Before the
Federal Communications Commission
Washington DC 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

REPLY COMMENTS OF COVAD COMMUNICATIONS COMPANY

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Comments submitted in this docket witness some predictable Bell Company rhetoric, and a few surprises that should facilitate the Commission's decision-making process. In these reply comments, Covad Communications Company (Covad) focuses on the four Bell Operating Company submissions, and in particular the various legal and policy arguments that those companies make in response to the Commission's notice. If the Commission needs a jarring reminder of why this proceeding is so important to the future of competition, it only need look at one single sentence in Verizon's comments. Verizon opposes the adoption of penalties associated with the Commission's UNE rules, contending that such penalties "can have the effect of requiring ILECs, in order to avoid even the possibility of an inadvertent performance miss, to provide CLECs with superior, rather than nondiscriminatory, service."[1] Contrary to BOC claims of wanting to be true wholesalers, and to desire nothing more than to treat CLECs as valued customers, this single statement by Verizon tells the real story. Verizon desires only to do the bare minimum that it is legally obligated to do under the Act and the Commission's rules, and only the threat of penalty for noncompliance can incent the BOC to provide quality wholesale service to its CLEC "customers." Whereas any legitimate wholesaler would never claim that providing better quality service to its customer would be a "bad" thing, Verizon has no such hesitation. What motivates Verizon? Fear of penalties. It should be clear to the Commission that performance rules and self-executing penalties are more important than ever.

[1] VZ Comments at 29.

The Commission's Legal Authority to Adopt National UNE Performance Rules is Clear

The Bell Companies generally agree that the Commission has authority to do what it proposes: define the exact parameters of the "just, reasonable, and nondiscriminatory" language of section 251(c)(3) by adopting specific rules defining incumbent LEC obligations. For example, Verizon concludes in its comments that the Commission "has statutory authority both to promulgate national performance measurements and standards for evaluating LEC compliance with the requirements of section 251 and 271."[2] In its comments, SBC similarly argues that the Commission "has authority to adopt regulations to implement, and guide state commission administration of, the requirements of section 251, including the obligation of incumbent LECs to provide nondiscriminatory interconnection and access to UNEs."[3] Not only does BellSouth concede the FCC's authority to adopt national UNE rules, it is even willing to accept self-executing performance penalties: "BellSouth will agree to the imposition of automatic penalties, provided they are reasonable, and do not duplicate penalties in the states. BellSouth believes that other incumbent LECs would be willing to agree to reasonable penalties as well"[4]

In short, there is no question that the Commission has authority to require incumbent LECs subject to section 251(c)(3) to provide UNEs according to a particular time table, at a particular level of quality, and pursuant to such other "just, reasonable, and nondiscriminatory" terms and conditions as Commission defines.

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[2] VZ Comments at 41.
[3] SBC Comments at 9.
[4] BellSouth Comments at 4 (emphasis in the original).

Despite its concession of Commission authority, Verizon obfuscates the issues under discussion in this proceeding by claiming that the Commission's adoption of such national UNE rules will result in excess costs to Verizon that must be offset by reduction of other burdens. Specifically, Verizon attempts to detail the costs that it currently suffers in tracking its performance, even in the absence of such national UNE rules:

- "Verizon is subject to at least seven separate sets of state reporting requirements, in addition to two federal reporting regimes."[5]
- "Verizon . . . reports approximately 2.4 million wholesale performance results each month."[6] (But compare later Verizon statement remarking on only "the tens of thousands of state and federal performance metrics to which Verizon and other incumbent LECs (ILECs) are currently subject . . . ."[7])
- Verizon is responsible for "a total of approximately 6,500 reports each month."[8]
- Verizon spent $14 million last year, and plans to spend $14 million this year developing a data warehouse for such info.[9]
- Verizon currently employs over 150 people, at a combined annual salary of $13 million, who are "charged with" producing reports, quality assurance, and on-going mechanization efforts."[10]

For purposes of this proceeding, Verizon's complaint about how expensive it is to track its performance can be dismissed with two observations. First, the $13 million that Verizon claims to have spent on its metrics employees last year is actually less than the

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[5] Verizon Comments at 2.
[6] Verizon Comments at 2.
[7] Verizon Comments at 3.
[8] Verizon Comments at 2.
[9] Verizon Comments at 2.

amount of fines that Verizon paid to state and federal regulators last year.[11] If Verizon were really concerned about the costs associated with regulatory requirements, it would chose to comply with them. Surely such compliance would provide better support for Verizon's argument that such metrics and penalties are unnecessary – Verizon proves their necessity to the tune of millions of dollars a year. Because Verizon has no qualms about paying out more in penalties than it costs to comply with the reporting requirements, Verizon's claim that the reporting requirements are not necessary is facially invalid.

Second, Verizon concedes in its comments that it "already reports versions of all 12 of the measurements the Commission has proposed in one or more jurisdictions."[12] Thus, Verizon concedes there is no additional burden whatsoever should it be required to report on the family of metrics proposed by the Commission at the federal level. Further, Verizon notes that there may not be any additional cost to adding new metrics. Specifically, Verizon states in its comments that the need for it to undertake OSS or process modifications "depends on the current state of its systems," which Verizon concedes already track the categories of metrics proposed by the Commission.[13]

BellSouth does not even attempt Verizon's rhetoric, but rather concedes that "[t]he measurements listed in the *Notice* are already being produced by most, if not all incumbent LECs, and are recognized throughout the industry as appropriate standards. Meeting these standards should not be burdensome."[14] Indeed, BellSouth even goes so

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[10] Verizon Comments at 3. SBC makes similar claims, arguing that it tracks three million data points per month and employs 435 people to do so, costing $33 million each year. SBC Comments at 7.
[11] See http://www.voicesforchoices.com/1091/wrapper.jsp?PID=1091-43.
[12] Verizon Comments at 6.
[13] VZ Comments at 12 n. 15.
[14] BellSouth Comments at 74-5.

