

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

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

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EXECUTIVE SUMMARY

Competitive local exchange carriers (“CLECs”) and interexchange carriers (“IXCs”) remain captive customers of the incumbent local exchange carriers’ (“ILECs”) interstate special access services. These competitive carriers use the ILECs’ special access services to provide interexchange services and -- due to various limits the Commission has sanctioned and the ILECs have imposed on the use of unbundled network elements -- to compete in local telecommunications markets as well.

Because the ILECs retain pervasive control over the loop and transport network elements that are used to provide special access, market forces cannot ensure that they provide the quality of service that their wholesale customers and end users require. Moreover, ILECs have strong incentives to hinder competitive entry in local markets (and increasingly in the interLATA market), especially since discriminatory performance does not reflect poorly on them. Rather, it directly affects the ILECs’ competitors, making it impossible for those competitors to make firm service commitments to, or to assure quality service for, their end user customers and resulting in lost revenue, diminished reputation, and decreased productivity for both competing carriers and their customers. Thus, it is no wonder that ILEC special access provisioning, repair, and maintenance performance is routinely lacking.

Given these serious performance problems and their impacts in both the local and interexchange markets, it is critical that the Commission take prompt and aggressive corrective action. Under the Commission’s jurisdictional rules, the vast majority of special access services are jurisdictionally interstate. Thus, the Communications Act gives the Commission both the authority and the obligation to establish processes that can detect -- and rectify -- ILEC *interstate* special access performance deficiencies. AT&T urges the Commission to adopt strong

performance measurements and standards, backed up by meaningful consequences for discriminatory and commercially unreasonable performance, so that the incumbents will understand that their inadequate provisioning and support of interstate special access services may not continue.

This does not mean, however, that the Commission must create a cumbersome regime that imposes significant and unnecessary costs on the incumbents or the Commission. To the contrary, today the ILECs generally create and collect performance data regarding such services. And, to the extent any new procedures or capabilities are required to monitor special access service performance or to prepare the associated reports, such work is largely duplicative of the type of work already required to monitor and report on their provisioning of unbundled network elements. In all events, such work would only require a one-time implementation effort, with on-going processing handled by computers. The Commission itself has acknowledged that this is a minimalist form of regulation.

Moreover, the effort required to establish the appropriate performance measurements and standards has been substantially reduced. Special access purchasers of all types have come together and, based on a wide variety of market experience, they have generated an industry consensus document, the Joint Competitive Industry Group Proposal. That proposal clearly identifies the necessary performance measures, measurement calculations, business rules, exceptions, disaggregation levels, and performance standards necessary to establish an effective federal performance assessment and remedy process. The competitive industry proposal in essence identifies the manner in which the special access market would operate if it were competitive. AT&T urges its expeditious adoption.

But that is only half the picture. Incumbent carriers obviously have no incentive to police themselves. Indeed, their every incentive is to forestall local competition and weaken their new (or anticipated) interexchange competitors. Accordingly, when the ILECs' own performance reports demonstrate performance deficiencies, the Commission must respond with compelling reasons for the ILECs to change their behavior promptly. To date, the ILECs have regarded Commission and state imposed fines for unlawful performance as simply a nuisance -- one more cost of doing business. Federally defined compensatory damages to special access purchasers should be sufficient to provide meaningful recompense to the injured competitors. Even more important, however, forfeitures for deficient special access performance must be substantial enough to make the ILECs sit up and take notice.

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2000 Biennial Regulatory Review - Telecommunications Service Quality Reporting Requirements)	CC Docket No. 00-229
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AT&T Corp. Petition to Establish Performance Standards, Reporting Requirements, and Self-Executing Remedies Needed to Ensure Compliance by ILECs with Their Statutory Obligations Regarding Special Access Services)	RM 10329

COMMENTS OF AT&T CORP.

AT&T Corp. (“AT&T”) hereby responds to the above-captioned Notice of Proposed Rulemaking (“*Notice*”),^{1/} which AT&T urges the Commission to translate as promptly as possible into final rules that provide a practical and effective solution to remedy serious, long-

^{1/} See *Performance Measurements and Standards for Interstate Special Access Services*, CC Docket No. 01-321, FCC 01-339 (rel. Nov. 19, 2001) (“*Notice*”).

standing, and competition-affecting deficiencies in the incumbent local exchange carriers' ("ILECs'") provision of interstate special access services.

INTRODUCTION AND OVERVIEW

Both interexchange carriers ("IXCs") and competitive local exchange carriers ("CLECs") have an acute need for special access services provided by ILECs, which retain considerable market power in the provision of such services. The ILECs' performance with regard to these crucial services varies markedly and unpredictably (*e.g.*, ILECs have generally improved provisioning intervals in the past year, even as maintenance and repair performance remains dismal), but -- overall -- poor quality, delays, and discrimination in favor of the ILECs, their affiliates, and their retail customers remains a significant problem. Substandard performance impedes competition, harms consumers, and violates the Communications Act ("Act"). It is therefore imperative that the Commission act promptly to establish the mechanisms necessary to expose and rectify these problems.

In both this proceeding and the companion proceeding on performance standards for unbundled network elements ("UNEs"), the central focus is on the ILECs' local bottleneck facilities. Regardless of the differing nomenclature -- "transport" and "loops" in the case of UNEs versus "channel mileage" and "channel terminations" in the case of special access -- the underlying facilities used to provide these functionalities are generally the same. So is competitors' need to obtain just, reasonable, and nondiscriminatory access to well-maintained and properly functioning facilities.

The ILECs' continuing control of access to facilities used to provide special access, combined with the serious performance deficiencies that IXCs and CLECs routinely encounter, provide ample reason for the Commission to act and to act promptly. The ILECs' ever-

increasing presence in the interLATA market makes the need for corrective measures even more urgent. Thus, AT&T strongly urges the Commission promptly to adopt measurements, performance standards, reporting requirements -- and, in the event of deficiencies, significant penalties -- to better ensure that competitors and their customers receive adequate service quality. In this regard, AT&T strongly supports the proposal formulated by the Joint Competitive Industry Group ("JCIG Proposal"), which, in a remarkable show of unanimity, presents the competitive industry's consensus on the appropriate metrics, business rules, disaggregation levels, and performance standards.

As the Commission is aware, any performance measurement plan must include a meaningful enforcement component to ensure that dominant carriers meet their obligations. Therefore, AT&T recommends that the Commission adopt a two-tiered self-executing remedy plan that, like state UNE performance plans, includes both carrier-to-carrier recompense and forfeitures to the federal government for injuries to the industry (and competition) as a whole.

I. NATIONAL PERFORMANCE STANDARDS FOR INTERSTATE SPECIAL ACCESS ARE ESSENTIAL.

A. CLECs and IXCs Remain Dependent on ILEC-Provisioned Special Access To Provide Quality Service to Their Customers.

Contrary to the incumbents' self-serving claims,^{2/} the ILECs retain considerable market power in special access services. Their dominance, resulting from the lack of reasonably available alternatives, enables the ILECs to offer poor quality services to competitors without

^{2/} See, e.g., Letter from Brian Benison, SBC, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 96-98 (Aug. 17, 2001) (arguing that the special access market is highly competitive). Indeed, if the competition that the ILECs claim existed, monitoring requirements would not be needed, nor would there be such persistent problems in performance areas critical to the ILECs' customers. Rather, the ILECs would be partnering with their customers to improve service and prove that such improvements were sustainable.

facing market pressures to take corrective action. Indeed, to a significant degree, the ILECs' economic interests are served by perpetuating the deficiencies in what they know to be critical inputs to competing carriers' provision of both local and interexchange telecommunications services.

Competitors' networks are typically comprised of UNEs, interconnection facilities, and special access links, as well as their own facilities, but competitors' commitments on retail service installation and service quality to their customers must be made based upon the weakest of all of the various inputs. As a result, the ILECs' special access performance deficiencies significantly lower the quality of both CLECs' and IXC's end user services. This, in turn, undermines the market position of competing carriers and reinforces the ILECs' own market power.

1. Competitors Rely on ILEC-Provisioned Special Access in Both the Local Exchange and Interexchange Markets.

Poor special access provisioning obviously affects IXCs' ability to provide quality long distance services to their customers.^{3/} In addition, Commission rulings^{4/} and ILEC practices often force competitive local carriers to use high-priced special access services in lieu of UNEs. While the anticompetitive effects of UNE performance problems have been well documented, similar problems associated with interstate special access performance may be less familiar to

^{3/} In addition to traditional voice services, IXCs use special access facilities to provide a number of advanced services including frame relay and Asynchronous Transfer Mode ("ATM") services.

^{4/} See *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 9587, 9592 ¶ 8 (2000) ("*Supplemental Order Clarification*") (finding that "IXCs may not substitute an incumbent LEC's unbundled loop-transport combinations for special access services unless they provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer").

the Commission. Such problems, however, are no less significant for local competitors and their customers.

Although special access services use the very same loops and transport facilities that are provided as unbundled network elements, CLECs serving larger business customers must often secure access to ILEC loops, transport, and combinations thereof via special access tariffs.^{5/} The principal reason for this predicament is the Commission's decision to permit ILECs to limit the manner in which CLECs may use combinations of the loop and transport elements.^{6/} The anticompetitive effects of this decision have been compounded by the ILECs' egregious misapplication of these use restrictions to foreclose CLECs from using UNEs in many circumstances.^{7/} Indeed, for new services, the ILECs simply refuse to "combine" network elements (loop and transport elements), meaning that special access service is the only "new" product available to connect an end user to the CLEC's facilities. Likewise, for existing circuits,

^{5/} See *Supplemental Order Clarification* ¶ 8. There is absolutely no difference between the loops and transport facilities delivered as UNEs and those used to provide special access services. In both cases, the *same* wires, cable, and equipment are used to perform the *same* function -- transporting communications from one point to another -- regardless of their regulatory classification. Even the ILECs do not argue otherwise; indeed, the fact that identical facilities are used for access and local services is fundamental to the very notion of the "use" restrictions they advocate. Yet by permitting the artificial distinction between UNEs and special access, continuing the use restrictions on extended enhanced links ("EELs"), and prohibiting the connection of access services and UNEs on the same facilities, the Commission virtually eliminated CLECs' ability to hub facilities as a precursor to the facilities investment that the Commission wishes to encourage.

