, the FCC should establish self-executing remedies that require ILECs to compensate CLECs for such damages, thereby deterring continued ILEC non-compliance.

The Commission could accomplish this in part by requiring that ILECs include liquidated damages, upon a CLEC's request, in interconnection agreements. Liquidated damages would compensate CLECs for losses caused by ILEC performance failures, including for intangible damages to the CLEC's reputation. Parties negotiating commercial contracts typically include liquidated damages in cases where the amount of damages caused by breach of contract are difficult to ascertain. Further, the FCC has recognized that liquidated damages clauses may be appropriate in interconnection agreements:

¹⁰ 47 C.F.R. § 1.80.

¹¹ For example, so long as the ILEC continues to treat CLECs at parity with its own customers and operations, it may be appropriate to excuse ILEC compliance with specific performance targets during a force majeure event.

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.¹²

Although 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, they are not widespread in interconnection agreements. The FCC should therefore establish by rule that Tier 1 ILECs must negotiate liquidated damages provisions with CLECs as part of their interconnection agreements. Pursuant to Section 251(c)(3) of the Act, ILECs are required to provide unbundled network elements on rates, terms and conditions that are just, reasonable and nondiscriminatory.¹³ Accordingly, the FCC should find that it would be unjust and unreasonable for the ILECs not to negotiate liquidated damages for the ILECs' provision of substandard and/or discriminatory service in violation of the UNE performance metrics. Without such a rule, ILECs will not voluntarily negotiate liquidated damages provisions.

Where state commissions have required ILECs to include liquidated damages in interconnection agreements, such provisions have been upheld by reviewing courts. For example, the United States District Court for the District of Colorado determined that the Colorado Public Utilities Commission ("COPUC") had authority under the Act to require that U S West include liquidated damages and penalty provisions in its interconnection agreements with AT&T and MCI. 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."¹⁴ Similarly, the United States District Court for the Eastern District of Michigan upheld benchmarks and liquidated damages/penalties in an arbitrated interconnection

¹² See *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, FCC No. 96-489, n. 863 (rel. Dec. 24, 1996) ("*Non-Accounting Safeguards Order*").

¹³ 47 U.S.C. § 251(c)(3).

¹⁴ *U S West Communications, Inc. v. Hix*, 57 F.Supp.2d 1112, 1121-1122 (D. Colo. 1999).

agreement between Ameritech and MCI, stating that such penalties do not violate the Act and are enforceable.¹⁵ In upholding the liquidated damages provision in TCG's interconnection agreement with U S West, the United States District Court for the District of Oregon 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).¹⁶

Given the difficulties that CLECs have encountered in attempting to include negotiated liquidated damages provisions in interconnection agreements, and the fact that ILECs appeal the imposition of liquidated damages provisions as *ultra vires*,¹⁷ the FCC should establish by rule

¹⁵ *MCI Telecommunications Corp. v. Michigan Bell Telephone Company d/b/a Ameritech Michigan, Inc.*, 79 F.Supp.2d 768, 775-76 (E.D. Mich. 1999). 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).

¹⁶ *US West Communications, Inc. v. TCG Oregon*, 31 F.Supp.2d 828, 837-838 (D. Or. 1998).

¹⁷ For example, 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 has the authority to require the inclusion of liquidated damages under the Act even if state law would preclude the Commission from enforcing that provision. *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 112 F.Supp.2d 1286, 1297-1298 (N.D. Fla. 2000). The Florida Commission subsequently ruled that,

that Tier 1 ILECs are required to include liquidated damages provisions in interconnection agreements upon a CLEC's request. In order to assist LECs in the negotiating process, the FCC also should consider establishing suggested guidelines for liquidated damages to govern negotiations between CLECs and ILECs to establish liquidated damages provisions in interconnection agreements.

C. Section 208 Complaints Regarding ILEC Non-Compliance With Performance Metrics Should Be Automatically Processed Under the "Rocket Docket"

The FCC should apply its streamlined "rocket docket" process and procedural rules to govern Section 208 complaints regarding ILEC non-compliance with UNE performance metrics. If the rules do not provide for a speedy process, the ILECs will have opportunity to create delays and exploit the formal complaint process, with the knowledge that with every day the injured CLEC will lose additional significant commercial opportunities as a result of the ILEC's poor service quality and/or discriminatory treatment. By definition, a Tier 1 ILEC performance failure should also be considered rebuttable *prima facie* evidence of a violation of the FCC's rules.

