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FEDERAL COMMUNICATIONS COMMISSION
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January 23, 2002

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, SW, Room CY-B402
Washington, D.C. 20036

Re: CC Docket Nos. 01-318, 98-56/98-147, 96-98 and 98-141

Dear Secretary Salas:

Attached please find the signed original of the Joint Comments of Dynegy Global Communications, e.spire Communications, ITC^DeltaCom, KMC Telecom, Metromedia Fiber Network Services, NuVox, Talk America and Z-Tel Communications that were filed electronically on January 22, 2002.

If you have any questions or concerns, please do not hesitate to contact the undersigned.

Respectfully submitted,

Andrew M. Klein

Enclosure

DC01/KLEIA/172538.1

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OFFICE OF THE SECRETARY

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

In the Matter of	)	
	)	
Performance Measurements and Standards for Unbundled Network Elements and Interconnection	)	CC Docket No. 01-318
	)	
Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance	)	CC Docket No. 98-56
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
Petition of Association for Local Telecommunications Services for Declaratory Ruling	)	CC Docket Nos. 98-147, 96-98, 98-141

JOINT COMMENTS OF DYNEGY GLOBAL COMMUNICATIONS, INC., e.spire COMMUNICATIONS, INC., ITC^DELTACOM, INC., KMC TELECOM, INC., METROMEDIA FIBER NETWORK SERVICES, INC., NUVOX, INC., TALK AMERICA, INC., AND Z-TEL COMMUNICATIONS, INC.

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Dated: January 22, 2002

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SUMMARY

The joint commenters support the creation of uniform federal metrics to supplement State-specific measures, and encourage the implementation of a federal enforcement plan that would effectively ensure compliance with the Act and the orders and rules of the Commission. The market-opening mandates of the Telecommunications Act of 1996 will be furthered by Commission action to supplement – but in no way supplant – State Commission performance metrics and enforcement plans. Despite numerous proceedings since the passage of the Telecom Act to establish unbundling and access rules, the goal of full local competition has not been attained and the Commission cannot currently measure whether the ILECs are meeting their obligations. As a result, appropriate measurement and enforcement action is appropriate.

The comprehensive performance measurement plans developed by many State Commissions are extremely helpful and must remain in place. With its national perspective, the Commission can take action to support the broad, pro-competitive goals of the Telecom Act with a separate and distinct federal measurement plan. The joint commenters therefore support the adoption of the metrics set forth in the Notice, as further defined and supplemented by the measurements, business rules and standards referenced herein. All five service domains should be captured by the metrics, as well as the essential UNEs and UNE combinations that run the gamut from POTS elements to high capacity circuits.

The Commission should use the uniform metrics it establishes to form the basis of a self-executing performance assurance plan that would apply to all major incumbents. Such a plan would permit the Commission to enforce the standards it creates by uniformly applying penalties across ILECs, efficiently supplementing the State-established plans, using the legal authority found in the Act.

There are several key factors in the design of an effective enforcement plan. The plan should apply on a fair and proportionate basis to ILECs of various sizes. The plan must also ensure adequate performance to low-volume (often new entrant) CLECs by separately measuring and assessing high volume and low volume products, and by including CLEC-specific measures and penalties. The plan must contain disincentives that effectively discourage substandard performance, by escalating penalties for continued poor performance or performance well below established standards. Lastly, the penalty payments should be given their maximum deterrent effect by requiring their payment directly to the competitive carriers aggrieved by the substandard service.

To ensure the reliability of the performance reports, all data underlying the reports should be provided to the relevant stakeholders. Audit procedures must also be specified, and penalties must be levied against ILECs that fail to accurately report data.

As ILECs comply with their obligations, the actual enforcement plan penalties will decrease accordingly. Compliance with the Act is therefore the best way for the ILECs to reduce their regulatory burdens.

I. INTRODUCTION

Dynegy Global Communications, Inc., e.spire Communications, Inc., ITC^DeltaCom, Inc., KMC Telecom, Inc., Metromedia Fiber Network Services, Inc., NuVox, Inc., Talk America, Inc. and Z-Tel Communications, Inc. (hereinafter the "Competitor Coalition") hereby submit these comments in response to the Commission's Notice of Proposed Rulemaking.[1] The Competitor Coalition encourages the Commission to take action in accordance with the Notice, and appreciates the opportunity to participate in this potentially significant proceeding. As Chairman Powell recently noted,

> The Commission now has the benefit of two years of experience with the current unbundling rules and almost six years of experience with promoting competition since the 1996 Act was passed. . . . [I]t is critical that we take stock of the lessons we have learned so far and make any changes that may be necessary to ensure that our rules remain faithful to the statute and its goals of promoting competition, deregulation and innovation in telecommunications markets[2]

The coalition believes that the market-opening mandates of the Telecommunications Act of 1996[3] will be furthered by Commission action to supplement State Commission performance metrics and enforcement plans.[4]

Commission monitoring of performance and implementation of enforcement mechanisms is needed. Despite the promise of competition contained in the Telecom Act, the

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1 *Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, CC Docket No. 01-318, Notice of Proposed Rulemaking, released November 19, 2001 (*NPRM or Notice).*

2 Separate Statement of Chairman Powell, *Review of Regulatory Requirements for Incumbent LEC Broadband Services,* Docket No. 01-337 and *Review of the Section 251 Unbundling Obligations on ILECs* Docket No. 01-339 (December 12, 2001) (*"Statement of Chairman Powell on Unbundling Obligations"*).

3 Codified at 47 U.S.C. §151, *et. seq.* ("Telecom Act").

4 The members of the Competitive Coalition are absolutely opposed to any action that would preempt or supercede current and future State plans.

incumbent LECs remain "so clearly dominant in the provision of local phone service"[5] that more action must be taken. For several years, the Commission has ordered the ILECs to provide interconnection and access to network elements in accordance with the Telecom Act so that the public could reap the benefits of local competition – better service, lower rates, less regulation, technological innovation and economic growth. Since the ILECs have been less than complete in honoring the Commission-mandated requirements, significant further action is required.