far as to state that "[c]learly, if the Commission were to set a reasonable uniform mandatory set of measurements, this would result (especially over time) in tremendous cost savings to ILECs."[15] In short, Verizon's detailing of the alleged costs it suffers are irrelevant, as it concedes that it already bears those costs under existing reporting requirements.[16] BellSouth even says there would be cost *savings*. This simple fact brings into serious doubt Verizon's claim that "the Commission must recognize that every additional reporting requirement increases carriers' regulatory burdens, whether it is a new measurement or a further disaggregation of an existing measurement."[17]

Despite its concession that the Commission has authority to promulgate UNE rules, Verizon still makes several wide-sweeping arguments against any Commission action in this docket. Those arguments are easily disposed of. First, Verizon contends that the "just, reasonable" language of section 251(c)(3) is exactly the same as word "nondiscriminatory" in that same statute, and thus the only thing the Commission need adopt are measures ensuring nondiscriminatory performance.[18] This contention ignores the most basic tenet of statutory construction -- never read language out of a statute as surplusage. Verizon would have Commission believe that Congress intended that the statute be read to require "nondiscriminatory, nondiscriminatory, and nondiscriminatory" provisioning of UNEs. Sadly, SBC makes the same claim in its comments: SBC even goes so far as to state that national performance standards are "contrary to the Act."[19] In support of that contention, SBC quotes in its comments the language of section 251(c)(3)

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[15] BellSouth Comments at 76.
[16] As such, Verizon also argues that all other regulatory requirements should be eliminated, an outrageous suggestion that is addressed in detail *infra.*
[17] Verizon Comments at 4.
[18] VZ Comments at 22.
[19] SBC Comments at 32.

but eliminates the "just, reasonable" language of statute by magic use of ellipses in its quote. But Congress put in the "just, reasonable" requirement for a reason – so BOCs couldn't claim that their only legal obligation was to provide equally poor treatment to their wholesale and retail customers. Congress added the "just and reasonable" language to the statute to prevent incumbent LECs from being the absolute arbiters of service quality. The "just, reasonable" language of section 251(c)(3) provides the core justification for the Commission's adoption of national UNE rules in this proceeding – which is why the BOCs are so keen to read the language right out of the statute, or simply pretend it doesn't exist.

Next, Verizon claims that because the 1996 Act "does not establish any objective standard of service that ILECs must provide," Commission cannot adopt any UNE rules.[20] This is exactly what an expert agency like this Commission is supposed to do – adopt rules in furtherance of a statutory mandate, using its expertise. If Verizon's theory were correct, the Commission could never have adopted the local loop unbundling rule because the word "loop" doesn't appear in section 251(c)(3). The Commission is empowered as the expert agency to provide meaning to statutory language, and interpretation of the "just, reasonable, and nondiscriminatory" UNE requirements in the statute is ripe for agency action.

Verizon also contends that "because ILECs' performance varies across states, performance benchmarks are likely to be particularly unsuitable for national measurements."[21] Verizon's circular logic lacks any persuasion. ILEC performance varies among states because the ILECs have incentive to make performance as poor as

[20] VZ Comments at 22.
[21] VZ Comments at 24.

possible except where required to perform well. National measures will end that problem. Similarly, the Commission should reject Verizon's false premise that "[b]ecause ILECs do not use uniform processes throughout the nation and CLECs do not have uniform needs, a single proxy for nondiscriminatory performance is not likely to exist."[22] There are two fundamental fallacies in this single sentence. First, Verizon gives not one example of how the existence of different "processes" makes it impossible to provision a UNE in a set period of time. This is a redux of the "technical infeasibility" argument that Verizon loves to make without any actual technical support. Why would the existence of a different "process" (whatever that means) render it impossible for an ILEC in New York to deliver a loop in the same time period as an ILEC in Los Angeles? What is the correlation between process and performance? There is none. Nor does Verizon seem to really know what a CLECs' "uniform needs" are: simply to get UNEs provisioned in a timely and quality manner across the country.

Verizon next claims that "highly correlated" measures need not be reported at the federal level, or at the state and federal level, because it would "simply provide redundant information at added cost."[23] Verizon neither explains what that added cost would be, nor does it explain how measuring on time performance and missed appointments is redundant, when they clearly measure different things.

Finally, Verizon launches a policy argument against the adoption of federal UNE performance rules. Specifically, Verizon claims that "CLECs have proven more than capable in the past of seeking remedies before the Commission . . . for any perceived

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[22] VZ Comments at 25.
[23] Verizon Comments at 14.

disparities in performance."[24] Notably, Verizon doesn't cite a single example of that, because there aren't any. The Commission has not taken a single enforcement action against Verizon or any other incumbent LEC for violation of section 251(c)(3) of the Act. One possible explanation for that is the lack of concrete and specific enforceable UNE rules. The Commission seeks to remedy that problem in this proceeding. Verizon then attacks the very notion that policing of unbundling rules is necessary at all. Specifically, Verizon contends that no incumbent LEC could ever discriminate against a competitive LEC, even without any UNE rules, because "for such a policy of discrimination to be effective, it must result in consumers choosing not to purchase the targeted services from CLECs. For consumers to make this choice, they would need to be aware that the quality of the targeted services from CLECs was, or was likely to be, poorer than the ILEC's. It is highly implausible that such a service disparity could escape the attention of regulators but be known to customers."[25] Verizon is wrong -- it hasn't escaped the attention of regulators – they just don't have the concrete rules to do anything about it. And by the way, it is known to consumers – according to the FCC's own statistics, 85% of those that buy DSL buy it from an ILEC.

SBC tries a similar argument in its comments. Specifically, SBC makes the broad-sweeping statement that "a "one size fits all" national performance standard could not possibly take into account all the myriad differences in incumbent LEC networks and systems, nor could it account for the differences in regulatory environments among the various states."[26] Notably, SBC doesn't cite one single specific example, other than the claim that SBC's own "networks and systems vary significantly not only between regions

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[24] VZ Comments at 15.
[25] VZ Comments at 15.

but sometimes also between states within a particular region."[27] While this may be true, it is also irrelevant to the simple question of whether SBC can deliver a linesharing UNE in one day in Texas and in California, where the only thing it has to do in either state is one simple cross connect. It certainly doesn't matter that SBC's OSS has a different acronym in each state.