^{6/} AT&T believes the use restrictions on access to UNEs were unjustified when adopted and are even less justified given implementation of the CALLS plan. See Comments of AT&T Corp. on Use of Unbundled Network Elements to Provide Exchange Access Services, CC Docket No. 96-98, at 14-18 (filed Apr. 30, 2001) ("*AT&T Comments*"). AT&T maintains that the Act prohibits all use restrictions on the network elements that are used to provide special access services and that CLECs and IXC's should be permitted to use those UNEs to provide any telecommunications service, including interexchange services.

^{7/} See *AT&T Comments* at Section III.; Letter from Peter D. Keisler, Counsel for AT&T, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 96-98 (June 11, 2001).

the complex and detailed use restrictions preclude CLECs from converting special access to UNEs, even when the carrier actually meets the Commission's substantive local service requirements.^{8/}

Another reason why CLECs are forced to use special access is that ILECs refuse to provide UNEs when existing facilities are "not available," even though ILECs will routinely add the identical facilities if they are needed to fulfill a special access service request.^{9/} Furthermore, in some respects, the ILECs' operations support systems and related provisioning systems for UNEs are far more cumbersome and much less efficient than the provisioning systems they use for interstate special access services, which further "steers" CLECs into ordering special access. Because of these factors, problems with ILEC special access provisioning seriously impede local competition.

The facilities underlying special access services are also critical inputs to the provision of interexchange services. The ILECs' ability and willingness to provide such facilities in a quality and cost-effective manner is essential to permit IXCs to provide interexchange services, including both traditional circuit-switched long distance service and various advanced services

^{8/} See Declaration of Alice Marie Carroll and Cynthia S. Rhodes on Behalf of AT&T Corp., at 5-6, *appended to AT&T Comments* (the Commission's rules prevent carriers from using such combinations even when they provide a "significant" amount of local service because the "safe harbors," as defined by the FCC and implemented by the ILECs, are so restrictive); see also *AT&T Comments* at 42-44.

^{9/} Even where facilities may be available, there are other impediments ILECs can use to hamper customers' conversion to a new carrier, such as requiring CLECs to pay termination liabilities before an efficient ordering process may be employed or disconnecting operations support systems. See, e.g., *Petition of AT&T Communications of Virginia, Inc., TCG Virginia, Inc., ACC National Telecom Corp., MediaOne of Virginia and MediaOne Telecommunications of Virginia, Inc. for Arbitration of an Interconnection Agreement with Verizon Virginia, Inc. pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, *Petition of AT&T Communications of Virginia, Inc., TCG Virginia, Inc., ACC National Telecom Corp., MediaOne of Virginia and MediaOne Telecommunications of Virginia, Inc. for Arbitration of an Interconnection Agreement with Verizon Virginia, Inc.*, CC Docket No. 00-251, at 114-16 (filed Apr. 23, 2001).

such as frame relay and ATM services. The ILECs continue to possess considerable market power in the provision of these essential inputs that IXC's must use to connect retail customers to their networks or to the incumbents' switching centers, whether at end offices or tandems.^{10/}

Moreover, as AT&T and other CLECs have previously demonstrated, the ILECs' unique market power flows directly from their control of ubiquitous loop and transport facilities that competitors -- even in the aggregate -- cannot reasonably be expected to replicate in the near or intermediate term.^{11/} The Commission's *UNE Remand Order* has similarly recognized that self-provisioning generally is not a viable alternative because "replicating an incumbent's vast and ubiquitous network would be prohibitively expensive and delay competitive entry."^{12/} In most cases, it is simply not feasible or economical for competitors to build facilities directly to the end user's premises. New network construction typically requires cooperation from localities, other carriers, and building owners, and can take months or even years to complete.^{13/} Most end users are unwilling to deal with these delays; when they want service, they generally want it

^{10/} The economies of scale and quality of fiber transport facilities are well recognized by the industry and most regulators. At the same time, the retail customers CLECs seek are generally accessible only through ILEC end offices or hub points, which are widely disbursed and only reachable through the use of ILEC transport.

^{11/} AT&T and other carriers have developed a detailed record regarding competitive carriers' reliance on incumbent facilities and the difficulties of replicating those facilities. See generally, e.g., *AT&T Comments*; Declaration of Anthony Fea and William J. Taggart III on Behalf of AT&T Corp. appended to *AT&T Comments* ("*Fea-Taggart Declaration*"); An Economic and Engineering Analysis of Dr. Robert Crandall's Theoretical "Impairment" Study, appended to Opposition of AT&T Corp to Joint Petition, CC Docket No. 96-98 (June 11, 2001) ("*Crandall Rebuttal*"); Letter from Robert W. Quinn, AT&T, to Dorothy Attwood, FCC (Aug. 23, 2001).

^{12/} *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3779, ¶ 182 (1999) (citation omitted) ("*UNE Remand Order*").

^{13/} See *Crandall Rebuttal* at Section II.B.

immediately.^{14/} And even for the small minority of local serving offices and buildings that might have sufficient traffic to support the cost of deploying dedicated transport, there are many factors that prevent AT&T and similarly situated carriers from constructing their own facilities, including the need to obtain access to rights-of-way and buildings, existing ILEC volume or term commitments, exhaustion of collocation capacity, and long distances between AT&T's points of presence and ILECs' end offices.^{15/} While facilities-based competition may be a reasonable long-term goal, requiring each prospective competitor essentially to rebuild every network component *before* entering the market is an impossibility and would simply perpetuate the ILECs' current monopolies.^{16/}

2. ILECs Retain Market Power in Even the Most Competitive Markets and Will Continue To Do So Given the Deterioration of the Competitive Local Exchange Market.

Compelling proof of the ILECs' continuing market power is provided by a recent ruling of the New York Public Service Commission ("NY PSC"), which found that Verizon remains the "dominant" provider of special access services in all of that state, including lower Manhattan.^{17/} The NY PSC carefully analyzed a detailed record regarding route miles of fiber,

^{14/} See, e.g., Declaration of Charles R. Fairbank at 2, *appended to AT&T Petition to Reject or Suspend and Investigate BellSouth Telecommunications, Inc. Revisions to Tariff F.C.C. No. 1, Transmittal No. 564* (filed Oct. 10, 2000)

^{15/} See *Fea-Taggart Declaration* at 5-13; *Crandall Rebuttal* at Section II.B.

^{16/} AT&T's ability to deploy its own facilities in the longer term is also hampered by other impediments to the creation of an efficient network design, including the inability to develop a network architecture (such as the ILECs' networks) that aggregates all demand through the use of hubbing arrangements. Such deployment is effectively precluded by continuing restrictions on co-mingling and the inability to use UNEs to handle special access traffic. Similarly, the CLECs' inability to obtain DS3 and higher capacity loop and transport UNEs reliably and efficiently further hampers their prospects for construction of their own facilities.

^{17/} See NY PSC Case 00-C-2051, *Proceeding on Motion of the Commission to Investigate Methods to Improve and Maintain High Quality Special Services Performance by Verizon New*

numbers of buildings passed, and especially numbers of buildings actually connected to non-ILECs, and concluded that “Verizon’s combined market share data demonstrate its continued dominance in all geographic areas. . . . In the 132 LATA, for example, Verizon has 8,311 miles of fiber compared to a few hundred for most competing carriers; Verizon has 7,364 buildings on a fiber network compared to less than 1,000 for most competing carriers.”^{18/} In New York City, Verizon’s own data show that “a maximum of 900 buildings [are] served by individual competitors’ fiber facilities,” but New York City has “775,000 buildings in the entire city, over 220,000 of which are mixed use, commercial, industrial, or public institutions.”^{19/} The NY PSC further concluded that claims regarding “buildings passed” by competitors’ facilities were virtually meaningless as evidence of a competitive market because “the data do not reflect how often fiber actually enters these buildings.”^{20/} Overall, the NY PSC found that Verizon “continues to occupy the dominant position in the Special Services [Special Access] market, and by its dominance is a controlling factor in the market. Because competitors rely on Verizon’s

York Inc., Opinion and Order Modifying Special Services Guidelines for Verizon New York Inc., Conforming Tariff, and Requiring Additional Performance Reporting, at 6 (June 15, 2001) (“*NY PSC June Special Services Order*”). What the NY PSC calls special services are “known as ‘special access’ when provided pursuant to federal tariffs. Special access services are provided pursuant to Federal Tariff if the customer advises that more than 10% of the traffic will be inter-state, regardless of where the facilities to serve the traffic are located. For reporting purposes, all special services are addressed by the Commission’s Special Services Guidelines.” NY PSC Case 00-C-2051, *Proceeding on Motion of the Commission to Investigate Methods to Improve and Maintain High Quality Special Services Performance by Verizon New York Inc.*, Order Denying Petitions for Rehearing and Clarifying Applicability of Special Services Guidelines, at 1 (Dec. 20, 2001) (“*NY PSC December Special Services Order*”).

^{18/} *NY PSC June Special Services Order* at 7.

^{19/} *Id.* at 7-8 (citing to *Land Use Facts*, Department of City Planning).

^{20/} *Id.* at 9.

facilities, particularly its local loops, Verizon represents a bottleneck to the development of a healthy, competitive market for Special Services.”^{21/}

These NY PSC findings are especially significant because they cover an area that is generally regarded as the most competitive in the United States. If CLECs still are reliant to a significant degree on ILEC-supplied facilities in a market that is acknowledged to possess conditions ripe for the development of competition, there is no reason to believe that significant competition for special access services -- that is, loop and transport facilities, whether used individually or in combination -- exists anywhere in the country. In such an unfettered monopoly, the temptation can arise to ignore service quality through lack of investment and diversion of resources to more competitive products. This can quickly lead to a serious erosion of the quality of services provided to competitors, especially given that ILECs currently suffer no penalties for their behavior.

Notwithstanding significant evidence to the contrary, the ILECs continue to assert that the special access market is competitive, basing their claims on purported growth in competitively owned facilities.^{22/} Aside from the fact that “growth” rates are at best a misleading indicator of competition when competitors start out with negligible market share, many of the competitive carriers that the ILECs cite as significant potential competitors are now facing severe financial difficulties or have simply disappeared. Indeed, many of the carriers the ILECs have held up as examples, including e.spire, Winstar, and Caprock, are in bankruptcy or have

^{21/} *Id.*

^{22/} *See generally* “Competition for Special Access Service, High Capacity Loops, and Interoffice Transport” (“USTA Report”) *appended to* Comments of United States Telephone Association, CC Docket No. 96-98 (Apr. 5, 2001) (claiming that CLECs can construct facilities to carry their customers’ special access traffic). Notably, AT&T has thoroughly refuted the assertions in the USTA Report. *See generally AT&T Comments; Crandall Rebuttal.*

merged with other carriers.^{23/} In addition, daily analyst reports indicate that the prospects for competitors are only getting *worse*, not better.^{24/} The deterioration of the competitive marketplace has also further reduced the surviving competitors' alternatives to ILEC-provisioned services. As the number of competitors continues to dwindle, what little market discipline that may have existed may well disappear.