II. THE FCC SHOULD ESTABLISH FEDERAL PERFORMANCE METRICS

A. Performance Measures Benefit All Parties – Regulators, ILECs and CLECs

The performance metrics painstakingly developed by many State Commissions are extremely helpful in measuring ILEC performance on a local level. Their significance cannot be overstated. These metrics assist the State Commissions in determining whether, for example, the Regional Bell Operating Companies ("RBOCs") are complying with their access and unbundling obligations, and with the competitive checklist set forth in the Telecom Act.[6] As the NPRM also points out, many State Commissions have also established performance assurance plans based on these metrics. The metrics are of great value to the competitive industry as they provide otherwise unavailable insight into the level of performance provided by their wholesale service providers. The ILECs should also value these metrics in that they enable the incumbents to objectively measure their performance and, hopefully, allocate resources to those areas identified as deficient.

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5 *Statement of Chairman Powell on Unbundling Obligations.*

6 47 U.S.C. §§251, 271.

While these State-set metrics have already proved invaluable and will continue to remain so, this Commission can build upon State efforts in a way that it is uniquely capable of doing. With its national perspective, the Commission can take action to support the broad, pro-competitive goals of the Telecom Act. The Commission could, for example, ensure that competitors have access to high capacity loops and transport, which would, in turn, ensure that other competitive carriers have alternative sources of network elements. If these policies ultimately proved effective and competition flourished, the deregulatory aspects of the Act could then be implemented.

The Commission can also use this opportunity to ensure that its orders and rules are not being ignored by those carriers at which its regulations are aimed. Thus, while the Commission has established minimum network unbundling requirements, it cannot currently measure whether the ILECs are meeting their obligations. Current Commission rules do not permit it to determine, for example, whether the UNE combinations necessary for mass-market competition are being made uniformly available, or whether the high-speed transport that will enable the broadband economy is being unbundled, despite the fact that the Commission's rules have required - for years - that access to these and other important elements be made available in accordance with the Act.

Since the current measurements are, by their nature, State-specific, they can be efficiently supplemented by federal metrics without undermining their effectiveness. Consistent with the concept of Federalism woven by Congress into the Act, the FCC should not attempt to supplant State plans or mandate what the States can and cannot measure, but rather should independently measure those items that it believes are important in promoting the goals of the Telecom Act. The Competitor Coalition therefore supports the adoption of the metrics set forth

in the NPRM, as implemented and augmented by WorldCom's proposed measures, as supplements to the performance metrics adopted by the States.[7]

B. A Federal Measurement Plan Would Serve Several Important Objectives

The Competitor Coalition supports the creation of a set of separate, uniform federal metrics for several important reasons. First and foremost, national metrics would enable the Commission to benchmark the performance of each ILEC. Through such benchmarking, the Commission could evaluate the effectiveness of its policies and, more generally, the openness of the local exchange market. By including other ILECs in addition to the RBOCs, the Commission can also to draw important conclusions about the relative ability of carriers to comply with the Commission's rules and about the ubiquity of local competition.

The net effect of such benchmarking could produce very tangible benefits, particularly in the enforcement arena. The deterrent effect of such uniform metrics should not be underestimated. Knowing that their performance would finally be subject to clear, apples-to-apples comparisons with similarly situated carriers, ILECs would be more inclined to ensure that their individual performance is satisfactory. As the Commission made use of these metrics in evaluating various petitions (*e.g.* §271 InterLATA authority, license transfers), the self-policing nature of the measurements would grow stronger.

With uniform metrics in place, ILEC-specific enforcement action would become much more easy to accomplish. FCC or State Commission improvement plans and penalty actions would be completed more efficiently and expeditiously with metric issues already

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[7] The coalition members have reviewed and generally support the measurements that WorldCom is proposing in the comments it is filing in this proceeding. Understanding the Commission's desire to establish the most efficient set of metrics possible, set forth below are the specific metrics that are most critical to the coalition members.

resolved. Carrier-specific actions, such as those pursuant to §208 of the Communications Act,[8] could actually be evaluated and resolved with the rocket-like speed envisioned by the Commission.[9]

From a purely regulatory perspective, uniform metrics could assist the Commission in the efficient fulfillment of its statutory duties. The newly enhanced benchmarking ability would enable the Commission to make the cross-RBOC performance comparisons that are difficult under the current regime. In considering an application from BellSouth or Qwest for interLATA authority under §271, for example, the Commission could evaluate checklist performance on an apples-to-apples basis with performance by Verizon or SBC,[10] enhancing the more thorough data already collected by the States. Similarly, applications from ILECs for license transfers attendant to mergers could be evaluated more easily (from a performance perspective at least) with a set of uniform metrics. Obviously, post-approval monitoring and enforcement would become easier tasks as well, with well-defined metrics established and the ability to benchmark already in place.

With all of the benefits described above, the argument will surely be made that the Commission should attempt to eliminate the State-established metrics and replace them with an FCC-administered regime. Such arguments must be rejected, however, as any such action would be extremely burdensome and ultimately detrimental.[11] The State plans are quite detailed

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8 47 U.S.C. §208. The Communications Act of 1934, as amended, will hereinafter be referred to as the "Act."

9 Currently, one of the first hurdles facing Commission staff in any §208 proceeding is determining which of several data sets are most comparable and useful.

10 The oft-cited claim that "other RBOCs measure this item differently than we do" would thankfully be retired.

11 The legal basis for any attempted preemption is also far from clear.

and comprehensive. They are the product of extensive proceedings, collaboratives and workshops, and demonstrate the expertise of the agencies that are closest to the local operating companies and are therefore most familiar with location-specific issues. So while there is a great deal of benefit in overlaying a smaller set of uniform federal metrics across the top of the State plans, great detriment would result from any attempt to replace them with federal measurements. Thus, if the only two options presented were replacement of the State metrics and performance plans versus no action at all at the federal level, the Competitor Coalition would clearly support the latter approach.