III. METRICS SHOULD PRECLUDE ILEC GAMESMANSHIP DESIGNED TO AVOID THEIR SECTION 251(c) AND 252(d) OBLIGATIONS (NPRM SECTION IV.B)

Notwithstanding the clear directives of the Act, FCC rules, and state commission decisions, some ILECs continue to defy their legal obligations to provide UNEs and interconnection. In this section, Joint CLECs address two such instances of ILEC intransigence

notwithstanding the court's decision in *MCI Telecommunications Corp. v. BellSouth*, nothing in the Act or FCC rules requires the Florida Commission to include liquidated damages provisions in interconnection agreements. *Petition by MCImetro 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 30, 2001). Similarly, upon review of the Kentucky Public Service Commission's decision not to adopt performance standards, reporting requirements and penalty provisions proposed by MCI, 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 Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 40 F.Supp. 2d 416, 428 (E.D. Ky. 1999).

and recommend that the FCC adopt a metric and/or business rules to detect and preclude such unlawful actions by ILECs.

A. The FCC Should Stop the ILECs' "No Facilities" Gamesmanship

The FCC has 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" and "what that measure would be."¹⁸ The ILEC "no facilities" response is an increasingly contentious issue that is severely delaying turn-up of CLEC service to new customers and/or increasing CLECs' costs by factors that range to over seven times the cost of the UNE to which the CLEC is entitled but does not always receive. Some ILECs have systematically failed to abide by the Act, the FCC'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. It is therefore critical that the FCC adopt a performance metric to address this issue.

1. The Act and FCC Rules Require ILECs to Make Modifications to Existing Facilities and to Provision UNEs at Parity with their Other Service Analogs

Neither the Act, *Local Competition Order*,¹⁹ or *UNE Remand Order*²⁰ support ILECs' efforts to force CLECs to purchase special access services instead of high capacity loop and transport UNEs through a "no facilities" response to a CLEC's UNE order. The FCC underscored in the *Local Competition Order* that ILECs are required to provide requesting

¹⁸ *NPRM* at ¶ 60 & n. 89.

¹⁹ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*") (subsequent history omitted).

²⁰ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*") (subsequent history omitted).

CLECs with unbundled DS-1 capable loops, including attached electronics. Specifically, the FCC 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*.²¹

In its *Local Competition Order*, the FCC then addressed the requirement for ILECs 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 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)*.²²

The FCC 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."²³

²¹ *Local Competition Order* at ¶ 380 (emphasis added).

²² *Local Competition Order* at ¶ 382.

²³ *UNE Remand Order* at ¶ 167.

Thus, an ILEC's obligations under Section 251(c)(3) are not defined by whether its technicians must remove equipment from, or add it to, the UNE. ILECs have an affirmative obligation to take steps to provide as network elements the same functionality that they provide to their special access, exchange access, and DS-n customers.

In defense of their "no facilities" policy, ILECs generally argue that requiring them to augment, modify, or rearrange electronics to fill loop and transport UNE orders is inconsistent with the decision of the Eighth Circuit Court of Appeals that "CLECs may not force an ILEC to construct a superior quality network on their behalf."²⁴ This interpretation misconstrues the Eighth Circuit's holding. The Eighth Circuit struck down the superior quality rules 51.305(a)(4) and 51.311(c)²⁵ that required ILECs to provide UNEs and access to UNEs "superior in quality to" that which the ILEC provides to itself.²⁶ However, the Eighth Circuit also 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.'²⁷

Requiring ILECs to perform minor modifications to their existing networks to fill CLEC loop and transport 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 only to an [ILEC's] existing network – not a yet unbuilt superior one."²⁸

Moreover, the ILEC "no facilities" policy attributes to the Eighth Circuit a distinction the Court did not make. The phrase "existing network" means the type of technology and facilities

²⁴ *Petition 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 Answer, 5 (hereinafter "**Exhibit 1**").

²⁵ 47 C.F.R. §§ 51.311(c), 51.305(a)(4) (1998).

²⁶ *Iowa Utilities Board v. AT&T*, 120 F.3d 753, 812-813 (8th Cir. 1997) (subsequent history omitted).

²⁷ *Iowa Utilities Board*, 120 F.3d at 813 (emphasis added).