There is also clearly no merit to any ILEC claims that special access services offered pursuant to the Commission's *Pricing Flexibility Order*^{25/} are effectively competitive and thus do not need to be subject to performance measurements and consequences.^{26/} In that decision, the Commission expressly *declined* to find that special access services are competitive enough to find the ILECs non-dominant, and the U.S. Court of Appeals for the D.C. Circuit confirmed the limited scope of that decision.^{27/}

^{23/} See Declaration of C. Michael Pfau on Behalf of AT&T Corp. at 18, *appended to AT&T Comments* (discussing the new market realities); see also J. Molloy and E. McKeever, *The Good, the Band and the Ugly*, THE MIRUS ONLINE NEWSLETTER (Jan. 2002), available at www.imakenews.com/rcwmirus/e_articl000017427.cfm (noting that over the previous five months, more than 14 CLEC mergers have occurred, 12 companies reduced their workforce, and at least five CLECs filed for bankruptcy).

^{24/} See Merrill Lynch Global Securities Research, *RBOCs Continue to Pay Fines, Highlighting Difficulties for Competitors, But Are Improving* (Dec. 28, 2001) (finding that "the cost of violating merger agreements is below the cost of allowing competitors to enter the market [and that] it continues to be cheaper to pay the government for violating certain performance targets versus completely opening up the local markets to competitors"); Credit Suisse First Boston Corporation Equity Research, *Telecommunications: Financial Implications of Central Office Co-Locations* (May, 2, 2001) (noting that SBC received numerous requests from CLECs to decommission approximately 1800 central office collocations).

^{25/} See *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of U S WEST Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, FCC 99-206, *Fifth Report and Order*, 14 FCC Rcd 14221 (1999) ("*Pricing Flexibility Order*"), *aff'd sub nom., WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

^{26/} See Notice ¶ 14.

^{27/} See *WorldCom*, 238 F.3d at 460.

Indeed, the *Pricing Flexibility Order* recognized that an ILEC may still exercise market power even after receiving pricing flexibility. For that reason, the Commission expressly refused to deem ILECs “non-dominant” in the provision of special access services.^{28/} Furthermore, the Commission required ILECs to file generally available tariffs for special access services, which customers can challenge and the Commission can investigate if necessary.^{29/} In reviewing the Commission’s actions, the D.C. Circuit observed “that the FCC did not engage in the thorough competition analysis” of the sort that would be expected in “non-dominance proceedings.”^{30/} The court upheld the Commission’s findings, however, because the Commission continued to require ILECs to file tariffs and declared its willingness to investigate tariff provisions, as well as its commitment to enforce the statutory requirements of Sections 201 and 202, which is precisely what this proceeding is about.^{31/}

In fact, pricing flexibility rules are simply inapplicable here. They are intended to permit ILECs to respond to *emerging* -- but not yet established -- competition. Thus, the *Pricing Flexibility Order* provides no basis to find that any part of the special access market is sufficiently competitive to obviate the need for oversight of ILEC provisioning of those services. Tellingly, the ILECs’ most notable uses of pricing flexibility have been to *increase* prices for low capacity loops and transport -- for which competition is non-existent -- and to tie discounts for such services to growth commitments for higher capacity transport where some non-ILEC

^{28/} See *Pricing Flexibility Order* ¶ 151, n.372.

^{29/} See *id.* ¶ 151.

^{30/} *WorldCom*, 238 F.3d at 460.

^{31/} See *id.*

substitution is occurring.^{32/} This behavior, of course, is only possible if the ILEC in fact possesses significant market power.

B. ILECs Are Not Providing Special Access Services at Acceptable Quality Levels, Which Harms Carriers, Customers, and Competition.

1. There Is Clear Evidence of the ILECs' Sub-par Performance.

Against the background of negligible (and in some respects declining) competition, it should not be surprising that there is also clear evidence that the ILECs' special access performance is unacceptable.^{33/} The ILECs' performance deficiencies are documented (among other ways) in the detailed service quality data they provide directly to IXC for important business purposes. These data, however, are typically subject to confidentiality agreements that forbid IXCs from disclosing them, or require IXCs to seek ILEC approval before doing so.^{34/}

^{32/} See, e.g., Letter from Jim Brinkley, BellSouth Interconnection Services, to All Interexchange Carriers, Wireless Carriers and Competitive Local Exchange Carriers (Sept. 28, 2001), available at http://www.interconnection.bellsouth.com/notifications/carrier/carrier_pdf/91082602.pdf. In this letter, BellSouth explained that it was raising special access prices for those areas in which it had received pricing flexibility. Against this backdrop, BellSouth offered plans requiring long-term commitments and minimum volumes so that carriers could "avoid paying higher month-to-month rates."

^{33/} See, e.g., Letter from Patrick J. Donovan, Swidler Berlin Shereff Friedman, LLP, to Magalie Roman Salas, FCC (Oct. 25, 2001) (discussing Verizon's increasing application of its "no facilities" policy to prevent competitors from obtaining special access circuits); Letter from Andrew D. Lipman and Patrick J. Donovan, Counsel for Adelfia Business Solutions, Inc., Broadslate Networks, Inc., Focal Communications Corporation, Madison River Communications, LLC, Mpower Communications Corp., and Network Plus, Inc., to Dorothy Attwood, FCC (Sept. 28, 2001) (explaining how Verizon's "no facilities" policy disadvantages competitors). At least some of the ILECs' poor performance also seems to be intentional. At times, the ILECs refuse to provide the service a competing carrier needs to meet a customer request, claiming that no facilities are available, and then directly proposition the same customer to offer the very same service they were "unable" to provide their rival.

^{34/} In general terms, the overall data supplied to IXCs reflect levels of performance that is deficient in a number of ways. Although, results vary from month to month, service to service, and carrier to carrier, in recent months, special access provisioning performance has generally improved, even as special access maintenance and repair performance has remained well below

Notably, however, several state commissions have made findings confirming the deficiencies of incumbents' special access services. In response to a complaint filed by AT&T against U S WEST, the Minnesota Public Utilities Commission found a

clear need for further investigation, careful monitoring, and, potentially, wholesale access service quality standards for U S WEST [because] ensuring reliable, high quality long distance service between all Minnesota households and businesses is one of this Commission's highest priorities. The record in this case raises the serious possibility that the quality of U S WEST's wholesale access services may jeopardize this important goal.^{35/}

In another state complaint case, the Colorado Public Utilities Commission similarly found that

AT&T has experienced regular, frequent, widespread, and ongoing delays in obtaining access . . . When U S WEST does not meet its dates for the provision of service, it works a hardship on AT&T as well as AT&T's customers . . . On a region-wide, multi-state basis, U S WEST has provisioned DS1s and DS0s to AT&T on a wholesale basis after a longer interval than it provided those same services to other wholesale customers.^{36/}

These conclusions are further validated by in the NY PSC's recent determination that "Verizon's provision of Special Services is below the threshold of acceptable quality."^{37/}

Competitive carriers across the country have also documented the less-than-acceptable-quality of ILEC special access performance. In response to a petition for declaratory ruling filed by the Association for Local Telecommunications Services ("ALTS") asking the Commission to

stated expectations. Improvements, of course, are welcome, but these are not sufficient, especially when the quality of performance cannot be reliably predicted in advance.

^{35/} MPUC Docket No. P-421/C-99-1183, *Complaint of AT&T Communications of the Midwest, Inc. Against U S WEST Communications, Inc., Regarding Access Service*, 2000 Minn. PUC LEXIS 53, *34 (Aug. 15, 2000).

^{36/} CPUC Docket No. 99F-404T, *AT&T Communications of the Mountain States, Inc. Complainant, v. U S WEST Communications, Inc., Respondent*, Decision No. R00-128, at II. D, F, G (Feb. 7, 2000) ("*Colorado Access Complaint Order*").

^{37/} *NY PSC June Special Services Order* at 5.

find “that ILECs must provision special access circuits within the same interval in which they provision [those] circuits for their own retail services” and to adopt *prima facie* federal penalties for failure to do so,^{38/} commenters confirmed that ILECs in fact provide poor special access service.^{39/} For example, Focal explained that its “customers repeatedly experience significant delays in ILEC provisioning of special access” and a serious problem surrounding Firm Order Commitments dates, which have become “essentially meaningless” in Focal’s view.^{40/}

Thus, the evidence is incontrovertible. The ILECs’ own data, the states’ independent investigations, and evidence from competitive carriers confirm that there is insufficient competition to discipline ILECs’ special access service quality.^{41/}

2. Inadequate Special Access Performance Harms Carriers, Customers, and Competition.

Because the ILECs’ special access services are so often the only means by which competing carriers can connect their own equipment and facilities to ILEC end offices and ILEC end offices to customers, deficiencies in ILEC special access provisioning compromise competitors’ ability to offer quality services to the customers they seek to serve. The impact of the ILECs’ service deficiencies on their competitors includes lost revenue, diminished reputation

^{38/} See Association for Local Telecommunications Services Petition For Declaratory Ruling: Broadband Loop Provisioning, CC Docket Nos. 98-147, 96-98, 98-141, at 3-4 (filed May 17, 2000) (“*ALTS Petition*”); see also Notice ¶ 4 (incorporating the *ALTS Petition* and corresponding record into the current proceeding).

^{39/} See, e.g., *ALTS Petition*; Comments of WorldCom, Inc., DA 00-1141 (filed June 23, 2000); Comments of AT&T Corp., DA 00-1141 (filed June 23, 2000).

^{40/} See Comments of Focal Communications Corporation, DA 00-1141, at 4 (filed June 23, 2000) (“*Focal Comments*”).

^{41/} Cf. Letter from Representatives Largent, Stupak, Cannon, McCarthy, Eshoo, and Pitts, to Michael K. Powell, Chairman, FCC (Jan. 16, 2002) (expressing concern “that the ILECs have not taken all of their obligations under the Telecommunications Act of 1996 seriously” and that “American consumers are suffering as a result”).

and loss of good will, decreased internal productivity, and decreased customer productivity.^{42/}

Under these circumstances, CLECs cannot attract and retain customers, much less begin to make a dent in the ILECs' market share.

