

**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 Standards for Interstate Special Access Services	)	CC Docket No. 01-321
	)	

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

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## SUMMARY

The initial comments filed in the UNE-performance-metrics and special-access-performance-metrics proceedings demonstrate remarkable consensus among the states and the CLEC community. They recognize that negotiated performance measurements and non-compliance penalties provide a deregulatory, market-based solution to resolve provisioning disputes between CLECs and ILECs. The Commission's role should be to validate the work already completed by numerous state commissions that have established performance measurements and standards for ILECs. The Commission would advance local competition by establishing national baseline performance measurements and standards that build on state experience and that states would be permitted to supplement. States that had not yet adopted any performance measurements could use the national baseline performance metrics as the default requirements that parties could incorporate into interconnection agreements.

The Commission's authority to adopt rules governing the provision of UNEs under Section 251 and for interstate special access services under Section 201(b) is clear. Challenges to the Commission's authority to adopt self-effectuating forfeitures and other remedies are misplaced. As Joint Commenters show, the Commission can adopt a streamlined forfeiture procedure that will comply with the requirements of the Act while at the same time providing Tier 1 ILECs greater incentives to meet their statutory obligations. The Commission may also establish self-effectuating liquidated damages provisions for special access pursuant to Section 201(b) to ensure that interstate special access services are provisioned in a just and reasonable manner. Similarly, the Commission may adopt remedies for UNE provisioning under Section 251(c)'s dual mandate that ILECs must negotiate in good faith with requesting carriers and must provide just, reasonable and nondiscriminatory access to UNEs. Exercising this authority and

adopting metrics and remedies is the next logical step in the implementation of the local competition provisions of the Act.

The national performance metrics adopted in the UNE metrics proceeding should be the same as those applicable to ILEC provisioning of special access circuits because special access circuits use the identical facilities as UNEs.

Contrary to the views of the ILECs, the special access market is not sufficiently competitive that market dynamics alone will constrain ILEC anticompetitive behavior. Given a competitive choice, CLECs do not purchase special access circuits from ILECs. Yet ILECs provide an overwhelming majority of the special access circuits used by CLECs. Because the market for special access circuits is not yet competitive, and because CLECs must rely on ILEC provisioning of special access circuits for the foreseeable future, the Commission should establish performance metrics for special access circuits. The performance measurements adopted in this proceeding should apply at this time only to Tier 1 ILECs. They should not apply to CLECs, and they should only apply to non-Tier 1 ILECs when local competition develops further and circumstances warrant oversight of provisioning of facilities and services by smaller ILECs.

ILEC reporting requirements should be as frequent and as detailed as necessary to ensure compliance by the ILEC. Data validation, regular audits of reports, and periodic review of the regime are necessary to ensure the accuracy and efficacy of the performance metrics. Further, it is premature to consider a sunset date for national performance standards and penalties.

In order to maximize the deterrent effect of performance standards, the Joint Commenters proposed that the enforcement scheme should include both a streamlined forfeiture penalty component and an automatic, self-executing compensation component (including liquidated

damages provisions), to facilitate the efficient and speedy recovery of damages suffered by carriers as a result of ILEC discrimination and substandard performance. The Commission should also consider adopting non-monetary penalties that strip ILECs of certain kinds of authority to do business, in addition to financial penalties, when they fail to comply with their statutory obligations.

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PAC-WEST TELECOMM, INC., AND US LEC CORP.**

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

**I. NEGOTIATED SELF-EFFECTUATING REMEDIES PROVIDE A  
DEREGULATORY, MARKET-BASED SOLUTION**

In their initial comments, Joint Commenters urged the Commission to establish self-effectuating performance standards to be negotiated by the parties. For example, CLECs and ILECs could negotiate liquidated damages for ILEC failure to meet performance standards for

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

UNE and special access provisioning. As explained by Joint Commenters, the Commission could require that ILECs include liquidated damages provisions for UNEs in interconnection agreements, which would also, as a practical matter, apply to special access because, in general, performance standards and non-performance penalties should be the same for both UNEs and special access.