²⁸ *Iowa Utilities Board*, 120 F.3d at 813.

that the ILEC actually currently deploys and when and how it ordinarily deploys them in the aggregate. In order to interpret the holding as the ILECs' do, one would have to alter the Court's phrase to read "existing unbundled network element." As the FCC previously found, the Eighth Circuit did not impose such a limitation on Section 251(c)(3).²⁹ The existing network includes the types of electronics that ILECs ordinarily attach to loops, even if not attached to particular loops,³⁰ and it does not constitute provision of a new network to attach routine electronics to a loop.

Pursuant to Section 251(c)(3), the FCC may require ILECs to attach electronics and take other affirmative steps, such as reconfiguration and installation of multiplexers and equipment cases, in order to provide DS-1 and DS-3 loops and other high capacity loop and transport UNEs. Section 251(c)(3) requires that ILECs provide UNEs on "conditions that are just and reasonable." In the recent *Collocation Remand Order*, the FCC found that the comparable provision in Section 251(c)(6) provided the FCC 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.³¹ Similarly, the FCC 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.

Section 251(c)(3) also requires that ILECs provide UNEs on nondiscriminatory terms and conditions. Simply stated, ILECs discriminate against CLECs when they routinely provide network capabilities to their special access, exchange access, and retail DS-n customers while refusing to do so in the form of UNEs used by CLECs. Accordingly, the Commission may under Section 251(c)(3) require ILECs to provide enhancements to loops that they provide to their

²⁹ *UNE Remand Order* at ¶ 173.

³⁰ *See, e.g., UNE Remand Order* at ¶ 191 (ILECs cannot refuse a CLEC's request for a conditioned loop on the grounds that they themselves are not planning to offer xDSL to that customer).

special access, exchange access, and retail DS-n customers in order to assure non-discriminatory provision of UNEs.

2. *Where Evidence Shows that Some ILECs Reject up to 60% of UNE Orders Due to “No Facilities,” the Record Supports Adoption of a Metric and/or Business Rules to Address This Issue*

A number of CLECs have attempted to ascertain how often ILECs reject UNE orders on the basis of “no facilities” and how often such rejections are justified by a true lack of facilities. Without data concerning ILEC provisioning performance for both high capacity UNEs and their service analogs, however, it is nearly impossible for a single CLEC to determine whether an ILEC’s rejection violates the law. The evidence gathered to date, however, shows that the “no facilities” response is a growing problem that the FCC should address with performance metrics and self-effectuating remedies.

For example, limited Verizon data filed in a Virginia complaint proceeding 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, 2001.³² 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, DS-n and OC-n loop and transport UNEs.³³ As a result of Verizon’s implementation of these policies and practices, Cavalier and other CLECs experienced an immediate and significant increase in the percentage of DS-1 UNE orders rejected by Verizon in Virginia from approximately zero percent to a peak of approximately 60 percent in August, 2001.³⁴ Cavalier has compiled data concerning Verizon’s provision of UNE

³¹ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Fourth Report and Order, FCC 01-204, ¶¶ 80-84 (rel. Aug. 2, 2001) (“*Collocation Remand Order*”).

³² *Petition 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 2**”).

³³ *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), 4-5 (hereinafter “**Exhibit 3**”).

³⁴ See Exhibit 2.

loops from May 31, 2001 to December 12, 2001. This data shows that Verizon rejected approximately 54% of UNE loop requests during this period based on “no facilities.” This information is set forth in **Exhibit 4**. Similarly, Alltel reports that the percentage of DS-1 UNE orders rejected by Verizon has reached 54.8 percent of recent orders.³⁵ Other carriers including Adelphia Business Solutions, Inc., Focal Communications Corporation, 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.³⁶ 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 in Virginia Verizon rejected 63 DS-1 UNE loop orders out of a total of 105 orders for a rejection rate of 60%.³⁷ Most importantly, although Verizon’s own data confirm the experience of individual CLECs, Verizon did not volunteer this information; rather, it was forced to provide the information through a complaint proceeding.

Contrary to its policy for high capacity UNEs, Verizon states that to fill orders for special access, T-1 exchange access or other DS-n facilities at prices that do not comply with Section 252(d), it “generally will undertake to construct the facilities required to provide service at tariffed rates (including any special construction rates).”³⁸ 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.³⁹ Additionally, Verizon admits that with respect to facilities ordered pursuant to Verizon’s 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

³⁵ *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).