C. The List of Metrics Proposed in the NPRM Should Be Supplemented to Measure Several Other Significant Activities

The list of measurements in the NPRM provide a solid starting point for an effective set of federal measurements. As noted above, the undersigned carriers support the adoption of the metrics set forth in the Notice, as further defined and supplemented by the measurements, definitions and standards being proposed by WorldCom in this proceeding.[12]

The members of the Competitor Coalition identify below those measures and products that are most critical to their business plans, and with regard to which it would be particularly useful to have cross-ILEC comparisons. Since the Competitor Coalition embodies a very broad spectrum of competitors, these measures signify activities that are important to many different types of competitors.[13] As a general matter, the metrics adopted must ensure that the pro-competitive goals of the Act are effectively promoted. All of the service domains – from

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12 The WorldCom proposed measures provide responses to many of the metric-specific questions posed in the NPRM.

13 The Coalition does not attempt to identify an exhaustive list of metrics that would represent every aspect of the competitive industry. Certain metrics not mentioned herein may be critical as well.

pre-ordering to billing – should be captured by the metrics, as well as the essential UNEs and UNE combinations, which both run the gamut from POTS elements to high capacity circuits.

With regard to the twelve measurements set forth in the Notice,[14] the undersigned carriers support their adoption[15] and believe that, where disaggregation is required, each measure include the following products: UNE-Loops (two-wire, four-wire, DS-1, DS-3 and OC-n); UNE-Platform (residential and multi-line business);[16] EELs; Inter-Office Transport (DS-1, DS-3 and OC-n), and Trunking (DS-3 and OC-n). In terms of the other definitional issues on which the Commission has requested comment,[17] the Competitor Coalition supports the business rules, calculations and standards in the WorldCom proposed definitions. The WorldCom metric interpretations were developed with input from a significant number of competitors, and appropriately and efficiently implement the intent behind the NPRM's proposed metrics.

In addition to the twelve NPRM measurements, the Competitor Coalition specifically encourages the Commission to adopt the following metrics and incorporate them into the federal measurement plan:

4.[18] (a) Percent of Software Errors Corrected in X Days

(b) Average Delay for Resolution of OSS Problems

This measurement is significant in that it captures the efficiency with which the ILECs are identifying and correcting OSS problems. Particularly important are those errors that

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14 *NPRM* at ¶¶36-72.

15 With the exception of the Percentage Missed Appointment metric, as noted below.

16 By proposing this level of disaggregation, the Competitor Coalition does not mean to imply its agreement that "residential" and "business" are separate product markets for purposes of competitive analysis. In adopting any level disaggregation, the Commission should be clear that such disaggregation levels are selected for their diagnostic value and not to imply that a complete competitive analysis has been undertaken.

17 *See, for example,* ¶¶29-34.

18 The metric numbers listed correspond to the list of metrics proposed by WorldCom.

cause outages for which there is no workaround, as these are the most likely to be customer-affecting.

7. Flow-Through Percentage

There is no doubt that manual intervention in the ordering process causes errors, and that the ILEC internal systems have what is essentially built-in flow through for all orders. To minimize the likelihood of errors on CLEC orders as compared to ILEC orders, the Commission should establish uniform flow-through standards for various types of CLEC orders. UNE-P, UNE-Loop and Resale orders should flow-through 90% of the time, since they are generally quite easy for the ILEC systems to process, while a slightly lower 75% standard is appropriate for all other order types since these run the gamut from simple to more complex.[19] For those specific product/order types that the ILECs have specifically delineated as eligible for flow-through,[20] a 97% standard is appropriate. Since this last group of orders have been identified as eligible for flow-through, and there is consequently is no reason to expect performance below 100%, a 3% margin of error represents a reasonable accommodation for the ILECs in this context.

15. Percent of Coordinated Hot Cut Conversions Completed On Time

Where live customer loops are involved the risk of a customer-affecting outage is heightened. If the cut-over is not performed on-time, there is a very good chance a customer will be put either partially or completely out of service since so many different activities are being coordinated. In light of the significance of following prescribed hot cut procedures, it is essential that the Commission measure the level of compliance. As the Commission is aware, this has

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19 Even with a 75% standard, 33% more of the ILEC orders will be flowing through the incumbents' systems without manual intervention.

20 Often referred to as "Designed Flow Through."

been a critical issue,[21] and remains so for at least several ILECs. The Competitor Coalition supports the business rules, disaggregation and standards set forth in the WorldCom proposed measurements and encourages their adoption.

Percentage of Orders Held for Lack of Facilities[22]

Several of the undersigned carriers have experienced what they believe to be discriminatory assignment of facilities by ILECs, in that a disproportionate number of orders remain unfulfilled due to a claimed facilities shortage. It would therefore be very useful to have a uniform federal metric to measure the number of orders that are not completed within the standard interval for facilities-related reasons.[23] The Competitor Coalition proposes that ILEC performance under this metric be measured using both comparative/parity and absolute standards. In so doing, the Commission would ensure that ILECs are providing nondiscriminatory access to available facilities, and that they are forecasting and planning effectively.

23. Percent Trunk Blocking

Pursuant to Section 251(c)(2), ILECs have a duty to provide interconnection that is "at least equal in quality" to that provided to themselves, upon "terms and conditions that are

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21 *See, for example, Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953 (1999)("*New York 271 Order*"), *aff'd*, *AT&T v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

22 This metric is not among those proposed by WorldCom, although it is at least partially captured in the disaggregation of metric 14, Percent of Orders Completed On Time. This particular metric was, however, alluded to at ¶60 of the NPRM as a possible alternative to the missed appointment metric. This metric could be used instead of the missed appointment percentage measurement, as the NPRM contemplated, since the on-time percentage metric captures what is essentially the flip-side of the data that would otherwise be captured.

23 This would include both lack of facility and defective facility situations.

just, reasonable, and nondiscriminatory."[24] The ILEC have, unfortunately, often failed to meet these clear requirements. One manifestation of this failure is call blockage, which is always customer-affecting and therefore very harmful to competition.