Joint Commenters emphasize that this approach would also help fulfill the goal of the 1996 Act of creating a deregulatory framework for provision of local telecommunications services. Thus, negotiated self-effectuating remedies provide a market-based, non-regulatory solution for assuring performance by the owner of bottleneck facilities. Apart from the other merits of self-effectuating remedies explained in the record of this proceeding, negotiated self-effectuating remedies are a simple, non-regulatory market-based approach that is in complete accord with Congress' intent to replicate market-based solutions to the greatest extent possible.

## **II. THE OVERWHELMING PREFERENCE AMONG COMMENTERS IS FOR FEDERAL METRICS FOR UNES THAT SERVE AS DEFAULT BASELINE STANDARDS THAT STATES MAY SUPPLEMENT**

In their initial Comments, Joint Commenters requested that the Commission adopt strong national performance metrics that establish baseline requirements for UNEs that states must adhere to yet supplement as appropriate.<sup>2</sup> In varying ways, all of the states, all of the CLECs, and even Qwest agree. Only Verizon, SBC, and BellSouth propose federal performance metrics that completely supplant the existing state performance metrics.<sup>3</sup> Thus, these ILECs seek the

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*Measures and Standards for Interstate Special Access Services*, CC Docket No. 01-321, FCC 01-339, Notice of Proposed Rulemaking, (rel. Nov. 19, 2001) (“*Special Access Metrics NPRM*”).

<sup>2</sup> Comments of Focal Communications Corporation, Pac-West Telecomm, Inc., and US LEC Corp. (“Focal/Pac-West/US LEC”) at 14.

<sup>3</sup> BellSouth UNE Metrics Comments (“BellSouth UNE”) at 15-16; SBC Communications, Inc. UNE Metrics Comments (“SBC UNE”) at 9; Verizon Telephone Companies UNE Metrics Comments (“Verizon UNE”) at 32.

lowest possible level of supervision of their performance, while the states and CLECs recognize that strong performance metrics, tailored to meet the circumstances of individual states, are essential to assure ILEC compliance with their statutory obligations.

The comments reveal key developments in the ILECs' and states' positions since the Commission first proposed performance metrics in the *OSS NPRM*.<sup>4</sup> The states make clear that the Commission suggested in that NPRM that states should develop performance metrics to measure ILEC provisioning of UNEs.<sup>5</sup> Many states followed that suggestion, and committed extensive resources to the establishment of performance metrics, usually through the process of collaborative workshops involving ILECs and CLECs. That effort should not be rendered moot by imposing federal performance metrics that preempt state performance metrics.

NARUC also highlights an interesting point regarding the *OSS NPRM*. NARUC explains that SBC, Bell Atlantic, and BellSouth "strenuously rejected the notion of national standards in favor of a State-by-State approach."<sup>6</sup> As recently as October 2001, BellSouth asked the Chief of the Common Carrier Bureau not to supplant state performance measure plans.<sup>7</sup> Now that strong state performance metrics have been established, SBC, Verizon, and BellSouth want to eliminate them by having the Commission adopt weaker federal metrics to replace the state metrics. This about-face by the BOCs should come as no surprise to the Commission. Quite obviously, the Commission should not consider the BOC proposal seriously.

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<sup>4</sup> *Performance Measures and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, CC Docket No. 98-56, Notice of Proposed Rulemaking, 13 FCC Rcd 12820 (1998) ("*OSS NPRM*").

<sup>5</sup> Public Utilities Commission of Ohio Comments ("PUCO") at 2-3; National Association of Regulatory Utility Commissioners Comments ("NARUC") at 2-3.

<sup>6</sup> NARUC at 3 n.3. The following quote from Bell Atlantic's comments cited by NARUC is worth repeating: "[A] single national set of performance measurements would not take into account the differences in systems and would produce meaningless results."

<sup>7</sup> NARUC at 3 n.4.

Moreover, the approach requested by SBC, Verizon, and BellSouth has dire policy implications. State commissions are not likely to expend limited resources on future proceedings suggested by the Commission if the Commission decides to preempt their efforts here. The performance metrics established by the states should be retained, to the extent they meet or exceed, and are otherwise consistent with the federal standards.<sup>8</sup> Federal baseline metrics would also serve as a default for those states that do not want to commit resources to develop metrics on their own.