SBC also cites the section 271 long distance process (which is state by state) as an example of how national standards are not permitted under the Act, but state measures are.[28] Contrary to SBC's contention, state specific 271 proceedings address the particular state of competition within each state. Such proceedings have nothing to do with national UNE rules – only whether such rules are being adhered to by the BOC in a state in which it is a long distance applicant. The states address their particular needs in such proceedings, including the need to preserve and promote competition within their borders. It is particularly ironic that SBC points to state metrics as the preferred method under the Act when out of the other side of its mouth it calls for the FCC to preempt them all into oblivion.[29] It is clear what SBC wants – no measures from anyone, state or federal, given the over $188 million SBC has paid out thus far for refusal to comply with the Act.[30]

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[26] SBC Comments at 34.
[27] SBC Comments at 34 n.68.
[28] SBC Comments at 35.
[29] See SBC Comments at 2 ("the Commission must . . . ensure that these measures supplant any additional or different measures that have been adopted by the states").
[30] *See* "As SBC Wars With Regulators, Local Phone Competition Stalls," Wall Street Journal, page A1, February 11, 2002.

The Commission's Legal Authority to Adopt Self-Executing Penalties to Enforce National UNE Performance Rules is Clear

BellSouth sets the proper tone for this proceeding by stating plainly and unequivocally in its comments that ""BellSouth will agree to the imposition of automatic penalties, provided they are reasonable, and do not duplicate penalties in the states. BellSouth believes that other incumbent LECs would be willing to agree to reasonable penalties as well."[31] Unfortunately, Verizon not only does not agree with BellSouth's wisdom – it makes far-reaching and legally unsound arguments about the scope of the Commission's authority to enforce its own rules.

Covad argued in its initial comments that the Commission should exercise its authority pursuant to section 206 of the Act to adopt a self-executing performance penalty plan that would obviate the need for case by case monthly enforcement proceedings. Such Commission action would be not only within the statute, it would also continue the sound policy of those state commissions that have adopted such plans successfully across all BOC regions. Under Covad's plan, the Commission would take three steps in its initial order adopting national UNE rules: (1) fix the appropriate interval and similar metrics (24 hours for linesharing UNE provisioning, e.g.), (2) establish the appropriate penalty for failure to meet that interval or metric ($50 per day each linesharing UNE is late, e.g.), and (3) require incumbent LECs to pay such remedies directly to the aggrieved CLEC on a monthly basis, using a tri-monthly appeals process to address exigent circumstances as needed, but in any event only after payment has been made.

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[31] BellSouth Comments at 4 (emphasis in the original).

As noted above, the BOCs generally concede that the Commission has authority to take step (1), promulgation of specific UNE rules. In addition, Verizon concedes that, pursuant to section 206 of the Act, the Commission can "adopt presumptive damage amounts that eliminate the need for a CLEC to prove the precise extent of its damages . . . ."[32] Verizon disputes, however, the Commission's authority to make those presumptive damage awards self-executing, contending that the Commission must make those amounts a "rebuttable presumption."[33] The primary judicial authority cited by Verizon is support of that erroneous contention actually stands for the exact opposite proposition – the Commission is fully empowered to adopt by rule a self-executing penalty plan.

In *Heckler v. Campbell* , the Supreme Court was asked to address the ability of a federal agency to adopt by rule a replacement for a case-specific enforcement remedy. The agency sought to avoid time consuming case-specific enforcement hearings, and chose instead to adopt via a rulemaking proceeding a self-executing performance rule that would apply to all violations by covered entities and replace individual hearings. The Supreme Court held that federal agencies are fully empowered to adopt such rules, even where Congress required the agency to hold hearings in enforcement proceedings.

> "The Court has recognized that even where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking authority to determine issues that do not require case-by-case consideration. See *FPC v. Texaco, Inc.,* 377 U.S. 33, 41-44, 84 S.Ct. 1105, 1110-1112, 12 L.Ed.2d 112 (1964); *United States v. Storer Broadcasting Co.,* 351 U.S. 192, 205, 76 S.Ct. 763, 771, 100 L.Ed. 1081 (1956).[34] A contrary holding would require the agency continually to relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding."[35]

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[32] VZ Comments at 47.
[33] VZ Comments at 47.
[34] Indeed, *Storer Broadcasting* expressly provided the Commission authority to adopt rules that take the place of hearings ("We agree with the contention of the Commission that a full hearing, such as is required by s 309(b), note 5, supra, would not be necessary on all such applications."). *Id.* at 205.
[35] *Heckler v. Campbell*, 461 U.S. 458, 467 (1983).

The Court noted the fact that "the statutory scheme at issue allowed an individual applicant to show that the rule promulgated should not be applied to him."[36] The question before the Court was thus whether the agency's rules that replaced a hearing afforded an entity to demonstrate whether it should be subjected to the agency's rules at all. Verizon raises no such claim in this proceeding – it concedes (as indeed it must) that it is subject to section 251(c)(3) of the Act, and that the Commission "has statutory authority both to promulgate national performance measurements and standards for evaluating LEC compliance with the requirements of section 251."[37] Verizon claims, incorrectly, that *Heckler* stands for the proposition that "parties must be permitted to rebut any presumption adopted with specific evidence." Verizon is not claiming that it is not an ILEC, nor that it is somehow not subject to section 251(c)(3) or the rules that the Commission will adopt in this proceeding. *Heckler* stands for the proposition that an agency is empowered to utilize the rulemaking process to adopt rules that replace a traditional enforcement hearing scheme. The FCC is fully empowered to adopt rules regarding UNE unbundling, and to make the punishment for violation of those rules self-executing.

The second case cited by Verizon (also cited by SBC in its comments[38]) is no more helpful to the incumbents. In *AOPL v. FERC*,[39] the Court followed *Heckler* and upheld the decision of the FERC that "established a general rule that will allow the recovery of normal costs" rather than holding individual hearings. This case, like *Heckler*, is on all fours with the advocacy of Covad in this proceeding. There is absolutely no need for the

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[36] *Id.* at n.11,
[37] VZ Comments at 41.
[38] SBC Comments at 38 n.73.