Since there are several ways in which ILECs currently measure trunk capacity and blockage, it would be most helpful if the Commission were to establish a single, uniform metric that would facilitate comparative analysis. It is for these reasons that the Competitor Coalition supports the business rules, disaggregation and standards set forth in the WorldCom proposed measurements and encourages their adoption.

25. (a) Percentage of Collocation and Augment Appointments Met
(b) Average Collocation and Augment Interval

As with some of the other metrics cited herein, a uniform federal measurement would be very useful here. Since the FCC has issued an Order specifying default collocation interval standards,[25] this provides a very solid example of a federal rule without corresponding analysis or enforcement. In order to measure the extent to which ILECs are failing to comply with the Commission's mandate, the Competitor Coalition supports the business rules, disaggregation and standards set forth in the WorldCom proposed measurements and encourages their adoption.

27. Timeliness of Daily Usage Feed

In the Notice, the Commission asked whether there are any billing measures that are "equally or more critical to promoting competition" than those proposed. Measuring the timeliness of the Daily Usage Feed (DUF) is one such measure that should be included in the

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[24] 47 U.S.C. §251(c)(2).

[25] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 15

. . . .*Continued*

uniform federal measures since carriers rely substantially on the DUF in operating their businesses. As a result, the Competitor Coalition endorses the business rules, disaggregation and standards set forth in the WorldCom proposed measurements and encourages their adoption.

28. Timeliness of Carrier Invoice

This is another billing measure that is critical to competitors. To be truly effective, however, it must count only bills that are complete when sent. To do otherwise would permit ILECs to send out error-ridden or incomplete bills, that would be useless to competitors but would permit the ILECs to meet the metric.

III. THE FCC SHOULD CREATE A SUPPLEMENTAL FEDERAL PERFORMANCE PLAN

A. The Federal Plan Should *Not* Supercede State Plans

The Commission should use the uniform metrics it establishes to form the basis of a performance assurance plan. Such a plan would permit the Commission to enforce the standards it creates by uniformly applying penalties across ILECs, efficiently supplementing the State-established plans.

To be most effective, the federal enforcement plan must be self-executing. The Commission has already recognized the importance of self-executing enforcement plans in ensuring that RBOCs continue to meet their §271 obligations after the incentive of gaining InterLATA authority has been removed.[26] A similar, self-executing FCC-established enforcement plan should be an equally important element in ensuring that all ILECs comply with their §251 obligations, as interpreted by this Commission in its rules and orders.

FCC Rcd 17806, (2000) (*Collocation Reconsideration Order*), *petitions for further recon. pending.*

As the Commission is aware, the various State-specific enforcement plans are very detailed and comprehensive. They have evolved over the several years since the New York PSC established the original plan in 1998,[27] and have become much more uniform in their application to each particular RBOC. The Massachusetts DTE and Pennsylvania PUC have, for example, adopted the New York PSC model for Verizon.[28] The North Carolina Utilities Commission has adopted the Georgia SEEM plan,[29] and several other Commissions in the BellSouth region are considering doing the same. Similarly, each SWBT operating company is generally operating under the plan originally created by the Texas PUC,[30] while the draft Qwest plan[31] was developed primarily on a region-wide basis. Several of these enforcement plans have

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26 *See, for example, New York 271 Order* at ¶429.

27 Pre-filing Statement of Bell Atlantic-New York, *Petition of New York Telephone Company for Approval of its Statement of Generally Available Terms and Conditions pursuant to Section 252 of the Telecommunications Act of 1996 and Draft Filing of Petition for InterLATA Entry pursuant to Section 271 of the Telecommunications Act of 1996,* New York Public Service Commission, Case 97-C-0271, filed April 6, 1998.

28 Massachusetts Department of Telecommunications and Energy, Case 99-271; Pennsylvania Public Utility Commission, Docket No. P-00991643.

29 State of North Carolina Utilities Commission, *In the Matter of BellSouth Telecommunications, Inc. to Provide In-Region InterLATA Services Pursuant to Section 271 of the Telecommunications Act of 1996*, Docket No. P-55, Sub 1022; Georgia Public Service Commission, *In re: Performance Measurements for Telecommunications Interconnection, Unbundling and Resale*, Docket No. 7892-U.

30 *See e.g.*, Public Utility Commission of Texas, *Section 271 Compliance Monitoring of Southwestern Bell Telephone Company*, Project No. 20400.

31 Idaho Public Utilities Commission, *In the Matter of Qwest Corporation's Motion for an Alternative Procedure to Manage the Section 271 Process*, Case No. USW-T-00-3; State of Iowa Department of Commerce Utilities Board, *In Re: Qwest Corporation*, Docket No. INU-00-2; Department of Public Service Regulation, Public Service Commission of the State of Montana, *In the Matter of the Investigation Into Qwest Corporation's Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. D2000.5.70; State of North Dakota Public Service Commission, *Qwest Corporation's Section 271 Compliance Investigation*, Case No. PU-314-97-193; Public Service Commission of Utah, *In the Matter of the Application of Qwest Corporation for Approval of Compliance with 47 U.S.C. § 271(d)(2)(B)*, Docket No. 00-049-08; Public Service Commission of Wyoming, *In the Matter of the Application of Qwest Corporation Regarding 271 of the Federal Telecommunications Act of 1996, Wyoming's Participation in a Multi-State Section 271 Process, and Approval of its Statement of Generally Available Terms,*

. . . .*Continued*

already been endorsed by the Commission in the context of §271 reviews. The Commission should continue its current approach of requiring post-InterLATA entry performance assurance plans that are managed by the State Commissions, and should simply supplement those plans for the reasons stated herein.

The Competitor Coalition supports the adoption of an additional, more limited federal enforcement plan. The federal plan would contain fewer (and therefore more focused) metrics, be less complex, and contain lower penalties. The utility of the plan is that it would support and require compliance with federal policies and put some money behind those requirements.