³⁶ **Exhibit 5**, Letter to Dorothy Attwood, Chief, Common Carrier Bureau, FCC, dated September 28, 2001.

³⁷ Exhibit 2.

³⁸ Exhibit 1, Verizon Answer, at ¶ 21.

³⁹ Exhibit 1, Verizon’s Answer, at ¶ 21.

of facilities. If Verizon determines that there are no facilities available for these orders, they will build the facilities and complete the order.⁴⁰

Verizon policy toward CLEC UNE orders is clearly discriminatory because if high capacity facilities are needed to fill a service order where the service is not priced at Section 252(d) cost-based rates, then, generally, Verizon will modify, reconfigure or augment the electronics to provide the facility – the same actions it refuses to take to fill a UNE order. The Illinois and Michigan Commissions have rejected as inconsistent with the Act similar discriminatory Ameritech policies under which Ameritech treated retail customers more favorably than CLECs.⁴¹ Accordingly, the FCC should adopt an ordering performance metric and business rules to measure the frequency with which ILECs provide a response of “no facilities” or “lack of facilities” to CLEC UNE orders.

With respect to the “lack of facilities” performance measure, ILEC treatment of UNE orders should be measured against a performance standard of strict parity between UNE orders and orders for the ILEC’s special access, exchange access, and other DS-n/OC-n facilities priced at rates that do not comply with Section 252(d). Further, the FCC 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 “no facilities.” For example, Verizon and Qwest often contact CLECs, request that they cancel UNE orders that are denied for “no facilities,” and suggest that the CLEC resubmit the orders as orders for special access circuits or other functionally equivalent services.⁴² Under this practice, Verizon and Qwest able to avoid providing a Firm Order Confirmation (“FOC”) (*i.e.*, projected provisioning deadline) for the original order regardless as to whether Verizon and Qwest have a lawful basis for refusing the

⁴⁰ **Exhibit 6 (Redacted)**, Verizon Virginia, Inc. Responses to Broadslate Networks of Virginia, Inc. First Set of Interrogatories, Response to No. 16, subparts a and b.

⁴¹ See Exhibit 5 at 5-6.

⁴² See XO Communications’ Ex Parte in CC Docket No. 96-98, Attachment at 9 (filed Aug. 24, 2001).

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 high capacity loop and transport UNE orders, while misleadingly demonstrating strong performance regarding a FOC Timeliness performance measure.⁴³ 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)”⁴⁴ would thus be misleading. The CLECs therefore propose the measurement included in **Exhibit 7** to address these issues.

B. Performance Metrics and Remedies Should Affirm and Monitor ILECs’ Obligation to Provide Cost-Based Transport for Interconnection Facilities

In the *NPRM*, the FCC seeks comment on measurements and standards for, among other things, interconnection trunk facilities.⁴⁵ In order for CLECs and ILECs to exchange traffic between their respective customers, they must interconnect their networks. Under Section 251(c)(2) of the Act, ILECs are required to provide any requesting telecommunications carrier with interconnection that is equal in quality to that provided by the ILEC to itself on rates, terms and conditions that comply with Section 252. The FCC has interpreted the term “interconnection” to mean “the physical linking of two networks for the mutual exchange of traffic.”⁴⁶ It has also adopted “a cost-based methodology for states to follow in setting interconnection . . . rates.”⁴⁷ In approving SWBT’s Section 271 application for the State of Texas, the FCC took note that while CLECs may choose any method of technically feasible interconnection, ILEC “provision of interconnection trunking is one common means of

⁴³ FOC Timeliness 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.” *NPRM* at ¶ 39.

⁴⁴ *NPRM* at ¶ 48.

⁴⁵ See, e.g., *NPRM* at ¶¶ 1, 27, 33, 51.

⁴⁶ *Local Competition Order* at ¶ 176.

⁴⁷ *Id.* at ¶ 625; see also 47 C.F.R. §§ 51.501, 51.503(b).

interconnection.”⁴⁸ RCN, for instance, utilizes ILEC transport facilities to interconnect its network (*e.g.*, switches, etc.) with the ILEC’s network (tandem switches, end office switches, etc.) under the expectation of paying for such interconnection transport at cost-based UNE dedicated transport rates. Importantly, RCN cannot turn up a market to begin serving customers, or augment its network or alleviate a blocking situation in an existing market, unless the ILEC timely provides quality interconnection facilities.