Commission to require adjudication of every single UNE that is late, every loop that is delivered in a non-working order, and every second that an ILEC OSS is unavailable. The Commission has the authority and the expertise to set, in this proceeding, the penalty for noncompliance with the rules it adopts. More importantly, the Commission has authority to determine, pursuant to its general rulemaking authority and section 206 of the Act, that penalty payments to aggrieved carriers for damage suffered as a result of violation of those rules will be fixed in advance and paid automatically by the ILECs to those carriers on a monthly basis.[40]

Verizon makes several other erroneous statements regarding the Commission's enforcement authority that, although not relevant to the issues in this proceeding, should not remain unchallenged. For example, Verizon claims that should a carrier file a complaint against a BOC pursuant to 271(d)(6)(B), the carrier could only allege a violation of 271, not of the performance rules adopted by the Commission in this proceeding.[41] Verizon is wrong. The Commission has authority, pursuant to section 251 of the Act, to adopt the rules that are proposed in this proceeding. Verizon concedes as

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[39] 83 F.3d 1424, 1439 (D.C. Cir. 1996).

[40] Other authority, not cited by Verizon, makes clear that Verizon's reading of *Heckler* is wrong. *See, e.g. FPC v. Texaco, Inc*., 377 U.S. 33, 39, 84 S.Ct. 1105, 1109, 12 L.Ed.2d 112 (1964) (". . . the statutory requirement for a hearing under s 7 does not preclude the Commission from particularizing statutory standards through the rulemaking process and barring at the threshold those who neither measure up to them nor show reasons why in the public interest the rule should be waived."); *Id.*, 377 U.S. 33, 44, 84 S.Ct. 1105, 1112, 12 L.Ed.2d 112 (1964) ("To require the Commission to proceed only on a case-by-base basis would require it, so long as its policy outlawed indefinite price-changing provisions, to repeat in hearing after hearing its conclusions that condemn all of them. There would be a vast proliferation of hearings, for as a result of Phillips Petroleum Co. v. Wisconsin, there are thousands of individual producers seeking applications . . . . We see no reason why under this statutory scheme the processes of regulation need be so prolonged and so crippled."); *American Airlines, Inc. v. CAB*, 123 U.S.App.D.C. 310, 319, 359 F.2d 624, 633 (1966) (en banc), cert. denied, 385 U.S. 843, 87 S.Ct. 73, L.Ed.2d 75 (U.S.Dist.Col. Oct 10, 1966) ("The statutory requirement for a hearing under § 7 does not preclude the Commission from particularizing statutory standards through the rulemaking process and barring at the threshold those who neither measure up to them nor show reasons why in the public interest the rule should be waived.).

[41] VZ Comments at 41 n.80.

much in its comments.[42] Because the competitive checklist of section 271 requires Verizon to comply with the unbundling obligations of section 251, a violation of section 251(c)(3) is necessarily a violation of section 271. As such, contrary to Verizon's contention, a carrier could file a so-called "backsliding" complaint against Verizon or any other BOC, pursuant to section 271(d)(6)(B), for failure to comply with the Commission's UNE performance rules.

Verizon also claims that the Commission "has no authority under section 208 to hear complaints that a failure to meet the national performance measurements violates sections 251 or 252."[43] In support of this proclamation, Verizon cites two authorities: (1) the 8th Circuit's decision in *Iowa Utilities Board* (which was vacated), and (2) the concurring statement of Justice Thomas in the Supreme Court's disposition of that case (which is a concurring statement).[44] Verizon can find no real support for the notion that the Commission is without authority to enforce its own rules, because no such authority exists.

SBC takes a somewhat different path, claiming that section 403 of the Act "expressly *prohibits* the Commission from ordering the payment of damages."[45] Despite this wide-sweeping statement, SBC correctly notes that section 403 does not apply in a case where the Commission orders damages (it is limited to forfeitures to the U.S. Treasury). In the same breath that SBC claim section 403 bars the Commission from attaching any penalties to its UNE rules, it concedes that the statute it cites is inapposite

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[42] *See* Verizon Comments at 41 (the Commission "has statutory authority both to promulgate national performance measurements and standards for evaluating LEC compliance with the requirements of section 251 and 271.").
[43] VZ Comments at 43 n. 84.
[44] *See id.*
[45] SBC Comments at 37 (emphasis in the original).

to the question at bar. SBC also claims that section 503 of the Act bars the Commission from adopting self-executing penalties.[46] Again, that statutory provision only applies to forfeitures, not payments made to aggrieved carriers as damage payments.

SBC is also incorrect that section 206 of the Act "requires that a complainant must demonstrate through record evidence" that it has suffered specific damage as a result of a carrier's violation of the law."[47] Section 206 allows the Commission to award a carrier compensation for damages – it sets no particular proof requirements or procedures. In the instant proceeding, the Commission will be following the Supreme Court's *Heckler* line of cases and setting the damages in a rulemaking, because the harm suffered by virtue of a late UNE, for example, need not be adjudicated by the FCC on a case by case basis.[48] The Commission has undertaken this rulemaking to determine whether, and to what extent, a carrier is damaged when a UNE is delayed in violation of the Act and the Commission's rules. Based on the overwhelming record in support of adoption of those rules, (only the BOCs dispute it), it will conclude that indeed CLECs are damaged, the extent to which they are damaged (based on the record), and thus will satisfy the requirements of section 206.

Finally, SBC claims that lack of self-execution within Title V of the Act provides "the best evidence" that FCC cannot adopt self-executing measures.[49] This too is simply wrong. The provisions of sections 503 and 504 of the Act simply stand for the proposition that the Commission is without power to act as a collections enforcer – only the courts can act to force a carrier refusing to pay a forfeiture to pay what it owes.

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[46] SBC Comments at 39.
[47] SBC Comments at 37.
[48] Allegations made by a carrier in a judicial proceeding against an incumbent LEC might require particularized showings, depending on the specific legal theories advanced by the plaintiff.