B. The FCC has the Legal Authority to Establish a Minimum Performance Plan

As the Chairman recently noted, one of the Commission's policy shifts is from "constantly expanding . . . permissive regulations to strong and effective enforcement of truly necessary ones."[32] "To that end," he added, "I support H.R. 1765, which would increase by 10 fold statutory levels for forfeitures, as well as extend the statute of limitations for common carrier enforcement actions to two years."[33] Consistent with these goals, and as acknowledged in

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Docket no. 70000-TA-00-599; New Mexico Public Regulation Commission, *In the Matter of Qwest Corporation's Section 271 Application and Motion for Alternative Procedure to Manage the Section 271 Process*, Utility Case No. 3269; Nebraska Public Service Commission, *In the Matter of Qwest Corporation, Formerly Known As U.S. West Communications, Inc., Filing Its Notice of Intention to File Section 271(c) Application with the FCC and Request for Commission to Verify Qwest's Compliance with Section 271*, Case No. Application No. 1830; Washington State Utilities and Transportation Commission, *In the Matter of the Investigation Into U.S. West Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. UT-003022; Washington State Utilities and Transportation Commission, *In the Matter of U.S. West Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Docket No. UT-003040.

32 Summary of Testimony of FCC Chairman Michael K. Powell Before the Subcommittee on Commerce, Justice, State and the Judiciary of the Senate Committee on Appropriations, June 28, 2001.

33 *Id.*

the Notice,[34] the Commission can draw upon multiple sources of authority in developing a self-executing enforcement plan. Sections 201-202, 206-208 and 503 of the Act each provide support for an enforcement plan.

In developing the appropriate standards associated with each of the metrics ultimately adopted, the Commission would be establishing what it considers to be just and reasonable practices pursuant to Section 201(b) of the Act.[35] That section provides that all practices "shall be just and reasonable," that any unjust or unreasonable practices are "declared to be unlawful," and that the Commission may prescribe rules and regulations "as may be necessary in the public interest" to carry out the provisions of the Act.[36] Establishing precisely what practices are just and reasonable, in a proactive manner, and measuring those practices by reference to the performance reports, would be a lawful and wise use of the powers granted this Commission by the Act.

Section 202 of the Act, with its prohibitions on unjust or unreasonable discrimination, undue or unreasonable preferences, and undue or unreasonable prejudice or disadvantage, provides another source of authority for the establishment of self-effectuating remedies. This authority would be particularly useful in ordering penalties based on parity metrics, where the failure to provide analogous service to competitors provides *prima facie* evidence that an ILEC has violated these prohibitions. In other words, the failure of an ILEC to provide service to a competitor that is equivalent to service provided by the ILEC to its retail customers and/or affiliates pursuant to a pre-determined and well-defined metric proves almost

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34 NPRM at ¶21.

35 47 U.S.C. §201(b).

36 *Id.*

conclusively that the ILEC has violated the Act. Section 202, in fact, provides its own remedy for carriers that knowingly violate that section.[37]

Section 206 of the Act provides a specific source of authority for the establishment of carrier-specific payments for performance failures.[38] That section provides that any carrier that does anything prohibited by the Act, or *omits to do "any act, matter, or thing in this Act required to be done, . . .* shall be liable" to the person(s) injured thereby for the "full amount of damages sustained in consequence" of any such violation.[39] Once a metric has been defined, thereby establishing what is "required to be done" pursuant to Section 251 of the Act,[40] the failure to meet that standard would be a *per se* violation of Section 206 entitling those affected to recover consequential damages. The default level of those consequential damages could be predetermined by the Commission for various levels of violations, and then awarded to the affected carriers automatically.[41] Section 207 adds additional support for the recovery of damages for violations of the Act, recognizing the right to such damages and providing two separate venues for their recovery.[42]

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37 $7,600.00 per day for each offense and $330.00 for each and every day the offense continues, payable to the United States. 47 U.S.C. §202(c). The ILEC would of course have or at least be chargeable with knowledge of its violation since the measuring stick would be defined in advance and permit continual performance monitoring during the measurement period.

38 47 U.S.C. §206.

39 *Id. (emphasis added).*

40 47 U.S.C. §251.

41 Competitive carriers would of course retain the rights granted them by the statute to pursue the full amount of damages sustained as a result of the violation.

42 47 U.S.C. §207. This section permits aggrieved parties to seek relief from either the Commission or U.S. District Court.

Section 208 of the Act provides the process by which violations will be investigated and resolved by the Commission.[43] This section permits complaints to the Commission for actions and omissions "in contravention of the provisions" of the Act, and provides that carriers may resolve some issues up front by making "reparation for the injury alleged."[44] Following an "award" of damages pursuant to the Commission's predetermined schedule, the aggrieved carrier could still maintain a cause of action against the violating carrier, with the penalty already paid credited as an offset against any further damage awards. The assessment of penalties could also be deemed a "final order" pursuant to Section 208(b)(3), subject to appeal as provided therein.[45]

The foregoing statutes provide solid legal basis for the establishment of a metrics-based enforcement plan. Using Sections 201 and 202, the Commission would clearly determine what it considers to be just and reasonable practices and what would be considered unjust or unreasonable discrimination, preference, prejudice or disadvantage. Sections 206 and 207 provide the authority to determine liability and award damages to the aggrieved party for violations of the established standards. Adding certain procedural guidelines, Section 208 provides investigative, determinative, and appellate provisions. Individually, these sections provide a solid foundation for enforcement actions; taken as a whole, they clearly provide more than enough authority for the Commission to establish a plan to ensure compliance with the Act.

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43 47 U.S.C. §208.

44 47 U.S.C. 208(a).

45 Should this approach be considered, the Commission may want to clarify the circumstances under which appeals may be pursued, so as to avoid ILEC attempts to frustrate the self-executing nature of the enforcement plan.

Finally, Section 503(b)[46] provides a separate basis under which the FCC can (and should) penalize ILECs for failing to "comply with any of the provisions of [the] Act or of any rule, regulation, or order issued by the Commission under [the] Act."[47] The simple establishment of a rule, regulation or order specifying the level of ILEC performance that would be considered compliant with the Act would permit the assessment of a likewise predetermined forfeiture to the United States for the failure to meet that level of performance.[48] This is consistent with very recent Commission action. Just last week, for example, the Commission issued a Notice of Apparent Liability against SBC Communications for violations of various existing performance standards.[49] This provides a prime example of the Commission determining the non-price terms and conditions under which certain ILECs must offer unbundled network elements.[50] In this instance, the Commission used a comparative/parity standard; in others, it could determine that an absolute standard is appropriate. Since the ILEC at issue failed to meet the particular standard, it was assessed a penalty.