Although the Act and FCC rules entitle CLECs to purchase cost-based facilities for interconnection purposes, like the “no facilities” excuse, some ILECs refuse to sell CLECs cost-based transport, *i.e.*, “UNE Dedicated Transport,” for interconnection trunks. For example, Verizon-Pennsylvania refuses to provide RCN cost-based interconnection facilities and forces RCN to order such facilities from Verizon-Pennsylvania’s interstate special access tariff. Notwithstanding the fact that this position is completely inconsistent with FCC precedent, ILECs such as Verizon-Pennsylvania require CLECs to purchase interconnection facilities at higher rates that do not comply with the cost-based pricing requirements of Section 252(d)(1) and FCC rules. However, given the choice of obtaining a necessary input or foregoing it, some CLECs make a business decision to purchase special access circuits to achieve speed to market. Nonetheless, this forced choice comes at great expense to the CLEC. As RCN and others have shown in comments filed previously in CC Docket 96-98, purchasing special access instead of cost-based transport could increase a competitors’ costs by a factor ranging to over seven, depending on the market at issue.⁴⁹ Thus, by requiring a CLEC to purchase special access instead of cost-based UNE dedicated transport for interconnection facilities, an ILEC can create

⁴⁸ *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Service, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, FCC 00-238, ¶ 64 (rel. June 30, 2000).

⁴⁹ *See, e.g.*, RCN Comments in CC Docket No. 96-98, Declaration of Joseph Kahl, ¶ 18 (filed June 11, 2001) (special access could increase costs by factor of 5); WorldCom Comments in CC Docket No. 96-98, Exhibit G (filed June 11, 2001) (special access could increase costs by up to 397%); AES Communications Comments in CC Docket No. 96-98, Exhibit 1 (filed June 11, 2001) (special access could increase costs by over 700%).

a substantial cost disadvantage for its competitors and discriminate in favor of its own operations.

In order to preclude this form of price discrimination, as part of this proceeding, the FCC should clarify that ILECs may not refuse to provide CLECs cost-based transport, such as UNE dedicated transport, when such transport will be used for interconnection trunks. Absent this clarification, an ILEC could manipulate performance measures relating to UNEs by excluding CLEC UNE dedicated transport orders that are rejected because the ILEC claims that the CLEC must order special access services for interconnection facilities. Indeed, in the most egregious case where an ILEC refuses to provision any UNE dedicated transport for interconnection trunks, any performance metric that purports to measure the “percentage of [CLEC] orders that were provisioned on or before the scheduled due date (Percentage On Time Performance)”⁵⁰ for interconnection trunks would be worthless. It would provide regulators and the industry no evidence to show whether or not an ILEC was meeting its obligations because the ILEC Percentage On Time Performance would not include any interconnection trunks. The FCC should therefore clarify ILECs’ obligations to provide interconnection facilities at cost-based rates to ensure that ILEC provisioning of interconnection trunks is captured by federal performance metrics and self-effectuating remedies.

IV. THE FCC SHOULD ADOPT PROCEDURES TO ENSURE THE INTEGRITY OF PERFORMANCE METRICS REPORTS (*NPRM* SECTION V.A.1)

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

The FCC seeks comments on methods it could adopt to ensure the reliability of all data gathered and stored in connection with national performance metrics.⁵¹ The data generated by any 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

⁵⁰ *NPRM* at ¶ 48.

⁵¹ See *NPRM* at ¶ 73.

file, outside of the control of the reporting ILEC. In order to accomplish this task, the FCC should mandate the type of electronic format for such reports and should require ILECs to submit the reports to the FCC. The Joint CLECs do not recommend that the FCC itself audit data underlying national performance metrics reports,⁵² but underlying data should be filed with the FCC.

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

Establishing a comprehensive auditing program in connection with performance metrics is a necessary tool in ensuring the accuracy and validity of ILEC reported data. 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 FCC or CLECs are not confident that ILEC reported data is accurate, the FCC and carriers alike will waste significant resources analyzing data integrity. 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 FCC's performance metrics. The FCC should establish safeguards from the outset in order to avoid having to do so at a later date. Joint CLECs address additional aspects of the FCC's requests for comment in this section below.