Indeed, SBC even concedes the irrelevancy of sections 503 and 504 of the Act to the question of self-executing carrier payment penalties, noting in its comments that Title V "does not allow the forfeiture mechanism to be used to require payments to CLECs or other private parties."[50]

Qwest mounts it own attack on the Commission's enforcement authority. Qwest argues that section 407 of the Act provides that a carrier "ordered to pay money by the Commission is *entitled* to refuse to pay the money and defend against the lawfulness of the order in a collection action" in federal court.[51] This is not exactly true. Section 407 provides that if a carrier ordered by the Commission to pay damages to another party refuses to pay, the party owed damages can sue to collect those damages in court. The statutory provision does not "entitle" Qwest or any other BOC to refuse to abide by a lawful Commission order to pay damages. It simply provides judicial recourse for collection of damages owed from a recalcitrant defendant.

Qwest also cites the Supreme Court's decision in *ICC v. Atlantic Coast Line R. Co.*[52] for the proposition that the Commission cannot adopt self-executing damage awards. In *Atlantic Coast Line*, the Court addressed identical language to the Communications Act's section 407 in the Interstate Commerce Act (ICA). The Court concluded that section 407 of the ICA required collection proceedings to take place in the courts, and addressed the standard of review to be applied in those collection proceedings. The Court concluded that if "a Commission order containing findings on all matters essential to the shipper's recovery is admitted and the carrier produces no

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[49] SBC Comments at 40.
[50] SBC Comments at 40 n.75.
[51] Qwest Comments at 27.
[52] ICC v. Atlantic Coast Line R. Co., 383 U.S. 576, 594.

opposing evidence, the findings and order of the Commission may not be rejected by the jury and the shipper is entitled to judgment."[53]

Qwest makes the illogical leap to this conclusion based on the case: "In other words, an FCC damages award may not be self-executing."[54] The only thing the case stands for is that if a carrier refuses to abide by a Commission order, the aggrieved carrier can't commence a collection proceeding at the FCC. It has nothing whatsoever to do with the authority of the FCC to impose a penalty, but rather only with the authority of the FCC to undertake collection. That latter action lies, according to section 407 of the Act, within the authority of the courts. It has no bearing on the authority of the Commission to impose penalties, self-executing or otherwise, in the first place. Thus, the Commission must reject Qwest's attempt to link a line of cases concluding that the Commission cannot conduct collection proceedings with the Commission's underlying authority to impose penalties in the first place.

Qwest next claims that the Commission's enabling statute permits carriers to challenge forfeiture orders only if the government seeks to enforce the order under section 504(a) of the Act, and the only exception to this is 503(b)(3), which provides for notice and opportunity for hearing.[55] As such, Qwest believes that the Commission has no power to adopt self-executing penalty plans. Qwest is incorrect here as well. This statutory provision is only applicable to forfeitures to the U.S. Treasury, not payments to carriers.

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[53] Atlantic Coast Line R. Co., 383 U.S. at 576 n.6.
[54] Qwest Comments at 29.

Damage Payments to Aggrieved Carriers Must Be Self-Executing, But the Commission Must Put An Exceptions Process In Place to Address ILEC Concerns

Verizon suggests in its comments that "penalties should not be imposed merely because an ILEC's wholesale performance on a given measurement is worse, in absolute terms, than either its performance for the retail comparison group or the benchmark."[56] This suggestion is, of course, wishful thinking – the whole the reason the Commission has undertaken this important proceeding is because it knows full well that every time a loop is late, or a linesharing UNE doesn't work, the requesting CLEC is harmed. Verizon's concerns are, simply put, that it will be punished for things that are beyond its control. As such, Verizon suggests that an "exceptions process" is needed.[57] SBC also shares this concern: "SBC would have to be given the opportunity to show, for example, that its failure to comply with a particular standard was the result of circumstances beyond its control."[58] Covad agrees.

Verizon has experience with the so-called performance assurance plan (PAP) put in place by the New York PSC in 1999 upon approval of then-Bell Atlantic's New York long distance application. That PAP, like those in every other state that has adopted them, is a self-executing plan. In short, the state commission adopts certain UNE performance rules, sets a penalty for violation of those rules, and requires the BOC to pay aggrieved carriers automatically every month an amount equal to the penalties associated with the rules violated by the BOC. This is exactly the type of self-executing plan with

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[55] Qwest Comments at 29.
[56] VZ Comments at 27.
[57] VZ Comments at 28.
[58] SBC Comments at 41.

which all the BOCs are familiar, and it is the plan that the Commission should adopt in this proceeding.

When Verizon or its BOC brethren believe that circumstances beyond their control contributed to their rule violations, and that they should not be subjected to payment penalties for such violations, they offer their excuses to the state commission in a timely manner (in New York, every three months) and the state commission evaluates the excuse. The same system is in place at the Commission in the Bell Atlantic/GTE and SBC/Ameritech merger dockets, where the BOCs can petition the Commission for relief from certain performance penalties. The BOCs are not permitted to withhold payment from aggrieved carriers while their excuses are prepared and evaluated – such a system would defeat the whole purpose of the penalties (deterring anticompetitive behavior) by permitting the BOCs to game the system. Rather, the BOCs can seek offsetting refunds should their appeals be granted. The Commission should adopt the same system. In order to provide incumbent LECs the opportunity to receive credit for circumstances truly beyond their control, the Commission should afford the incumbents the opportunity to present their excuses on a tri-monthly basis for evaluation.

What is not necessary, despite BOC suggestions, is the adoption of complicated statistical analyses that serve only to hide anticompetitive ILEC behavior. For example, Verizon claims that a statistical analysis is necessary to avoid penalizing ILECs for "disparities" due to "random variation."[59] The example Verizon cites: "if the benchmark is 95 percent and there are only 12 CLEC orders in a particular month, even one miss will prevent an ILEC from meeting the standard."[60] That's exactly the point. Verizon in fact

[59] VZ Comments at 73.
[60] VZ Comments at 74.

will not have met the standard, and thus should be penalized. Indeed, it should be particularly embarrassing for Verizon – which claims readiness to serve untold volumes of CLEC orders – to fail to comply with the Act when it receives only 12 orders for a particular UNE. No statistics are necessary – Verizon failed to meet its legal obligation. Indeed, the Commission should take note that Verizon argues in its comments that if its statistics were adopted, it would owe no penalties for missing the one order out of twelve it gives as an example. That cannot be the intent of the Commission's rules.