Even more problematic, as more and more ILECs (especially the Bell Operating Companies ("BOCs")) enter the interLATA market, the threat to competition increases because the ILECs are also able to leverage their cost advantages to bolster their long distance competitiveness. In addition, once the carrot of long distance entry is removed for the BOCs, they have considerably less incentive to provide quality inputs to competitive services, including interstate special access. For these reasons, both the Commission and the Department of Justice ("DOJ") have stressed (in the context of UNEs) that accurately developed performance measurement results are important to detect poor performance and assist in post-entry oversight to ensure that the local market is irreversibly open to competition. Indeed, in evaluating Section 271 applications, the DOJ looks for UNE performance standards supported by strong remedies and liquidated damages.^{43/} Similarly, the Commission has relied on meaningful UNE performance standards, robust metrics and the performance results that demonstrate compliance with the relevant standards in its evaluation of BOCs' Section 271 applications.^{44/} The

^{42/} See *Focal Comments* at 4 (explaining how delays in special access provisioning "damage Focal's reputation for quality and make it increasingly difficult to maintain positive relations with clients").

^{43/} See, e.g., Evaluation of the United States Department of Justice, CC Docket No. 97-231, at 31-32 (Dec. 10, 1997) ("*DOJ Louisiana 271 Evaluation*") (examining "whether a BOC has established . . . performance standards -- i.e., commitments made by the BOC to meet specified levels of performance (preferably backed up by liquidated damages clauses)"); see also Evaluation of the United States Department of Justice, CC Docket No. 97-137, at 39 (June 25, 1997) ("*DOJ Michigan 271 Evaluation*") (stating that performance benchmarks are necessary to demonstrate that the market is open to competition).

^{44/} See, e.g., *Application of Verizon Pennsylvania et al. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd 17419, 17487, ¶ 127 (2001); *Joint Application by SBC Communications Inc., et. al. Pursuant to Section 271 of the*

Commission has repeatedly held that measured performance that meets or exceeds appropriate standards is necessary to demonstrate compliance with the Commission's nondiscrimination standards, to give competitors a meaningful opportunity to compete, and to permit the application of consequences to help prevent backsliding after a grant of Section 271 authority.^{45/}

All of these considerations apply equally to special access. Given that special access services are provided using the same facilities that are also provided as UNE loops and transport, BOC long distance entry raises the same concerns about discrimination and backsliding in connection with special access performance as the Commission and DOJ identified with regard to UNEs.

II. THE COMMISSION HAS THE AUTHORITY AND OBLIGATION TO TAKE CORRECTIVE ACTION TO CURE THE ACUTE PROBLEMS CAUSED BY INADEQUATE ILEC SPECIAL ACCESS PERFORMANCE.

While state commissions have taken major strides forward in developing performance standards and enforcement mechanisms for UNEs,^{46/} the Commission is uniquely situated to develop and implement a comprehensive solution to the problems arising from the ILECs' poor provisioning of special access. Indeed, because the vast majority of special access services are

Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Arkansas and Missouri, FCC 01-338, ¶ 127 (rel. Nov. 16, 2001); *Application of Verizon New England, Inc., et al. for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, 16 FCC Rcd 8988, 9119, ¶ 236 (2001). Indeed, in all orders granting Section 271 applications, the Commission ensured the applicant was subject to a performance measurement and enforcement plans.

^{45/} See, e.g., *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, Memorandum Opinion and Order, CC Docket No. 97-137, ¶ 204 (rel. Aug. 19, 1997) ("*Michigan 271 Order*") (citing to the *DOJ Michigan 271 Evaluation*).

^{46/} See Comments of AT&T Corp., CC Docket No. 01-318, at Section III.B. (filed Jan. 22, 2002) ("*AT&T UNE Performance Measure Comments*").

jurisdictionally interstate, the state commissions' ability to cure problems affecting such services is significantly less clear than with UNEs.

As the Commission correctly recognizes, it possesses broad authority to establish national performance standards, measurements, and reporting requirements for interstate special access services.^{47/} Indeed, the Commission's authority -- and its corresponding responsibility -- is even broader than the *Notice* reflects. The Commission has long regulated carriers' provision of special access service based on the sweeping jurisdiction conferred by Sections 1, 4(i), 201(a) and (b), 202, and 205 of the Communications Act.^{48/} These sections of the Act similarly provide the Commission with authority to adopt performance standards, measurements, and corresponding reporting requirements, especially in the case of critical ILEC-provisioned interstate services such as special access.

In particular, Section 201(a) requires ILECs to provide telecommunications service upon reasonable request, and Section 201(b) requires that all charges, practices, classifications, and regulations for, or in connection with, such services be just and reasonable.^{49/} In addition, Section 202(a) forbids incumbent carriers to provide services in an unjustly or unreasonably discriminatory manner, making it unlawful for them to give preferential treatment to any carrier or to discriminate in favor of themselves against their competitors or their competitors'

^{47/} See *Notice* ¶ 8 (citing 47 U.S.C. §§ 201, 202).

^{48/} The Commission also seeks comment on whether it can or should rely on Section 272 as a basis for its authority in these matters. See *Notice* ¶ 10. The perceived utility of Section 272 is that it, like Section 251, imposes an exact parity standard. Reliance on Section 272 is unnecessary, however, because, as shown below, the express Commission authority under Sections 201 and 202, and its additional authority under Section 4(i), is so clear, and in this context justifies a full parity requirement. Thus, there is no need to rely on the additional authority of Section 272.

^{49/} 47 U.S.C. §§ 201(a), (b).

customers.^{50/} The Commission can also look to Sections 1 and 4(i) of the Act as additional sources of authority. Section 1 underscores the Commission's responsibility to take the actions necessary to make quality communications services available to all consumers,^{51/} and Section 4(i) provides the Commission with broad authority to promulgate "any and all" rules and regulations necessary to execute its functions under the Act.^{52/} The Commission and the federal courts have long recognized the considerable authority Section 4(i) bestows upon the Commission.^{53/} Indeed, the Commission has repeatedly invoked Sections 1 and 4(i), along with Sections 201 and 202, as bases for the Commission's major common carrier initiatives, such as

^{50/} 47 U.S.C. § 202(a). The *Notice* seeks comment on the differences between the nondiscrimination requirements in Sections 201/202 and Section 251. *See Notice* ¶ 9. While there may be a linguistic difference in the two provisions (*i.e.*, the former forbids "unjust and unreasonable discrimination" and the latter requires "nondiscriminatory" access), it is of no consequence in the current context. Given the substantial competitive harm in both the local and long distance markets that results from discriminatory ILEC provisioning of special access services, *any* such discrimination is inherently unreasonable and thus a violation of Sections 201 and 202. This is precisely the logic the Commission followed in *Computer II*, where Sections 201 and 202 were construed to prohibit *all* discrimination against customers who chose independently supplied CPE or enhanced services. *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C. 2d 384, 432 (1980) ("*Computer II*"), *modified on recon.*, 84 F.C.C. 2d 50 (1980), *further modified*, 88 F.C.C. 2d 512 (1981), *aff'd sub nom.*, *Computer and Communications Industry Ass'n v. FCC* 693 F.2d 198 (D.C. Cir. 1982), *cert. denied* 461 U.S. 938 (1983). There, the Commission rejected any need to decide whether any instances of such discrimination might be "reasonable" or "unreasonable." Moreover, Section 201's requirement that interstate services be provided in a "just and reasonable" manner provides the Commission with additional authority to adopt and enforce strict performance requirements.

^{51/} 47 U.S.C. § 151.

^{52/} 47 U.S.C. § 154(i).

^{53/} *See, e.g., United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) (endorsing the Commission's authority to regulate cable television prior to the enactment of Title VI); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1183 (D.C. Cir. 1989) (affirming the Commission's authority to enact syndicated exclusivity rules for cable television as ancillary to the FCC's authority to regulate television broadcasting).

Competitive Carrier and Computer II.^{54/} The Telecommunications Act of 1996 (“1996 Act”) gave the Commission additional powers, responsibilities, and guidance, but it did not remove or diminish its responsibilities under the various sections described here. Accordingly, the Commission has regularly used its Sections 1 and 4(i) jurisdiction in acting pursuant to the 1996 Act.^{55/}

Above all, these provisions of the Act give the Commission primary, if not exclusive, authority to address issues associated with interstate services. The Commission’s jurisdictional rules define special access services as “interstate” if more than 10 percent of the traffic on those facilities is interstate.^{56/} As a result, special access services are overwhelmingly classified as interstate, even when a significant percentage (up to 90 percent) of the traffic is intrastate. Thus, in Massachusetts, for example, an overwhelming 99.4 percent of Verizon’s special access services are provisioned under federal tariffs, even though the breakdown of traffic carried over those facilities is more evenly divided.^{57/}

^{54/} See *Computer II* ¶ 286; *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 91 F.C.C. 2d 59, 73-74, ¶¶ 29-31 (1982), 98 F.C.C.2d 1191, 1209, ¶¶ 1, 28 (1984) (“*Competitive Carrier*”) (subsequent history omitted).

^{55/} See, e.g., *Implementation of the Local Competition Provisions in the Telecommunications Act 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, 16181, ¶ 1442 (1996); *UNE Remand Order* ¶ 525.

^{56/} See *MTS and WATS Market Structure Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, 4 FCC Rcd 1352, 1352, ¶¶ 1-4 (1989); see also 47 C.F.R. § 36.154(a) (stating that “lines carrying both state and interstate traffic” are interstate “if the interstate traffic on the line involved constitutes more than ten percent of the total traffic on the line”).

^{57/} D.T.E. 01-34, *Investigation by the Department of Telecommunications and Energy on Its Own Motion Pursuant to G.G. c. 159, §§ 12 and 16, into Verizon New England Inc. d/b/a Verizon Massachusetts’ Provision of Special Access Services*, Order on AT&T Motion to Expand Investigation, at 2 (Aug. 9, 2001) (“*Massachusetts Special Access Order*”).