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

The Joint CLECs recommend that the FCC require ILECs to employ independent third party firms to audit ILEC data. The FCC has neither the time nor the resources to conduct audits. Instead, the FCC should require ILECs to employ an independent entity or entities to conduct exhaustive audits. Third party auditing firms should have access to all reported data. The FCC should review the results of the audits and assess penalties where needed.

⁵² See *infra* IV.B.1.

In implementing the most effective and efficient means to audit ILEC-reported data, the Joint CLECs recommend that the FCC utilize “for cause” and random audits. The FCC or a third party firm would initiate a “for cause” audit if there was 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, or by comparing reported data to historical trends or information developed at the state level. “For cause” audits may also be triggered if one ILEC’s performance metrics are clearly out of the range of a similarly situated ILEC.

The FCC 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, 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.

2. The FCC 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 required to maintain national performance metrics reports. 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.⁵³ Section 251(c) of the Act defines the inputs that ILECs are to make available to CLECs.⁵⁴ Since this same section is explicitly limited to ILECs, it follows that ILECs alone should be required to maintain records in connection with any 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

⁵³ See *NPRM* at ¶ 2.

⁵⁴ See 47 U.S.C. § 251.

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.

3. *Posting of Raw Data on Websites is Not an Adequate Substitute for Audits*

The FCC proposed that instead of adopting an auditing system, incumbents could 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.⁵⁵ For a number of reasons, the Joint CLECs 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 1996 Act. Such a system would require a great deal of time and expense to be incurred by parties that can least afford it. 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 FCC should instead implement a comprehensive program of reports and audits in order to promote integrity in the performance metrics reporting system.

V. THE FCC SHOULD NOT UTILIZE IMPLEMENTATION WORKSHOPS (NPRM Section V.A.2)

The FCC seeks comment on whether it should utilize implementation workshops.⁵⁶ The FCC should not attempt to refine performance measures and standards through implementation workshops. Workshops are enormous undertakings that require a great deal of time from the industry and regulators alike. As the FCC notes, implementation workshops are prone to delay and stalemate.⁵⁷ While it may be possible to adopt procedures to mitigate factors that lead to the gradual progression of issues through the implementation workshop process, the FCC must recognize that the CLEC industry is operating on extremely limited resources. The resources of

⁵⁵ See NPRM at ¶ 74.

⁵⁶ See NPRM at ¶ 75.

⁵⁷ See NPRM at ¶ 76.

all interested parties are better focused on ensuring accurate reporting of performance measurements and compliance with performance metrics. Adopting and enforcing performance measurements will allow CLECs and ILECs to refine performance measures and standards through interconnection agreements that are subject to arbitration. By allowing the industry to build on the select group of measurements adopted by the FCC, CLECs will be able to work with ILECs on the performance measures and standards which will have the greatest impact on their business through interconnection negotiations and arbitrations.

VI. THE FCC SHOULD NOT ADOPT A SUNSET PROVISION FOR NATIONAL PERFORMANCE METRICS REPORTING REQUIREMENTS OR FOR AN AUDITING PROGRAM (NPRM Sections V.B & V.C)

In attempting to reduce the regulatory burdens associated with national performance metrics requirements, the FCC asks whether it should establish a sunset date on which the proposed reporting requirements would cease to apply to ILECs.⁵⁸ At this time, the Joint CLECs recommend that the FCC not adopt a sunset period for the proposed reporting requirements under any circumstances. The FCC should not consider a sunset for performance measurements reports until the industry and the FCC have gained more experience with this program. Although metrics and self-effectuating remedies may assist regulators and the industry in detecting and deterring ILECs' violations of their unbundling and interconnection obligations, metrics will not remove the inherent conflict between an ILEC's desire to increase its retail market share and its obligation to provide wholesale services and inputs to its competitors in those retail markets. After the ILECs have demonstrated compliance with the national performance measurement reporting requirements for a sustained period of time and competitors have captured a greater percentage of the nation's local access lines, the FCC 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.

⁵⁸ See NPRM at ¶¶ 78-79.

The FCC should also not premise any sunset date on Section 271 approval or any other threshold.⁵⁹ Conforming to the requirements of Section 271 is only one aspect of the Act's provisions designed to open local exchange markets to competition. Regardless of Section 271 entry, national performance measurements will assist CLECs in competing for market share in the local exchange market that is still primarily dominated by ILECs. Joint CLECs submit that establishing any sunset date at this time would be premature.