BellSouth makes the argument that "[h]aving penalty payments available to CLECs as a potential revenue stream encourages them to engage in behavior to maximize penalty payments."[61] This argument is economically irrational and unsupportable. BellSouth theory is that a CLEC would refocus its business plan not on serving customers, but rather on *not* serving customers – the CLEC would sign up customers and delay turning up service as long as possible in order to maximize penalty payments. Rather than work to ensure quality customer service and the most timely service delivery possible, this CLEC would seek to "engage in behavior to maximize payment," such as deliberately delaying provisioning, submitting false information to BellSouth, and other tricks to support its penalty-driven business plan. Covad respectfully submits that although this plan may work when that CLEC signs up its first customer, a CLEC that seeks to minimize the customer's positive experience will never be able to sign up a second customer. To its credit, BellSouth does advocate a plan similar to its state-level SEEM plan, where "penalties are automatically paid to individual CLECs."[62] Covad supports BellSouth here. Covad does not, however, support BellSouth's suggestion that

[61] BellSouth Comments at 22.
[62] BellSouth Comments at 21.

payments all flow to the U.S. Treasury.[63] Such a system fails to compensate the carriers actually harmed by the ILECs' anticompetitive behavior.

The Commission cannot preempt state metrics, nor should it do so.

Verizon claims that state performance measures "are the source of the most significant regulatory burdens imposed by the current performance measurements regime."[64] Verizon further suggests that if "states retain the authority to adopt measurements in addition to the national measurements, then there is little chance of a significant net reduction in LECs' reporting requirements."[65] It is no surprise that Verizon complains about the measures adopted by every single state in its legacy BOC region, as well as the federal measures, and claims that they are all unnecessary, all too burdensome, and all should be eliminated.

The surprise is that Verizon believes the Commission has the power to override all state commission decisions, given its own concession the Commission "does not have clear statutory authority to preempt the existing state performance regimes."[66] VZ further admits that in order to preempt, the Commission must find that state measures "substantially prevent implementation" of the 1996 Act.[67] In addition, section 261(c) of the Act expressly provides states the authority to adopt rules that "further competition" in the telecommunications market. Finally, Verizon concedes that in the post 271 world, the Commission is without authority to preempt state PAP plans, particularly because they are the basis for 271 approval in the first place.[68]

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[63] BellSouth Comments at 22.
[64] VZ Comments at 33.
[65] VZ Comments at 35.
[66] VZ Comments at 47.
[67] VZ Comments at 48.
[68] VZ Comments at 51.

It is clear, particularly given Verizon's own compelling arguments, that the Commission cannot simply override state performance plans and penalties. If Verizon has an issue with the number of measures and amount of penalties adopted by a state, Verizon should take its complaint to the state commission –the only entity that can eliminate its own rules. Similarly, if a state feels that its measures should change or be eliminated after adoption of national measures, that is the state's decision to make, not that of the FCC.

The States Are Unanimous In Their Support Of Expanded Federal UNE Rules, But Only If Such Rules Are a Floor, Not a Ceiling.

The state Commissions that submitted comments to the Commission in this docket are unanimous in their support of the Commission's efforts to step up federal UNE enforcement.[69] The support of all commenting state commissions follows the adoption by the National Association of Regulatory Utility Commissioners (NARUC) of a resolution, at its November 2001 meeting, which supports the Commission's adoption of national UNE rules and "recognizes the FCC for its continued focus on enforcement

[69] *See* California PUC Comments at 4 ("California believes that the best way to harmonize state and federal regulation is for the FCC to develop a minimum set of national performance measures and standards."); *Id.* at 5 ("California believes that supplanting state measures and standards immediately, or even gradually, is premature at this time."); *Id.* at 6-7 ("California supports a self-executing mechanism to ensure compliance with adopted standards and measures. California also believes that it is appropriate to presume competitive harm when violations occur. A case-by case- determination of competitive harm is not necessary, and will only mire the FCC and carriers in endless proceedings, at great time and expense."). Oklahoma CC Comments at 2, 5 (supporting the adoption of a core set of national performance measurements without any preemption of performance measurements). Texas Comments at 3 (FCC must adopt a plan that does not preclude states from adopting additional measures); *Id.* at 5 (Texas believes self-executing enforcement payments are necessary). (p. 5). Virginia Comments at 4 (if the FCC does develop such standards, they should not be "preemptively" imposed on the states). Missouri Comments at 2 (the benefits of performance measurements outweigh the burdens); *Id* at 6 (federal measures should not preempt the state measures). New York PSC Comments at 2 (Commission may adopt national metrics and definitions, but allow for state-specific standards). Colorado Comments at 2 (FCC standards should not preempt state commissions). Minnesota Department of Commerce Comments at 2 (national performance measurements should not preempt states and should preserve the ability of states to address particular areas of concern); *Id.* at 4 (national penalties must be severe).

and enforcement related issues."[70] Importantly, NARUC's resolution provides the view that "States should continue to be able to develop and oversee their State specific plans."[71] This dual theme is echoed in the comments of all the state commissions: the FCC should act to strengthen federal UNE rules and penalties, but it should ensure that those rules permit the states to exercise their own authority to promote competition within their borders. Specifically, as with all other UNE rules adopted pursuant to section 251(c)(3) of the Act, the FCC's new national UNE performance rules and penalties should serve as a floor, not a ceiling. States should be free to adopt (and maintain) any performance penalty plans and metrics as they see fit, so long as those metrics and plans do not fall below the minimum standards set by the Commission.

SBC contends not only that the Commission's adoption of rules in this proceeding will preempt all state performance plans and remedies, but also that the *absence* of any particular Commission rules should preclude any states from adopting rules not adopted by the Commission. Specifically, SBC argues that "a decision by the Commission not to include a particular measurement on the list necessarily represents a determination that the measure is not critical to competition, and therefore is superfluous."[72] This is a dangerous suggestion and the Commission should expressly reject it. SBC seeks some sort of "super preemption," assuring not only that states will be barred from improving upon Commission-enacted rules, but that states will be barred from addressing areas that the Commission did not address – arguably the areas that most need state involvement. The states are uniquely positioned to determine the competitive needs within their borders, given the particular behavior of the ILECs and competitive issues raised by

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[70] NARUC Resolution #4, "Resolution on National Performance Standards," Nov. 13, 2001.
[71] *Id.*

CLECs before the state commission. The FCC has its own statutory mandates and particular enforcement goals to support by means of the adoption of federal UNE rules. The policy goals could be the same as the states, or they could be different, but Congress certainly did not strip the states of the power to ensure competition within their borders.