Notwithstanding the fact that interstate special access services are often used extensively for intrastate purposes, state commissions have been hesitant to assert jurisdiction over matters relating to the ILECs' provisioning of such services. For example, the Massachusetts Department of Telecommunications and Energy ("DTE") considers data pertaining to interstate performance only for purposes of directly regulating the few special access services that are intrastate. Similarly, the NY PSC has made it clear that it will not regulate interstate special access absent an explicit delegation of authority from the Commission to do so.^{58/} Other state commissions have also declined to rule on the merits of AT&T complaints regarding ILEC special access performance because they believe the jurisdiction to handle these matters rests entirely with the Commission.^{59/} Tellingly, even U S WEST (now Qwest) claimed that the responsibility to address matters relating to interstate special access lies exclusively with the Commission.^{60/} Given the state regulators' jurisdictional concerns, there is no reasonable prospect that they will act to resolve competitors' special access problems. Even more troubling, in those states in which some special access reporting requirements have been adopted (e.g.,

^{58/} See Letter from Chairman Maureen O. Helmer, NY PSC, to Michael K. Powell, Chairman, FCC (May 22, 2001). The NY PSC, however, still requires Verizon to provide service quality information about all special access services in order to allow the NY PSC to monitor Verizon's performance under a New York state law that gives the NY PSC the authority to gather data. See *NY PSC December Special Services Order* at 9.

^{59/} See, e.g., CPUC Docket No. 99F-404T, *AT&T Communications of the Mountain States, Inc., Complainant v. U S WEST Communications, Inc., Respondent*, Decision No. R00-128, at IV.(A) (Feb. 7, 2000) (deferring AT&T's claims for relief to the Commission).

^{60/} See Notice ¶ 3; see also *Petition of U S WEST, Inc. for a Declaratory Ruling Preempting State Commission Proceedings to Regulate U S WEST's Provision of Federally Tariffed Interstate Services*, Petition for Declaratory Ruling, CC Docket No. 00-51, at 6-8 (filed Dec. 15, 1999) ("state commissions are thus precluded from regulating services taken out of U S WEST's federal tariffs").

Massachusetts and New York), the ILECs have stated their intention to discontinue reporting on service quality for special access circuits provided under federal tariff.^{61/}

There is also an obvious gap in the regulation and enforcement of special access services on the federal level. Competitors' ability to obtain enforcement through individual complaint proceedings is minimal at best because the complaint process is too slow and costly, and the results too uncertain. Indeed, the *Commission* itself recognizes the inherent difficulties in basing business judgments on such a "regulatory patchwork."^{62/}

The Commission is now at a crossroads. It can either turn a blind eye to the ILEC failures to provide adequate services to competitors -- placing additional strain on what little competition remains in the local exchange market -- or it can adopt straightforward and enforceable ILEC performance standards and remedies to give that competition a chance to flourish. AT&T submits that the Commission not only has the authority to resolve these issues, it has the responsibility to do so.^{63/} The special access problems competitors are experiencing

^{61/} See *NY PSC December Special Services Order* at 9; *Massachusetts Special Access Order* at 7-8.

^{62/} See *Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, Notice of Proposed Rulemaking, CC Docket No. 01-318, ¶ 3 (rel. Nov. 19, 2001) ("*UNE Performance Measures NPRM*") (noting that piecemeal regulation "fails to provide industry with consistent and 'bright line' guidance . . ."). Moreover, although some performance standards and compensatory damages can be found in a few ILEC special access tariffs, these tariff terms severely limit the ILECs' obligations and are plainly insufficient to assure competitors will receive the critical services they require.

^{63/} This duty would be made even more explicit were Congress to enact S. 1364, a bill introduced by Senators Hollings, Inouye, and Stevens. Among other things, the bill would add a new Section 294 to the Communications Act requiring the Commission to adopt the "most rigorous performance standards, data validation procedures, and audit requirements" as needed "to ensure full compliance with the requirements of the [Communications] Act for the opening of local telecommunications markets to competition." This provision would explicitly apply to special access. AT&T has endorsed S. 1364, but also believes that it provides useful guidance as to how the Commission should use its existing authority even in the absence of further legislation.

are utterly inconsistent with the ILECs' statutory duty to provide just, reasonable, and not unjustly or unreasonably discriminatory service. It is plainly time for the Commission to put some teeth in its pro-competitive pronouncements and let the ILECs know that they will not be allowed to continue their unlawful and anticompetitive conduct.

III. PERFORMANCE STANDARDS AND REPORTING REQUIREMENTS ARE THE MOST EFFICIENT AND LEAST REGULATORY METHOD OF ENSURING THAT ILECS COMPLY WITH THEIR STATUTORY OBLIGATIONS.

Today, CLECs and IXC are captive customers of the incumbents' special access services, but their ability to hold their suppliers accountable for poor performance is extremely limited. In a competitive market, service providers provide appropriate performance data to their customers, and are subject to significant market-driven consequences if their performance falls below acceptable commercial standards. Because special access customers typically lack the negotiating leverage to impose such obligations on ILEC special access services,^{64/} and because the special access market is not competitive enough to impose its own discipline, it is essential that the Commission develop a mechanism that requires ILECs to make performance data available (most of which already is being collected) and to assess their performance using a uniform set of measures. As noted above, the Commission has recognized that performance measurements, performance standards, and reporting requirements are useful tools in determining whether ILECs are in compliance with their statutory obligations^{65/} and that the use

^{64/} AT&T does have certain term and volume contracts with ILECs that include some limited penalties for poor performance, but these contracts are not yet the norm. More importantly, even these contracts have not yet produced sustained improvement in all service aspects (e.g., maintenance and repair, as well as provisioning).

^{65/} See Notice ¶ 13; see also *Bell Atlantic-New York Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, 3974, ¶ 53 (1999) ("NY 271 Order").

of metrics is a “relatively non-intrusive means of implementing pro-competitive policies and rules and of evaluating incumbents’ compliance with such requirements.”^{66/} Likewise, virtually every other relevant government authority, including state commissions and the DOJ, has recognized the value of meaningful performance measurements, standards, and reporting requirements. The Commission should address special access issues by focusing on these tools, which, when coupled with an effective enforcement regime, can help to ensure appropriate ILEC performance in a market that is not subject to effective competitive discipline.

Here, the Commission has the unusual good fortune of an industry consensus among the entire spectrum of special access users, who have provided it with a complete set of metrics and definitions that is based on their collective experience over the last decade.^{67/} This presents a unique opportunity to create clarity (and thus reduce confusion and the need for repetitive regulatory action) by adopting a single set of measures that can be applied uniformly on a nationwide basis. Moreover, if these measures are adopted and ILECs prove they can produce reliable results, the Commission (and the states) could eliminate the duplicative ARMIS and other ILEC reporting requirements. This would simplify administration for all and permit the Commission to establish promptly an effective enforcement plan that is especially essential now, as the anticompetitive effects of poor special access provisioning are beginning to have increasingly significant market effects.

^{66/} See *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 63, 90, 95 and 10 of the Commission’s Rules*, 14 FCC Rcd 14712, 14770, ¶ 125 (1999) (citation omitted) (“SBC Merger Order”).

^{67/} See Letter from Joint Competitive Industry Group, to Michael K. Powell, Chairman, FCC, CC Docket No. 01-321 (filed Jan. 22, 2002) (“JCIG Proposal”).

A. Performance Metrics and Associated Reporting Obligations Provide Objective Evidence of ILEC Performance.

Performance metrics provide a structured means for gathering operational data that permit third parties to compare ILEC behavior against quantitative standards. Metrics focus on objective facts (*e.g.*, what percentage of orders are being completed on time? how long does it take for a trouble ticket to be cleared?). Thus, although metrics may be subject to some subjective manipulation (*e.g.*, exclusions of performance failures falsely attributed to a “customer not ready” condition), they can still provide reliable evidence of the ILECs’ special access performance, especially if the opportunities for manipulation are minimized or eliminated.^{68/}

The JCIG Proposal is a collaborative effort of a broad array of companies that purchase special access services from the ILECs and use them to provide local and interexchange services. Based upon their extensive experience with the ILECs’ services, these companies have developed a detailed set of performance measures and standards that are necessary to assess the ILECs’ performance in key areas. In particular, the JCIG has identified eleven such measurements and provided detailed definitions of those measures (as well as relevant terms in those measures), together with calculation methodologies and business rules for making the necessary assessments of ILEC performance. The JCIG has also identified the levels of disaggregation needed to provide meaningful results for each measure, as well as legitimate exclusions the ILECs may use in reporting on their performance. Finally, each measure sets forth the appropriate performance standards that the JCIG members know, from hard-earned

^{68/} To deter the manipulation of results in ways that obscure performance deficiencies, the Commission should require ILECs to report the percentage of observations that are excluded from their measurement results. If the number of data points excluded represents a sizeable proportion of the total measurements or is isolated to one or a few market participants, then additional process investigation, if not regulatory intervention, is merited.

experience, are necessary to support a competitive marketplace. If adopted by the Commission and faithfully implemented by the ILECs, these criteria will provide an accurate and objective view of the ILECs' performance. This, in turn, will avoid unnecessary debates among carriers as to whether the ILECs have complied with their statutory obligations and, if not, the type of consequences that should apply.

Monthly service quality reports are typical in state UNE performance plans. They ensure that performance problems are visible to all concerned (ILECs, carriers, and regulators) and thereby increase the prospects for prompt and effective regulatory action if appropriate corrective measures are not promptly agreed to by the ILECs and their carrier customers. Indeed, these monthly reports are the only way for competitors and the Commission to review the ILECs' service quality in the broader context of overall market evolution. In a truly competitive marketplace, ILECs would be motivated to sustain good performance for their wholesale customers and to rectify service problems promptly, so they can retain those customers. Because there is no effective special access competition, the ILEC performance reports are necessary to assess whether the ILECs are complying with the Act and the Commission's rules.

There are three types of monthly reports that ILECs should provide: (1) an aggregate summary; (2) a non-ILEC carrier exception detail report; and (3) a full report for each carrier (available only to that carrier and the Commission). The aggregate summary report should show results for the ILEC and its retail customers, ILEC affiliates, and wholesale purchasers in the aggregate, and should contain the information necessary to provide a direct determination of whether or not the ILEC has generally met its nondiscrimination obligation for the market as a whole. The purpose of the detail report is to identify the specific performance measurements for the "failed" performance areas that require investigation and improvement if and when the

summary report shows that the ILEC is not in compliance with its nondiscrimination obligations to all customers in the aggregate.^{69/} Finally, regardless of whether or not the ILEC is generally meeting its nondiscrimination obligations, the individual carrier report would allow each competitor to determine specific ILEC performance associated with the services it has ordered, and to obtain important data with which to verify the summary report results.^{70/} Submission of these reports and the associated competitor review also off-loads from the Commission much of the work needed to analyze and verify the reported results.^{71/}

Using processes similar to those adopted by most states, ILEC reports should also disaggregate their performance, by carrier, and in the aggregate, for DS0, DS-1, DS-3 and OCN-level special access services, as outlined in the JCIG proposal. Just as it is essential for metrics to be comprehensive, it is also critical that reporting occur at sufficiently discrete levels to provide meaningful results. As the Commission itself has recognized, proper disaggregation dimensions (*i.e.*, reasonable product and geographic levels) are necessary to assure proper detection of ILEC performance failures and to enable effective enforcement.^{72/} Conversely, inadequately disaggregated data enable ILECs to support the incorrect and misleading

^{69/} In the event of noncompliance on a measure, the ILEC should be required to provide a corrective action plan within thirty days. This is especially important for any measurement that shows a failure to meet the performance standard for two or more months. The plan should specify the root cause of the noncompliance problem, the corrective action to be taken, and a schedule for implementing the required correction. Competitors should also be permitted to comment on the appropriateness of the ILEC's analysis and corrective action plan.