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46 47 U.S.C. 503(b), which was specifically referenced in the Notice at ¶¶21-22.

47 47 U.S.C. §503(b)(1)(B).

48 47 U.S.C. §503(b)(1).

49 *SBC Communications, Inc. Apparent Liability for Forfeiture,* Notice of Apparent Liability for Forfeiture, File No. EB-01-IH-0030, Released January 18, 2002.

50 *SBC 2002 NAL,* at ¶3, *citing Application of Ameritech Corp, Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, CC Docket No. 98-141, *Memorandum Opinion and Order*, 14 FCC Rcd 14712, 15023-24, Appendix C, ¶ 56 (1999), (*"SBC/Ameritech Merger Order"*), *reversed in part on other grounds, Association of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001).

In light of the quite limited penalty caps set forth in Section 503(b)(2)(B),[51] however, the Commission would likely want to determine that each increment of performance below the standard or each failure to meet that standard with respect to an individual carrier would constitute a separate violation.[52] As a result, each increment or carrier-specific failure could be considered a separate, continuing violation which would therefore be subject to separate penalty caps. The Commission must exercise the legal authority it has, in order to implement the policy shift toward effective enforcement. Through such a shift, the Commission could pull the industry out of the current quagmire of difficult, expensive and lengthy enforcement proceedings and actions, and bring about the benefits of economic growth and technological advancement promised by the Telecom Act.

C. Elements of the Enforcement Plan

As an initial matter, any enforcement plan adopted should apply to all major incumbents, and should not be limited solely to the RBOCs. While there are some RBOC enforcement plans already in place as a result of the incentives created by Section 271, no such plans ensure that non-RBOC incumbents are in compliance with the Act. Even large carriers such as Verizon (GTE), Sprint, SNET and Cincinnati Bell currently avoid appropriate

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51 47 U.S.C. 503(b)(2)(B); *see also* 47 C.F.R. §1.80(b)(2) (Establishing maximum penalty of $120,000 for each violation, or for each day of a continuing violation, up to a maximum of $1,200,000 for any single act or failure to act).

52 The statute requires that the Commission consider "ability to pay" in considering the appropriate forfeiture amount. 47 U.S.C. §503(b)(2)(D). The Commission has repeatedly recognized that it will "take into account a violator's ability to pay in determining the amount of a forfeiture so that forfeitures against 'large or highly profitable entities are not considered merely an affordable cost of doing business.'" *SBC 2002 NAL*, at ¶22, *citing The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Commission's Rules*, Report and Order, 12 FCC Rcd 17087, 17100 (1997) ("*Forfeiture Policy Statement*"); *recon. denied* 15 FCC Rcd 303 (1999) and 47 C.F.R. § 1.80(b)(4). In light of the enormous size and profitability of the ILECs at issue here, the Commission must structure the plan in such a way that the penalties imposed are consistent

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monitoring for at least some of their local exchange operations, and should therefore be covered by the federal enforcement plan.

There are several key factors in the design of an effective enforcement plan.[53] The plan should have enough flexibility to apply on a fair and proportionate basis to ILECs of various sizes, and should also be flexible enough to facilitate semi-automatic adjustments for changes in carrier size and/or market position. The plan must also ensure adequate performance to low-volume (often new entrant) CLECs by separately measuring and assessing high volume and low volume products and by ensuring that CLEC-specific measures and penalties are included. Obviously, any effective plan must have enough disincentives to actually discourage poor performance, and must include provisions that increase the penalties for continued poor performance. Lastly, the penalty payments should be given their maximum deterrent effect, by requiring that they be paid directly to the competitive carriers aggrieved by the substandard service.

While there is no magic formula for determining the cut-off point between major and non-major ILECs, measuring revenue from local network operations may be an appropriate yardstick.[54] A cut-off that includes companies with local service revenues in excess of $500 million, for example, would capture significant incumbent carriers such as AllTel, CenturyTel, Cincinnati Bell, Citizens, SNET and Sprint, and while excluding smaller, often more rural

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with the statutory maximum while at the same time are not dismissed by the ILECs as simply affordable costs of doing business.

53 While several key factors and the broad elements of a potential enforcement plan are discussed herein, the Coalition members look forward to participating in the supplemental proceedings that would likely be necessary should the Commission decide to develop an enforcement plan.

54 The coalition proposes using publicly reported total revenue figures, such as those contained in annual reports to shareholders, since these are readily available numbers that the incumbents are

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carriers. Since several members of the Competitor Coalition are already attempting to compete in areas served by these medium-sized incumbents, the Commission should consider measuring and ensuring their compliance with the Act in order to promote ubiquitous local exchange competition.

Use of the ILECs' local service revenues also lends itself quite well for use in calculating the initial potential penalty amounts,[55] since it would enable the uniform application of a single enforcement structure to ILECs of varying size. The Competitor Coalition proposes a penalty base that subjects only 1% of each ILEC's annual local service revenues to potential penalties at the outset. Thus, for every $1 billion in annual revenue, an ILEC would face $10 million in potential penalties if it failed to comply with the Act.[56] Automatic adjustments would occur as markets are opened or closed to competition, and as service territories are bought and sold.

Use of a revenue-based figure in an enforcement scheme has the added benefit of flexibility. Should the Commission determine that the ILECs are not complying with the Act, and that the penalty amounts are being regarded as simply a "cost of doing business,"[57] an increase in the percentage of revenue at risk would immediately and consistently escalate all relevant figures.[58]

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unlikely to understate. The Commission has used such sources in prior proceedings. *See, for example, SBC 2002 NAL,* at ¶2.