Nor should the FCC choose a sunset date for any auditing procedures adopted in this proceeding.⁶⁰ The FCC 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 FCC should consider a sunset for a comprehensive auditing program.

VII. THE FCC SHOULD ADOPT REPORTING PROCEDURES THAT ALLOW FOR EFFECTIVE AND EFFICIENT ANALYSIS BY THE FCC AND THE INDUSTRY (NPRM Section V.B)

In establishing reporting procedures, the FCC should implement reporting requirements that permit meaningful analysis. Performance metrics reports must provide enough data to the FCC 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 FCC should seek to build upon state requirements to minimize disruption to existing state reporting requirements.

A. ILECs Should Report Performance Metrics on An MSA Basis

The FCC 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.⁶¹ Joint CLECs recommend that the FCC

⁵⁹ See *NPRM* at ¶ 79.

⁶⁰ See *NPRM* at ¶ 74.

⁶¹ See *NPRM* at ¶ 83.

require ILECs to report such data on 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 regulators and the industry with sufficient detail to evaluate ILEC performance. ILECs could provide excellent performance in one portion of the state, and terrible 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 regulators 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 FCC asks whether ILECs should provide separate performance metrics reports based on the type of customer served.⁶² Joint CLECs recommend that an ILEC 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. Without these separate reports, it will be very easy for an ILEC to distort the results of its performance metrics. Further, without such separate reports, regulators

⁶² See *NPRM* at ¶ 84.

and the industry will be unable to uncover preferential or discriminatory behavior. In order for regulators and the industry to extract the most value from performance metrics reports, ILECs must provide information that permits comparison of ILEC performance both in the aggregate and with respect to individual competitors.

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

The FCC should require ILECs to provide 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 regulators and the industry to efficiently evaluate the results of the performance metrics reports. Rather than having to compile such reports, regulators 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 performance metrics reports data should be made publicly available on a company-maintained web site and submitted to the FCC. Easy access to performance metrics data will allow the industry to review and analyze the results in a timely fashion. The production of underlying data has numerous advantages. Regulators 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 regulators 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 regulators and the industry can effectively evaluate the performance of ILECs.

The FCC is also seeking comment as to what parties should have access to performance metrics reports.⁶³ All information submitted by ILECs in connection with the performance metrics reports should be made widely available to the industry at large. Performance metrics

⁶³ See *NPRM* at ¶¶ 83, 88.

reports should not be limited to those carriers that obtain services or facilities from the ILEC through and interconnection agreement or Statement of Generally Available Terms. 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 FCC is seeking comment on how frequently reports should be produced and how such reports should be made available.⁶⁴ The Joint CLECs 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 an ILEC is not conforming to the requirements of the Act, regulators and the industry must have the ability to detect and require modifications to that ILEC's behavior as rapidly as possible. Quarterly or yearly reports would allow ILECs that fail to meet the metrics to do so for a substantial period of time without consequence. Permitting such discriminatory behavior to continue for this period of time would undermine the purpose of adopting performance metrics.

VIII. PROPOSED PERFORMANCE METRICS

Joint CLECs urge the FCC to adopt the performance metrics that will be proposed by the competitive industry groups comprised of ALTS and others. Their performance metrics, combined with enforcement mechanisms described in these comments and the metric in Exhibit 7, should help assure that ILECs provide satisfactory provisioning of UNEs and interconnection facilities.

⁶⁴ See *NPRM* at ¶ 87.

IX. CONCLUSION

For the reasons specified herein, Joint CLECs urge the FCC to adopt baseline performance metrics and self-effectuating remedies to govern ILEC provisioning of UNEs.

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CERTIFICATE OF SERVICE

I certify that on this 22nd day of January, 2002, the foregoing Comments of Business Telecom, Inc. (“BTI”), Cavalier Telephone, LLC (“Cavalier”), DSLnet Communications, L.L.C. (“DSLnet”), Network Telephone Co. (“Network Telephone”), and RCN Telecom Services, Inc. (“RCN”) were filed electronically through the Commission’s Electronic Comment Filing System and served via e-mail on the Commission’s copying contractor, Qualex International, at qualexint@aol.com.



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