^{70/} It is also important that discrimination applied to specific carriers or strategic products be detectable as well. Otherwise, the volume of other market participants could effectively "hide" targeted application of ILEC market power against that single carrier.

^{71/} These reports should also contain the ILECs' consequence calculations because such results depend upon, and should flow directly from, the reported data. For a more detailed discussion on all three types of reports, *see* Comments of AT&T Corp., CC Docket No. 98-56, at 59-64, Attachment H (filed June 1, 1998).

^{72/} *See, e.g., UNE Performance Measures NPRM* ¶ 32.

conclusion that they have complied with their statutory performance obligations when they have not. There is significant danger that performance failures associated with one group of services can be minimized or hidden completely by “lumping them in” with performance results from other classes of services for which there are no (or fewer) failures.^{73/} Critically, requiring appropriate disaggregation of performance results is relatively easy once performance measurement systems have been correctly implemented and the necessary data have all been captured. Disaggregation simply involves proper coding when data are collected and repetitive computations -- a task readily and quickly accomplished by computers in the matter of a few seconds. As a result, ILEC claims that regulators have required “thousands” of performance

^{73/} The Commission has frequently recognized the importance of disaggregated data in detecting discrimination. *See, e.g., UNE Performance Measures NPRM* ¶ 32; *Application of GTE Corporation and Bell Atlantic Corporation for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd 14032, 14074, ¶ 74 (2000) (“*Bell Atlantic-GTE Merger Order*”) (“disaggregated data on the merged entity’s provision of special access circuits and the showing of nondiscriminatory access to unbundled loops required for the merged firm to demonstrate Section 271 checklist compliance, will make any attempted discrimination . . . in the provision of these services highly detectable”); *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, Memorandum Opinion and Order, CC Docket No. 98-121, ¶ 92 (rel. Oct. 13, 1998) (“*Louisiana 271 Order*”) (finding that an insufficient “level of disaggregation undermines the usefulness of . . . performance data.”). State commissions also have recognized the value of requiring ILECs to provide disaggregated data. For example, the Florida Public Service Commission (“PSC”) found that “measurement categories should be broken down to a level so that there are meaningful direct comparisons between performance [the ILEC] gives its customers and that provided to ALECs and their customers.” FPSC Docket No. 000121-TP, *Investigation into the Establishment of Operations Support Systems Permanent Performance Measures for Incumbent Local Exchange Telecommunications Companies*, Order No. PSC-01-1819-FOF-TP, at 33 (Sept. 10, 2001) (“*Florida Performance Order*”). In addition, the Florida PSC also noted that “[d]isaggregation is important to an effective remedy plan because it prevents poor performance in one area from being combined with dissimilar performance data.” *Id.* at 126. Comparing mechanized processes of one carrier to a manual process for another carrier is one example the Florida PSC cites as aggregated data that may mask discriminatory performance. *Id.* The Florida PSC also found that “varying domains, such as preordering, ordering, provisioning, and maintenance and repair will have differing levels of disaggregation.” *Id.* at 33.

measurement results deliberately obscure the point and they overstate the burdens associated with producing appropriately disaggregated performance reports.

Finally, because the performance measurement process is critical to support the success of competition in the special access market, the Commission also correctly acknowledges that an appropriate audit process is essential to assure the reliability and validity of the information in the ILEC performance reports.^{74/} If ILECs' data collection systems and processes were not subject to periodic inspection, including the underlying support processes themselves, it would be impossible to determine whether the ILEC is accurately tracking and reporting its performance and performing in a nondiscriminatory manner. In addition, the ILECs' internal process rules for defining measurements and excluding measurements must be reviewed to assure that they are following the proper business rules for each measure and are not introducing bias into the documented calculations. Audits should also cover the statistical validity of any sampling that underlies the ILEC's measurements and the business processes used to perform the ILEC and IXC/CLEC functions being measured. Furthermore, in order to assure that data are available for audit and analysis, the ILEC performance data should be retained for a period of at least two years.^{75/}

In the event that an audit indicates that an ILEC has provided false or incorrect data, the Commission should use the full panoply of its enforcement tools to prevent future

^{74/} See Notice ¶ 17.

^{75/} Because some states require ILECs to retain data for periods of greater than two years in conjunction with state UNE performance measurement plans and reporting requirements, this requirement is not unnecessarily burdensome. See, e.g., *Florida Performance Order* at 226 (mandating retention of monthly reports for three years); *Filing of Nevada Bell Telephone Company for Approval of its Plan for the Reporting and Auditing of Performance Measures and a Plan for Establishing Performance Incentives*, Stipulations of the Parties, Docket No. 01-1048, at 72-76 (submitted June 5, 2001) (requiring ILECs to retain raw data and monthly reports for 24 months).

noncompliance. As the Commission has recognized, reporting complete and accurate data is critical to the success of a performance measurement plan.^{76/} Indeed, in assessing a more than \$2 million fine on SBC late last year, the Commission stated that it considers “misrepresentation to be a serious violation [because its] entire regulatory scheme ‘rests upon the assumption that [carriers] will supply the Commission with accurate information.’”^{77/} Thus, to the extent an audit demonstrates that an ILEC submitted false or inaccurate data, ILECs must be subject to heavy forfeitures. More importantly, if an audit or Commission investigation reveals that an ILEC intentionally submitted false data, the Commission should levy even more severe penalties.

B. Service Quality Reporting Requirements for Special Access Do Not Impose a Significant Burden on ILECs.

The *Notice* seeks comment on the appropriate special access reporting procedures to “help foster competition while avoiding increases on the overall burdens imposed on incumbent[s].”^{78/} Previously, the Commission has recognized that performance reporting requirements fulfill three important goals: (1) filling the “gap in everyone’s knowledge about how the [ILECs’] internal processes operate;” (2) increasing ILECs’ “incentive to comply with their statutory obligations;” and (3) reducing “the need for regulatory oversight by encouraging self-policing among carriers.”^{79/} All of these remain true today and apply directly to special access services.

^{76/} See Letter from Carol Matthey, FCC, to Jeff Ward, Verizon, DA 01-2944 (Dec. 26, 2001).

^{77/} See *SBC Communications, Inc. Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture and Order, FCC 01-308, ¶ 66 (rel. Oct. 16, 2001) (citations omitted).

^{78/} See *Notice* ¶¶ 18-19.

^{79/} See *Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, Notice of Proposed Rulemaking, CC Docket No. 98-56, 13 FCC Rcd 12820, 12824-25, ¶¶ 14-16 (1998) (“*OSS Notice*”).

Special access reporting requirements present no significant burdens on ILECs. In most instances, ILECs already measure and report the required information in conjunction with their contracts with large IXCs/CLECs or to fulfill obligations related to UNEs. The systems needed to generate the data are already established and were funded by captive ratepayers (in some cases the IXC and CLECs) over the past decades, and the recurring process for collecting performance data is largely automatic.^{80/} Moreover, some states, such as Massachusetts, already require ILECs to report on special access services.^{81/} In any event, even if new procedures or capabilities are required to monitor and report on special access provisioning, such work would only require a one-time effort.

Disturbingly, the *Notice* seems overly concerned about the possibility of placing additional “regulatory” burdens on ILECs.^{82/} In fact, the only real “burden” that the adoption of a special access performance measurement and enforcement regime would impose on the ILECs is that it would expose their discriminatory special access performance and subject that anticompetitive and unlawful conduct to appropriate consequences. More important, by applying consistent performance measures and standards to special access and enforcing them

^{80/} Even if the ILECs do not have the incentive to provide high-quality service to competitors, the ILECs do have an incentive to collect such data in order to lower their costs to provide these services.

^{81/} Likewise, many ILECs voluntarily collect data in connection with ISO 9000 certification, which requires extensive performance monitoring. In fact, competitive companies voluntarily seek certification in organizations such as the International Organization for Standardization (“ISO”), a non-governmental organization that promotes the development of standardization in an effort to facilitate international exchange of goods and services and to develop cooperation for intellectual, scientific, technological, and economic activity. ISO 9000, one of the ISO’s most widely known and successful standards ever, is a reference for quality requirements in business-to-business dealings. More specifically, ISO 9000 is concerned with quality management, meaning that the certified organization enhances customer satisfaction by meeting customer and applicable regulatory requirements and is continually improving its performance. *See What is ISO?*, <http://www.iso.ch/iso/en/aboutISO/introduction/whatisISO.html>.

^{82/} *See, e.g., Notice* ¶¶ 13, 14, 18.

vigorously, the Commission would promote competition, smooth the transition toward increased deployment of competitive loop and transport facilities, and thereby set the stage for greater deregulation at a later date.^{83/}

In any case, as discussed above, ILECs still retain substantial (and in some cases overwhelming) market power and they are still properly classified as dominant carriers in the provision of special access services. As a result, they are not subject to the disciplines of competitive market forces. Therefore, it cannot reasonably be deemed “regulatory” for the Commission to require ILECs to measure performance in the manner that would be required in a competitive market. Neither is it “regulatory,” in the absence of competitive market discipline, for the Commission to develop effective enforcement measures that require the ILECs to comply with their statutory obligations to provide interstate special access services on a just, reasonable, and nondiscriminatory basis.

Chairman Powell has wisely observed that “deregulation for its own sake is not responsible policy.”^{84/} That is obviously correct. In markets that are dominated by monopoly incumbents, deregulation cannot be an appropriate regulatory agenda until *after* competition is firmly established and competitors have nondiscriminatory access to inputs they must have to compete against the incumbent monopolists. Section 10(d) makes this point explicit by forbidding the Commission to forbear from enforcing Sections 251(c) (including Section 251(c)(3)’s requirement to provide access to UNEs) until it has been “fully implemented,”^{85/} but

^{83/} In all events, consequences for deficient performance are natural consequences of a competitive market. Thus, when (and if) the market becomes truly competitive, the ILECs themselves will need to monitor the very same areas AT&T advocates here -- probably in even greater detail and applying even higher performance standards -- in order to remain competitive.