55 It is important to note that these are simply *potential* penalties, since no penalties would be levied against carriers that fully comply with the Act.

56 The RBOCs reported roughly $10 billion to $22 billion in local service revenues for the year 2000.

57 This is a concern the Commission identified at ¶22 of the Notice.

58 Downward adjustments, while certainly feasible, would never be necessary since full compliance with the Act would, in and of itself, lead to zero penalties.

Once the per-ILEC penalty amount is established, it should be allocated among the metrics contained in the plan according to the relative significance of each. That is, even among the select group of metrics ultimately included in the enforcement plan, certain measurements will be more critical to facilitating local competition than others. The actual penalty calculations should be triggered by substandard performance at either the aggregate or CLEC-specific level. As a result, if an ILEC fails to provide appropriate service to all carriers in the market, based on the average of its performance in the aggregate, it would owe a service rebate. To protect individual (particularly smaller or new entrant) carriers from more discrete or targeted substandard performance, a secondary penalty trigger should be based on any inferior ILEC performance as it relates to each individual carrier.[59] Regardless of whether the penalty is based on aggregate or carrier-specific performance, the payment should be paid to or allocated among the carrier or carriers that actually received substandard service in violation of the Act.

To prevent the penalties from simply becoming "an affordable cost of doing business"[60] and to encourage performance improvements once substandard performance is detected, the plan must contain a provision to escalate penalties for either continued poor performance or extremely low performance. At the outset, the payment floor would be set at a level based on the factors described above. Since neither the Commission nor the competitors know precisely where the ILECs' cost/benefit equation (between paying penalties versus improving performance) tips in favor of satisfactory performance, penalties should begin to escalate if an ILEC's performance indicates that payment of the penalty is an acceptable cost of

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59 This dual-level (aggregate/CLEC-specific) trigger is built in to the Critical Measures component of the Verizon-NY Performance Assurance Plan, NY PSC Case 99-C-0949.

60 *SBC 2002 NAL*, at ¶22, *citing Forfeiture Policy Statement* and 47 C.F.R. § 1.80(b)(4).

doing business. Thus, if an ILEC misses the same metric for three or more consecutive months, which would be indicative of a weakness in the cost/benefit analysis, the penalty would increase until it reaches the point at which the ILEC has the incentive to improve performance.[61] The plan would therefore automatically select the point at which the penalties become a true deterrent.[62]

If an ILEC's performance is far below the relevant standard, and the penalty remains stagnant, it may decide to simply continue to pay the penalty instead of even attempting to improve its performance. To prevent that situation, the penalty plan should contain a second escalation clause that would be triggered at a level of performance substantially below the target. Thus, for example, if an ILEC was required to provision a UNE 95% on-time, the initially penalty would be triggered if the on-time performance was below 95%. A secondary trigger, with escalating penalties, would trip at performance below 90%. As a result, an ILEC would have the proper incentive to improve its performance at levels below 95%, even if it did not believe it could hit the satisfactory performance target in a particular month.

Since the federal enforcement plan would serve as a supplemental, high-level plan with relatively low levels of potential penalties as compared to the State-specific plans, the Commission should resist the inclusion of elaborate waiver provisions that the ILECs would no doubt seek. Depending on which source of authority the Commission decides to act under, the

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61 This escalation provision is similar to one contained in the plan proposed in the Qwest region.

62 Once that point is identified, the penalty for any future violations of the same metric should remain set at that amount. Otherwise, the ILEC could simply roll back the penalty clock by meeting the standard only once. The Competitor Coalition recognizes that it may be feasible for the plan to contain a one-time pass if the substandard performance lasted less than several months at the outset of the plan, after which the ILEC penalty would return to the initial level.

statute would likely contain its own appeal procedure. Permitting additional delay and grounds for debate would serve no legitimate purpose and should be prohibited.[63]

IV. IMPLEMENTATION ISSUES

A. Data Underlying Metrics and Penalties Must Be Provided

One important aspect of the existing enforcement plans, according to the Commission, is the reasonable assurance that the reported data is accurate.[64] In light of the multiple purposes for which the federal metric data may be used, it is essential that it be totally reliable. The key to obtaining that assurance is the ability of interested parties to verify the performance reports.

To ensure the reliability of the performance reports, the data underlying the reports must be provided to all relevant stakeholders: the Commission, State regulators and competitors. The regulatory authorities must be given full access to all data as well as the formulas used to produce the end-result, so that specific numbers can be replicated as needed. Similarly, competitors should be granted access to their own raw data, as well as specific aggregate data upon reasonable request.

B. Audit Procedures Should Be Established

The Commission wisely requested input on whether audit procedures are necessary, and alluded to the benefit that obtains from such audit provisions.[65] The Competitor Coalition agrees that there are "substantial benefits" that result from having reliable data,

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63 Catastrophic events would of course be an exception to the prohibition. As the State Commissions would no doubt agree, however, any waiver provision will be used much more frequently than intended – no matter how narrowly it may be drafted.

64 *See, for example, New York §271 Order* at ¶433.

including the conservation of regulatory and industry resources when there is confidence in the accuracy and validity of the data.[66] Such benefits clearly justify the costs of any audits. However, such audits could be required with less frequency if the raw data is appropriately distributed to interested parties.

While audits may be scheduled periodically upon institution of the metric and enforcement plans, additional audits should be immediately scheduled if it is determined that a particular ILEC is failing to report its data accurately.

C. Firm Penalties for Reporting Inaccurate Data

To ensure the accurate reporting of data, the Commission must include appropriate incentives. Initially, these disincentives could likely take the form of monetary penalties. For repeated violations, however, the Commission should specify additional consequences, such as, for example, suspension of interLATA authority pursuant to Section 271(d)(6). Accurate reporting is essential to the Commission's ability to perform its policy-making and enforcement functions. It is for these reasons that the Commission has adopted firm positions concerning accuracy in reporting in the past, and should now adopt such a policy with regard to performance measurement reporting.