Verizon further argues that the Commission should not adopt any penalties associated with federal UNE rules because state post-271 performance plans are sufficient. In support of that proposition, Verizon cites a Commission statement in the Bell Atlantic – New York section 271 Order that "liability under [a performance plan] must be sufficient, standing alone, to completely counterbalance" an ILEC's incentive to discriminate."[73] The FCC reached this conclusion because Verizon represented to the Commission that even after long distance approval, it still "faces other consequences" should it fail to comply with the Act, including "remedies associated with antitrust and other legal actions." As the Commission well knows, Verizon immediately sought immunity from those very antitrust laws via court filings claiming that it is not subject to antitrust liability. The Commission, together with the Department of Justice, has filed an amicus brief with the 11th Circuit Court of Appeals directly opposing this position. Verizon want to have it both ways – immunity from antitrust liability, and immunity from performance penalties based on its duplicitous argument that it is subject to "other" legal liability. The Commission simply cannot accept Verizon's claim that it has other incentive to comply with its market-opening obligations, because it simply does not believe that it is liable in court – hardly the position of a carrier that has feels it has incentive to comply with the law. Verizon demonstrates similar duplicity in arguing that

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[72] SBC at 9.
[73] VZ Comments at 5, *quoting New York Order* at ¶ 435.

FCC-adopted metrics "should apply in place of – not in addition to – the existing state and federal reporting requirements and performance assurance plans."[74] But Verizon then argues that the Commission should not adopt federal UNE rule penalties, because "CLECs have proven more than capable in the past of seeking remedies before the Commission . . . for any perceived disparities in performance."[75] Again, Verizon wants the best of both worlds – elimination of all state performance penalties, and no adoption of federal performance penalties to replace them.

The Commission should reject BOC suggestions to apply UNE reporting requirements to CLECs, who have no UNE obligations

Covad agrees with BellSouth that penalty plans should apply only to incumbent LECs, not to competitive carriers, for the simple reason that rules adopted pursuant to section 251(c)(3) of the Act should not apply to carriers that do not have any 251(c)(3) obligations.[76] Unfortunately, despite the amount of paper Verizon wastes claiming that the Commission has no authority to enforce its own unbundling rules, Verizon has no qualms about calling on the Commission to apply those rules to CLECs. Verizon claims that any reporting requirement that the Commission imposes on incumbent LECs should be imposed on competitive carriers as well. Verizon believes that such a requirement will provide for "easier resolution of disputes about performance data"[77] and will "provide the context necessary for determining the competitive significance of any apparent disparities in ILECs' reported retail and wholesale performance."[78] Given the basis for the Commission's adoption of federal UNE performance rules is the

[74] VZ Comments at 5-6.
[75] VZ Comments at 15.
[76] BellSouth Comments at 24.
[77] Verizon Comments at 4.

requirement of section 251(c)(3) of the Act, which by its terms applies only to ILECs, it is nonsensical for Verizon to advocate applying such rules to CLECs. Nonetheless, Verizon offers four reasons why the Commission should require CLECs to report their performance under the Commission's UNE rules.

(1) Requiring CLECs to report their performance to the Commission will reduce factual disputes in, for example, long distance proceedings.[79] Verizon cites its New York long distance application as example of how Verizon would not have suffered harm if CLECs had been required to maintain data. First of all, Verizon was granted long distance authority in that proceeding and thus suffered no harm whatsoever. Second, Verizon has the burden of proof in a section 271 adjudication, not the CLECs, and shifting the burden to the CLECs simply to facilitate Verizon's efforts to satisfy its burden of proof is not sufficient justification for imposition of reporting requirements. The adoption of the performance reporting requirements proposed in this docket would provide the Commission more comfort that performance data submitted by the BOCs is valid. Third, to the extent there is a factual dispute in a section 271 proceeding, the Commission already has procedural rules in place regarding the weight it will give certain data submissions. To the extent a CLEC wishes to submit performance data, Verizon is free to dispute it, and the Commission is free to ignore it. Again, given that the Commission has never rejected a Verizon long distance application, it is unclear exactly what benefit Verizon seeks to derive from imposing reporting requirements on CLECs.

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[78] Verizon Comments at 4.
[79] VZ Comments at 18.

(2) CLEC reporting will assist Commission in determining if CLEC is "actually harmed" by failure of Verizon to comply with law.[80] Who could possibly argue that failure to deliver a loop on time benefits a CLEC, rather than harming it? Only Verizon. It is tautological to state that a CLEC that gets a loop three days date will be delayed in turning up service to its end user and thus will suffer competitive harm. Verizon has the incentive and ability to delay provisioning of UNEs to requesting carriers, which Verizon views as its competitors for retail customers. Verizon and other BOCs must report performance data to the regulators because in the absence of such close policing of their conduct, they will exercise their ability and incentive to discriminate. CLECs have no incentives to delay provisioning to their end users. There is no purpose in requiring CLECs to compile performance data.

(3) CLEC reporting on trouble tickets could avoid problem of repeat trouble tickets falsely suggesting that Verizon's trouble ticket performance is poor.[81] Verizon's suggestion ignores the simple fact that Verizon is the arbiter of its own trouble ticket performance. If Verizon simply records a trouble ticket disposition as "no trouble found," it is cleared of any responsibility for that trouble ticket. This is of course true whether or not Verizon actually finds trouble on the UNE, because Verizon is free to simply make up the disposition of the trouble ticket. That problem can best be solved by audit (as discussed below), not by imposing reporting requirements on CLECs. But as to the specific problem Verizon purports to address – false suggestions of ILEC trouble ticket problems – they are fully within the control of ILEC already, and thus no CLEC reporting requirements are necessary.

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[80] VZ Comments at 19.
[81] VZ Comments at 19-20.