^{84/} See Remarks by Michael K. Powell, Chairman, FCC, to Federal Communications Bar Association (June 21, 2001) (“*Powell 6/21 Remarks*”).

^{85/} 47 U.S.C. § 160(d).

the principle is no less true for competitors' access to critical special access services. As Commissioner Copps accurately warned, the Commission's "zeal to deregulate before meaningful competition develops might cripple the very competition that Congress sought to engender."^{86/}

C. Measuring Performance Permits Exposure of Patterns of Problematic Performance and Facilitates Benchmarking.

Access to a stable history of measured performance data based upon established performance measures makes it easier for regulators to identify areas where ILEC performance is stifling competition, because it enables them to observe patterns of performance failures and impose effective enforcement measures. The relevant question generally is not whether an ILEC has failed to meet prescribed performance standards in exceptional circumstances, *e.g.*, a handful of mis-provisioned or poorly maintained special access facilities out of many hundreds of similar facilities. What really matters is the extent and source of the problem, and whether the ILECs' performance is affecting CLECs' ability to attract and serve retail customers in competition with the ILEC. Properly structured metrics and meaningful standards for performance fill that need.

Equally important, and just as in any other business that operates in a competitive marketplace, properly constructed and robust measurements permit prompt isolation and correction of the root causes of underlying performance problems. Availability of such information permits meaningful dialog between two business partners -- a supplier (the ILEC) and a customer (the CLEC/IXC) -- which permits correction of costly process problems for the supplier and minimizes the ripple effects of failed performance on retail customers. Although limited communications of this sort are beginning to occur today between AT&T and certain

^{86/} Separate Statement of Commissioner Michael J. Copps, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Notice of Proposed Rulemaking, CC Docket No. 01-338 (rel. Dec. 12, 2001).

ILECs, given the wide disparity in incumbent/competitor bargaining power, there remains a crucial need for Commission intervention.

Performance monitoring requirements are a relatively non-intrusive means to require ILECs to behave as if they are operating in a competitive marketplace.^{87/} As the Commission has correctly observed, without benchmarking, “regulators would be forced, contrary to the 1996 Act and similar state laws, to engage in less efficient, more intrusive regulatory intervention in order to promote competition and secure quality service at reasonable rates for customers.”^{88/}

D. Performance Standards Should Generally Be Prescribed for the Largest ILECs.

AT&T recognizes that there are ILECs of different sizes. Moreover, because an ILEC’s ability to affect competition generally is in part a function of its size, the need for performance standards, measures, and reporting requirements may reasonably vary by carrier size.^{89/} In this regard, the Commission could appropriately look to Section 251(f) of the Act, which represents a determination by Congress that the different circumstances of the smallest ILECs may warrant a lighter regulatory touch.^{90/} Here, the Commission’s primary enforcement concerns should be with the Tier 1 local exchange carriers, which collectively control the vast majority of all access lines.^{91/}

^{87/} In this context, the regulator is simply protecting customers who have no practical alternative by requiring monopolists to provide information and be subject to discipline that the market cannot enforce.

^{88/} See *SBC Merger Order* ¶ 101.

^{89/} See *Notice* ¶ 15.

^{90/} 47 U.S.C. § 251(f) (creating separate classes for ILECs).

^{91/} Tier 1 local exchange carriers, also known as Class A local exchange carriers, are companies having annual revenues regulated telecommunications operations of \$100 million or more. Tier 1 local exchange carriers have been defined using criteria used to define Class A companies. See 47 C.F.R. §§ 32.11(a), (e); see also *Commission Requirements for Cost Support Material to be Filed with 1990 Annual Access Tariffs*, 5 FCC Rcd 1364, 1364, ¶¶ 3-5 (1990).

In sharp contrast, there is no need for the Commission to impose performance measurement or reporting requirements on competitors. In the (limited) circumstances in which a competitor has constructed its own facilities to connect a given customer, CLECs by definition lack market power. Thus, unlike the ILECs, they cannot possibly avoid customer demands for service that is at least at the same level as that offered by the ILECs, and market forces will provide the discipline needed to ensure quality performance.^{92/} Indeed, if the competitor cannot provide service that is the same or better quality than the ILEC's, its customers will not stay for long. Moreover, if public reporting of the ILECs' performance leads (as it should) to higher quality ILEC performance, market forces will require competitors to raise their standards as well.

In any event, requiring competitors to report on their service quality does not make sense while they are still so heavily dependent on ILEC facilities and services. As described above, a very large proportion of CLECs' local exchange service is provided through the use of unbundled network elements obtained from ILECs or by resale of ILEC retail services.^{93/} Accordingly, as the Commission and many state commissions recognize, a competitive carrier often has "no control over the service quality of the resold service or the purchased elements."^{94/}

^{92/} See *Fea-Taggart Declaration* at 19-20 (explaining that third-party providers often have significantly better performance at attractive prices).

^{93/} Because CLECs and IXC are often so reliant upon the services obtained from the ILEC, monitoring and reporting by the CLECs/IXCs would bring with it the substantial complexity of determining which failure were due to non-performance by the CLEC/IXC and which were due to an inability of the CLEC/IXC to recover from a performance failure on the part of the ILEC.

^{94/} *2000 Biennial Regulatory Review -- Telecommunications Service Quality Reporting Requirements*, CC Docket No. 00-229, Notice of Proposed Rulemaking, ¶ 32 (rel. Nov. 9, 2000); see also Comments of the Indiana Utility Regulatory Commission, CC Docket No. 00-229, at 3 (filed Jan. 12, 2001) ("customers have no way of knowing how the underlying network is configured and who is truly to blame for the service problems"); Comments of the Michigan Public Service Commission, CC Docket No. 00-229, at 4 (filed Jan. 12, 2001) ("[r]esellers and competitors that purchase network elements from an incumbent LEC may have no control over the service quality of the resold service or the purchased elements").

IV. THE COMMISSION SHOULD ADOPT A MEANINGFUL REMEDY AND ENFORCEMENT PLAN THAT INCLUDES SELF-EXECUTING REMEDIES.

Given the ILECs' incentives to discriminate, prompt, certain, and meaningful enforcement and remedies are essential to any performance standard and measurement plan.^{95/} Indeed, there is a significant need for Commission *enforcement* action when ILECs fail to meet federally mandated performance standards. Without remedies that provide incentives to correct deficiencies, performance standards are virtually useless. Thus, AT&T recommends that the Commission adopt a two-tiered remedy plan, similar to the plans adopted by many states in the 271 context.

A. Experience Has Shown That the Current Level of Penalties Imposed on The ILECs Generally Result in Little More Than Token Payments and No Meaningful Reform in Performance.

Officials from all telecommunications sectors, including the Commission, the DOJ, and Congress, have recognized that forfeitures of the current magnitudes are not succeeding in making the ILECs live up to their legal obligations to provision UNEs. Notwithstanding the imposition of what are, by historical standards, relatively substantial fines, the ILECs routinely pay them and just as routinely persist in failing to meet their statutory and regulatory obligations. As a result, there is widespread recognition that more severe penalties must be imposed.^{96/}

^{95/} See Notice ¶¶ 11-12.

^{96/} See, e.g., Evaluation of the United States Department of Justice, CC Docket 01-138, at 16-17 (July 26, 2001) (“*DOJ Pennsylvania 271 Evaluation*”) (explaining that the Pennsylvania Performance Assurance Plan (“PAP”) may not impose sufficient penalties to prevent harm to competition in Pennsylvania and encouraging the Pennsylvania Public Utility Commission to improve PAP penalties); Letter from Michael K. Powell, Chairman, FCC, to Leaders of the Senate and House Commerce and Appropriations Committees (May 4, 2001) (stating that current forfeiture amounts are “insufficient to punish and to deter violations in many instances” and urging Congress to “consider increasing the forfeiture amount to at least \$10 million in order to enhance the deterrent effect of Commission fines”); Testimony of Leon Jacobs, Chairman, Florida PSC, before the House of Representatives Committee on Energy and Commerce, on H.R. 1765 (May 17, 2001) (supporting the “goal of increasing the penalties at the national level

In recent years, the ILECs have paid literally hundreds of millions of dollars in fines.^{97/}

Nonetheless, in many respects, their performance in meeting their statutory obligations remains deficient. Apparently, the fines appear to be an annoyance rather than a deterrent -- they are viewed as little more than a routine cost of doing business.^{98/} Tellingly, when these paltry fines

against companies found violating the FCC's rules and orders" and noting that the "current level of penalties is not adequate in removing the incentives to violate current law"); Hearing before the Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce, House of Representatives, 107th Congress, First Session, Statement by Representative Markey on H.R. 1765, at 3 (May 17, 2001) (stating that "[i]t is very clear that the current forfeitures and penalties available to the Federal Communications Commission are woefully inadequate to act as a deterrent to multi-billion dollar enterprises"); *see also* H.R. 1765, 107th Congress (2001) (increasing penalties for common carrier violations of the Communications Act of 1934, particularly an increase in forfeiture penalties to \$1,000,000 per violation with a cap of \$10,000,000 for continuing violations). While AT&T supports efforts to raise the forfeiture amount to which ILECs may be subject, the Commission should aggressively use its existing authority to assure that the ILECs comply with their legal obligations.