In the *SBC/Ameritech Merger Order*, for example, the Commission required the merged entity to self-report performance data in a timely and accurate manner.[67] Though the Commission allowed for self-reporting, it noted that the carrier's failure to provide accurate data could lead to inaccurate and unreliable results that would compromise the Commission's

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65 *Notice* at ¶74.

66 *Id.*

effective monitoring of conduct towards other carriers.[68] The Commission determined that, in order to limit the potential weaknesses of self-reporting, it would insist on rigorous adherence to an established performance plan.[69]

The Section 271 application process has also provided the Commission with experience that highlights the need to provide incentives to ensure accurate and honest reporting in the context of performance measurements. Due to significant inaccuracies in the data Bell Atlantic had provided to the New York Commission during its review of Section 271 compliance, for example, the company was forced to withdraw all of the hot cut data it had previously submitted.[70] In another, more recent Section 271 proceeding, BellSouth acknowledged that it had misreported performance data relating to its flow-through performance.[71] While a carrier is likely to jeopardize the success of its Section 271 application through a lack of candor and diligence, most other performance measurement reporting requirements have built-in incentive to encourage accurate reporting or sanction those who fail to report data accurately. As a result, there is a need for the Commission to create appropriate incentives and stress the significance of accurate reporting.

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67 *Notice of Apparent Liability for Forfeiture, SBC Communications, Inc*, 16 FCC Rcd 1140, 1144 (2000). The Commission addresses SBC's non-compliance with the reporting requirements of the *SBC Merger Order*.

68 *Id.*

69 *Id.*

70 *New York 271 Order* at ¶293.

71 Letter from Sean A. Lev, Counsel to Bell South, to Magalie Roman Salas, Secretary of the Federal Communications Commission (November 6, 2001). BellSouth also filed an errata with the Commission to correct an affidavit filed with the Commission that incorrectly characterized the methodology BellSouth employed in cost studies. Letter from Sean A. Lev, Counsel to Bell South, to Magalie Roman Salas, Secretary of the Federal Communications Commission (November 21, 2001).

A statute-based performance measure reporting requirement implicates two responsibilities: the filing of the report itself, and the accuracy of the content/data that will demonstrate either compliance or non-compliance. Due to the volume of information and the technical nature of the data, the Commission must, in many cases, rely on the carrier's diligence and candor in reporting to the Commission. The Commission recently noted that "[t]he duty of absolute truth and candor is a fundamental requirement for those appearing before the Commission."[72]

At the very least, performance measurement reporting should require the same type of diligence and candor as application reporting under 47 C.F.R. § 1.65. Carriers submitting performance measures should be required to disclose inaccuracies or omitted information within thirty days of notice that the information furnished to the Commission was not accurate or complete. As the Commission has explained, "1.65 imposes an affirmative obligation on regulated entities to inform the Commission of the facts needed to fulfill its duties. As one court has stated, '[t]he Commission is not expected to 'play procedural games with those who come before it in order to ascertain the truth.'"[73]

Furthermore, the Commission's rules prohibit the submission of a written statement making any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission.[74] Though intent to deceive is an essential element of a misrepresentation finding, intent is simply, "a factual question that may be inferred if other

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72 *Notice of Apparent Liability for Forfeiture and Order, SBC Communications, Inc.* , 16 FCC Rcd 19091, 19106 (2001) ("*SBC NAL and Order*"). In commenting on Section 271 Applications, the Commission stressed the importance of the basic requirement of truth and candor before the Commission. *See, for example, New York 271 Order* at ¶¶293-298.

73 Id. at 19108, *citing RKO General, Inc. v. FCC*, 670 F.2d 215, 229 (D.C. Cir. 1981) (internal citations omitted).

evidence shows that a motive or logical desire to deceive exist."[75] The Commission should apply this rule with respect to performance measure reporting.

In the case of a repeat violator, the Commission must apply non-monetary sanctions once monetary sanctions have proven insufficient. The Commission may terminate a license or disqualify a petitioner from further consideration when it finds even the most insignificant misrepresentation or something less than a complete candor.[76] If a carrier repeatedly misrepresents its performance measures, then the Commission should consider suspending the carrier's interLATA authority pursuant to Section 271(d)(6) or, for carriers that either have not or are not required to obtain that authority, similar license-restrictive action

D. A Periodic Review Provision is Appropriate

The Commission should provide for a periodic review of the metrics and other components of the plans ultimately adopted.[77] In this regard, the Commission should benefit from the experience of the State regulators, several of whom have already used the periodic review provisions contained in their own performance assurance plans.[78]

There is no need to force migration from the State to the federal metrics, or vice-versa. Superior metrics will ultimately be proven so over time, and will eventually replace similar metrics in other plans that are ultimately determined, through the various review

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74 47 C.F.R. § 1.17.

75 *SBC NAL and Order*, 16 FCC Rcd 19091, 19115 (2001), *quoting*, *Black Television Workshop*, 8 FCC Rcd 4192, 4198, n. 41 (1993), *recon. denied*, 8 FCC Rcd 8719 (1993), *rev. denied*, 9 FCC Rcd 4477 (1994).

76 Id. at nt. 84 and 85. The Commission, through a set of string cites, highlights the vital role of honest dealing to the integrity of the Commission's process, specifically noting that misrepresentation to the Commission is an egregious violation that can result in the termination of a license or the disqualification of a licensee from further consideration.

77 *Notice* at ¶77.

78 *See, for example,* , NY PSC Cases 97-C-0271 and 99-C-0949; Texas PUC Project No. 20400.

processes, to be less effective. Likewise, there is no need to set a predetermined sunset for reporting or enforcement. Once the metrics and systems are established, ongoing reporting becomes routine. Similarly, as ILECs fully comply with their obligations, the enforcement plans will become of no consequence as penalties paid under the plan should eventually work their way closer to $0. Obviously, compliance with the Act is the best way for the ILECs to reduce their regulatory burden.

V. CONCLUSION

For the reasons stated herein, the undersigned carriers support the creation of uniform federal metrics to supplement State-specific metrics and encourage the implementation of a federal enforcement plan that would effectively ensure compliance with the Act and the orders and rules of the Commission.

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