(4) CLEC to CLEC conversions require CLECs to share information with one another, and CLECs should thus report on performance in sharing information.[82] It is unclear exactly what the issue of CLEC conversions has to do with provisioning a UNE on time. It would appear that Verizon is aiming to offset its negative performance by blaming performance problems on CLECs for failing to share information with each other. But then, later in the same comments, Verizon says that "CLEC-collected and –reported data should not be used to determine ILECs' performance results."[83] At the end, if Verizon and other ILECs simply report their performance correctly, there will be no disputes. There certainly is no reason to impose a burden on the aggrieved party to police the malfeasant's behavior. If a CLEC does dispute ILEC performance metrics, it can submit data if it chooses in order to satisfy its burden of production, should the Commission impose one. There is certainly no reason to impose a burden on CLECs[84] in the hypothetical possibility that it may be necessary some day to prove that an ILEC misreported its performance to the Commission.

For its part, SBC believes that "order processing performance measurements" should be applied to CLECs because it is "arguably more critical to measure CLECs since ILECs are already measured on their provisioning missed due date performance."[85] This too makes no sense. The UNE is the only essential input to CLEC service that is provided by a supplier that has the ability and incentive to delay provisioning of that input. Not being a monopoly, the CLEC's only incentive is to provide service to its end users in as timely and high quality a manner as possible. Why measure CLEC service? What is the legal

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[82] VZ Comments at 20

[83] VZ Comments at 68.

[84] CLECs have none of the processes, systems, procedures, or employees in place to collect and produce such information as the ILECs are already required to collect and produce.

obligation that a CLEC has an incentive and the ability to ignore? What essential input does a CLEC control that, in the absence of regulatory oversight, it would refuse to provide?

The Commission Should Not Adopt Automatic Sunset Provisions

Verizon proposes a two-year sunset date for the federal performance rules and penalties, without any explanation as to why.[86] Other Bell companies call for automatic sunset dates as well. It is clear what motivates these incumbents: the desire to get out of performance penalties (and thus the policing of their anticompetitive behavior). As with any other of the Commission's UNE rules, an automatic sunset date does not advance the vital, procompetitive policy goals of the Commission. The Commission cannot predict at this time whether its performance rules and penalties will cease to be necessary at some point in the future, and it certainly cannot sunset them now without inquiry into their ongoing necessity. State commissions participating in this Commission agree that automatic sunsetting is ill advised.[87]

The Commission Must Make Clear That Its Rules Are Effective and Enforceable Upon Adoption

SBC suggests that performance rules and penalties adopted by the Commission in this proceeding would become binding "through implementation in interconnection agreements."[88] Although the Commission should certainly, as SBC suggests, require incumbent LECs to negotiate in good faith the inclusion of all such rules and metrics in interconnection agreements, that is not the end of the story. The rules the Commission

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[85] SBC Comments at 29-30.
[86] VZ Comments at 67.
[87] *See* California Commission Comments at 10; Oklahoma CC Comments at 5 (sunset date should not be adopted).

adopts in this proceeding are effective immediately upon adoption, because they are federal rules. The FCC must make that clear – no adoption in interconnection agreements is necessary to effectuate the Commission's rules. Rather, such rules are effective immediately, must be followed immediately, and can be enforced immediately upon adoption (and publication in the Federal Register). The Commission must not permit the BOCs to delay the effectiveness of its rules.

The Commission Should Impose An Audit Requirement

The Commission has imposed audit requirements on the BOCs that report merger data to the Commission. The list of reporting violations uncovered by those audits is too long to recite here, but it is clear that the Commission cannot rely on the integrity of ILEC data without subjecting it to some independent check. Covad agrees with SBC that ILEC data should be stored in an auditable form for at least two years.[89] The Commission should also require ILECs to pay for an independent audit of their data every six months to ensure accuracy. Covad disagrees with SBC's argument that the Commission "should not impose any penalties in the event data inaccuracies are discovered."[90] SBC is wrong when it suggests that disputes over data should be handled via a "business-to-business opportunity to resolve apparent differences," rather than audit or regulation.[91] The issue of compliance with the Commission's rules and the market-opening obligations of the 1996 Act is not about business negotiations.

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[88] SCB Comments at 36 n. 72.
[89] SBC Comments at 42.
[90] SBC Comments at 43.
[91] SBC Comments at 44.

Verizon agrees that independent, third party audits should be used to verify data accuracy. Verizon also agrees that ILECs should provide raw data to CLECs.[92] Covad suggests that such data could most easily be made available in downloadable form via a website. Similarly, BellSouth suggests in its comments that such an audit is necessary to verify ILEC compliance with the Commission's UNE performance rules.[93] Covad applauds the willingness of these two incumbents to subject their reporting practices to independent audit, and strongly encourages the Commission to adopt concrete and timely auditing rules.

The Commission Must Appropriately Disaggregate Reported Performance

Verizon claims in its comments that disaggregation of performance data is not particularly important and should be eliminated.[94] Nothing could be further from the truth. In the absence of appropriate disaggregration, as the Commission well knows, it is impossible to gauge the true UNE performance of the ILEC. Aggregation, as the Commission has concluded in several long distance proceedings, allows incumbent LECs to hide poor performance. For example, Verizon claims that DS-1 loop measures are not necessary because volumes are so low.[95] Covad strongly disagrees – indeed, Covad recently launched a low-priced business-class DSL service that utilizes unbundled DS-1 loops. As the ILECs will likely seek to protect their legacy retail T-1 base by handicapping CLECs that order unbundled DS-1-capable loops, measuring the provisioning of such loops is of vital importance. If the ILECs are not required to disaggregate performance to the product level, they could easily hide DS-1 performance

[92] VZ Comments at 64.
[93] BellSouth Comments at 69.
[94] VZ Comments at 38.
[95] VZ Comments at 77.

in with the much higher volume UNE-P, for example, making it impossible to see the extent of DS-1 discrimination. Covad strongly encourages the Commission to adopt product-level disaggregating, as all state performance plans, and the Commission's own merger metrics plans, have done. Covad also agrees with BellSouth that, as to geographic disaggregation, "[s]tate level reporting is appropriate [for] performance that may vary from state to state, e.g. all provisioning and maintenance and repair measurements."[96]

Respectfully submitted,

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[96] BellSouth Comments at 77-8.