^{97/} *See, e.g.,* Robert Luke, *BellSouth Hits New Snag: FCC Raises Questions About Filing to Offer Long-Distance in Ga., La.*, THE ATLANTA CONSTITUTION, Dec. 21, 2001, at 3D (BellSouth has incurred nearly **\$40 million** in penalties levied by the Georgia Public Service Commission in 2001 for "poor performance in doing business with competitors"); *Techbits*, INVESTOR'S BUSINESS DAILY, at A7 (Jan. 7, 2002) (SBC has paid the federal government **\$53.5 million** in fines for failure to meet merger conditions since regulators approved SBC's merger with Ameritech Corp. in 1999); *Ameritech: Phone Company Pays More Fines*, CRAIN'S CHICAGO BUSINESS, at 1 (July 23, 2001) (Ameritech paid the Illinois Commerce Commission **\$24.2 million** for failing to provide adequate service to competing phone companies from July 2000 through July 2001); *Monopoly Claim Against Bell Atlantic Corp. Is Dismissed Where No Willfulness Is Alleged; Law Offices of Curtis v. Trinko, LLP v. Bell Atlantic Corp.*, NEW YORK LAW JOURNAL, at 25 (Dec. 4, 2000) (In March 2000, Bell Atlantic paid the Commission "a **\$3 million** fine to end an investigation into its alleged failure to provide adequate access to local phone service competitors in New York;" in addition, Bell Atlantic paid "**\$10 million** to competing local telephone service providers for injuries resulting from its misconduct in handling their orders.") (emphasis added); *Service Provider Briefs*, NETWORK WORLD, at 33 (Dec. 10, 2001) (Verizon paid the federal government about **\$4 million** for failing to meet performance targets from August to November 2001); Letter from Dee May, Verizon, to Magalie Roman Salas, Secretary, FCC (Dec. 28, 2001) (Verizon voluntarily pays **\$1 million** fine for metrics missed under its merger conditions); *SBC Communications, Inc. Apparent Liability for Forfeiture*, FCC 02-7, ¶ 1 (rel. Jan. 18, 2002) (finding SBC apparently liable for a **\$6 million** forfeiture for violating the merger condition requiring SBC to offer shared transport to competitors pursuant to certain terms and conditions).

^{98/} Representative W.J. "Billy" Tauzin lauded new legislation before his House Commerce Committee that "will increase the penalties that the FCC may impose on common carriers to a

are compared to the annual revenues of the major ILECs, the penalties often equate to only a few minutes' worth of ILEC revenues.^{99/} The message to a businessman is clear -- it is more profitable to pay the fine than to take corrective action.

B. A Two-Tiered Remedy Plan Is a Necessary and Complementary Element of An Effective Performance Plan.

Any effective enforcement regime has two components: compensation and deterrence. Thus, in the context of UNEs, the states have widely recognized the need for a two-tiered enforcement mechanism. The two tiers work in tandem to achieve the goals of the 1996 Act.^{100/} The first tier addresses compensatory consequences for an ILEC's non-compliant performance delivered to an individual CLEC. Such "Tier 1" remedies are paid to the injured carrier and are intended to compensate the injured carrier for the damage caused by the ILEC's deficient

level that is far beyond just the cost of doing business." Rodney L. Pringle, *Bell Backers Support FCC Call for Bigger Bell Hammer*, COMMUNICATIONS TODAY, May 21, 2001. In addition, Chairman Michael Powell reiterated the need for the reform: "We recognized quickly that much of the authority that we had in this area was inadequate. The level of fines we could impose in many cases was paltry. For many large carriers the penalties could be absorbed as the cost of doing business." Michael K. Powell, Chairman, FCC, Remarks at the Association for Local Telecommunications Services (Nov. 30, 2001); *see also* Merrill Lynch Global Securities Research, *RBOCs Continue to Pay Fines, Highlighting Difficulties for Competitors, But Are Improving* (Dec. 28, 2001) ("the cost of violating merger agreements is below the cost of allowing competitors to enter the market [and] it continues to be cheaper [for ILECs] to pay the government for violating certain performance targets versus completely opening up the local markets to competitors").

^{99/} For example, on October 16, 2001, the Commission issued a Notice of Apparent Liability against SBC in the amount of \$2.5 million. *See SBC Communications, Inc. Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture and Order, FCC 01-308, ¶¶ 3, 91, 92 (rel. Oct. 16, 2001). At the time, SBC's revenues for the preceding quarter were \$13.5 billion, or over \$103,000 per minute. A forfeiture of \$2.5 million therefore amounted to approximately 24 minutes' worth of revenues.

^{100/} For special access (in contrast to UNEs), given the lack of state plans, the Commission needs to address both tiers of an effective remedy plan. *Compare AT&T UNE Performance Measure Comments* at Section IV.B.

performance.^{101/} While Tier 1 remedies are valuable for (at least theoretically) making CLECs whole, these remedies are too small to cause the ILECs to make the significant behavioral changes that are needed. A Tier 1 component is a necessary -- but by no means sufficient -- element of the consequence plan that should be adopted for interstate special access performance deficiencies.

The second tier in the remedy plan must focus on deterrence. Tier 2 remedies are based on the consequences of the ILECs' overall performance in the marketplace. Because the focus is on injury to competition, not individual competitors, and the purpose is to change behavior, not compensate for injury, Tier 2 remedies would be payable to the U.S. Treasury. Tier 2 remedies have the potential to bring about significant improvements in ILEC performance, but only if the remedy amounts are truly meaningful. To the extent they can be treated by the ILECs merely as a cost of doing business, the deterrent effect is lost. The Commission should thus aggressively use its forfeiture authority within existing statutory limits, even while pursuing legislation to increase that authority.

One major step in establishing a regime of performance monitoring and enforcement typically is to define precisely what behavior will be measured for purposes for determining whether ILECs deliver services in a manner that meets the statutory requirements. As noted above, that task has already been addressed by the JCIG Proposal, which establishes the relevant measures and submeasures, identifies the pertinent levels of disaggregation needed, specifies the applicable business rules, and explains the applicable performance standards for each submeasure.

^{101/} In the course of establishing Tier 1 consequences, the rights of an individual competitor to pursue actual damages must be retained. However, if a competitor sought to pursue a claim for actual damages, it would be reasonable to offset the damage award by any Tier 1 payments it received from the ILEC for the same period and performance areas.

A number of additional steps are also appropriate to craft an effective regime, but again the experience acquired over the course of numerous state proceedings (and a few Commission proceedings) can be brought to bear to simplify the process. For example, when a performance standard is based on a parity standard, it is appropriate to use even-handed statistical techniques to determine whether measured differences between the ILEC's service to itself and its retail customers, on the one hand, and to its wholesale customers, on the other, are meaningful. Put another way, these statistical techniques are applied to determine whether differences in reported results are attributable to discrimination, which should be penalized, or to random sampling error.^{102/}

To handle this computation of parity assessment, a "z-test" is computed. The z-test that AT&T proposes is derived from a collaboration of AT&T statisticians and BellSouth's consultants (Ernst & Young) on a Louisiana study that led to the Louisiana Statistician's Report.^{103/} That report lays out the general fundamentals of the computations needed to process the various reported performance results for each metric to establish a "passing grade" for that metric for a month, including the need for what is called a "balancing critical value." AT&T recommends that the Commission adopt a simplified version of the computation proposed in the Louisiana Statistician's Report, in which the balancing critical value would be computed at the submeasure level. All of this can be done with standard formulas, and all necessary

^{102/} Where a benchmark standard is used, there is no need to use statistics to test for random error. Rather, comparison of performance results against a bright line test is sufficient.

^{103/} See LPSC Docket U-22252, Subdocket C, *In Re: BellSouth Telecommunications, Inc., Service Quality Performance Measurements*, Statistical Techniques for the Analysis and Comparison of Performance Measurement Data (Submitted to the Louisiana Public Service Commission by Drs. S. Hinkings, E. Mulrow, F. Scheuren, and C. Mallows) (filed Oct. 15, 1999) ("Louisiana Statistician's Report").

computations can be made electronically using only the power of an ordinary personal computer.^{104/}

The final step in a federal enforcement regime is to determine the appropriate remedy for a performance failure. Both tiers of the remedy plan must take into account certain variables: is the performance failure severe (for any given measure, more severe penalties should attach to performance that significantly misses the applicable standard), is the performance failure chronic (for any given measure, the third consecutive month of noncompliant performance should lead to increased penalties until the applicable standard is met), and what is the extent of competition in the particular state (the severity of penalties may reasonably be lessened as local competition reaches meaningful levels). The necessary calculations to determine such amounts can also be made on a personal computer.

AT&T also recommends that, to the extent the Commission intends to employ procedural caps,^{105/} the cap should be no less than 40 percent of the most recent ARMIS special access net revenues reported by the ILEC for the state in which the performance consequence applies.^{106/}

Whether or not any established procedural cap is actually invoked should be determined based

^{104/} If the Commission elected to adopt appropriately rigorous performance benchmark levels for all measurements rather than employing a mix of benchmark and parity standards, then statistical techniques to compare results would not be required and the entire process would be substantially simplified.

^{105/} See *AT&T UNE Performance Measure Comments* at Section IV.B. (explaining the use of procedural caps).

^{106/} See NY PSC Cases 00-C-0008, 00-C-0009, 99-C-0949, *Complaint of MCI WorldCom, Inc. against Bell Atlantic-New York Concerning Billing Completion Notices, Firm Order Commitments, Acknowledgements and Tracking Numbers, filed in C 99-C-1529, et al.*, Order Directing Market Adjustments and Amending Performance Assurance Plan at 4 (issued Mar. 23, 2000) (modifying the initial cap on the New York performance plan (\$269 million dollars at risk or 36% of Verizon's ARMIS net return) to add an additional \$24 million in dollars at risk, with the net result being a cap of \$293 million or 39% of Verizon's ARMIS net return).

upon the penalties the ILEC has paid (for the applicable state) over a rolling twelve-month period ending with the current period.

C. Concerns About Sunsetting Are Premature.

The *Notice* reflects premature concern about establishing periodic reviews of, and the timing for, the dismantling a regime that the Commission is only starting to craft.^{107/} Although it is reasonable to assure that the Commission's new rules are calibrated to current market needs, it is premature to focus energy on periodic reviews or the eventual sunset of those rules. When an ILEC demonstrates that it is *regularly* meeting its obligations under the Act and when competition is firmly established, there will be time enough to evaluate the means for eliminating the performance measures and reporting regime.^{108/}

From a more practical standpoint, the potential consequences under such a plan are simply irrelevant if the ILEC maintains consistently compliant performance -- as would be required of a supplier in a competitive market. Furthermore, the so-called "burden" or reporting would be rendered moot if and to the extent a competitive market actually exists, because market discipline would force the ILEC to meet its customers' needs voluntarily, rather than oppose them.

^{107/} See *Notice* ¶¶ 19-20.

^{108/} In all events, as explained above, remedy payments themselves may reasonably decrease as the ILECs' market share (and concomitant power) decreases.

CONCLUSION

For the foregoing reasons, AT&T respectfully requests that the Commission adopt the performance measures, business rules, and disaggregation levels set forth in the JCIG Proposal. In addition, AT&T urges the Commission to adopt a corresponding enforcement plan, which is necessary to provide ILECs with meaningful incentives to comply with the Act and the Commission's rules.

Respectfully submitted,

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