Qwest, alone among the BOCs, asks the Commission not to preempt the state performance measurement plans.<sup>9</sup> Qwest asserts that “[f]or so long as UNEs exist and ILECs are required to unbundle them under Section 251 of the Telecommunications Act of 1996, and the states’ actions are consistent with the 1996 Act, the Commission should defer to the states.”<sup>10</sup> The Commission should be aware, however, of one fact underlying Qwest’s ostensibly reasonable proposal. As Qwest admits, the Performance Assurance Plans it has developed throughout its service territory will not be implemented until Qwest is granted Section 271 relief in each state where Section 271 authority has been requested.<sup>11</sup> The legal authority for the dubious proposition that Qwest may be granted Section 271 authority first and then demonstrate compliance with the Telecom Act later is never stated. It is clear that Qwest wants the Commission to avoid imposing federal performance measurements and standards so that Qwest can decide when and where it will agree to binding performance metrics. To date, Qwest is the only BOC that has filed no applications for Section 271 authority with the Commission. While the Joint

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<sup>8</sup> Federal rules *would* need to preempt the performance plans of states that are less rigorous than the new federal performance metrics. As Verizon points out, the Commission may preempt the states on this issue if the measurements adopted by the states substantially prevent implementation of the purposes of the local competition provisions of the 1996 Act. Verizon UNE at 47-48, *citing* 47 U.S.C. § 251(d)(3)(C). Once the Commission rules that the national performance metrics established in this proceeding are the minimum requirements, all state performance metrics that provide for less supervision of ILECs would necessarily conflict with the 1996 Act as implemented by the FCC and would be preempted.

<sup>9</sup> Qwest Communications International, Inc. UNE Metrics Comments (“Qwest UNE”) at 2.

<sup>10</sup> *Id.* at 4.

<sup>11</sup> *Id.* at 2.

Commenters agree with Qwest that the Commission should not undermine the work done by ILECs, CLECs, and state commissions establishing performance metrics, Joint Commenters question whether Qwest is seeking to preserve the Performance Assurance Plans it has agreed to, or whether Qwest is simply using its PAPs as a ruse to avoid having to record and report its performance. Qwest's comments actually provide support for the Joint Commenters' proposal that the Commission should adopt strong federal performance measurements and standards modeled after the best state performance metrics that will serve as a baseline and default regime for states that do not yet have performance metrics.

It is clear that SBC, Verizon, and BellSouth want the Commission to adopt watered-down federal performance metrics so that they do not have to comply with more rigorous state performance metrics. As the Joint Commenters stated, having no baseline performance metrics would be better than having weak federal baseline performance metrics that supplant more meaningful state metrics.<sup>12</sup> If there is no federal framework in place, CLECs could still seek to have the states establish ILEC performance standards that will ensure compliance with the Act and promote local competition. The proposal by SBC, Verizon, and BellSouth to replace state performance metrics with weak federal performance metrics should be rejected.

Instead, the Commission should adopt strong federal performance measurements and standards that are modeled after the "best of the best" state performance metrics to serve as minimum requirements for states to adopt. The Joint Commenters support the performance metrics proposed by WorldCom. These performance metrics should be coupled with substantial penalty provisions to provide ILECs with the incentive to improve UNE provisioning rather than pay fines.

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<sup>12</sup> Focal/Pac-West/US LEC at 15.

### III. THE FCC HAS THE AUTHORITY TO ESTABLISH RULES AND REMEDIES GOVERNING PROVISION OF UNES AND SPECIAL ACCESS

#### A. UNEs

##### 1. Provisioning Standards

As the Commission stated in its *UNE Metrics NPRM*, its authority to issue regulations implementing performance metrics is clear.<sup>13</sup> That authority was supported by most Commenters.<sup>14</sup> As the Supreme Court has found:

We think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the “provisions of this Act,” which include §§ 251 and 252, added by the Telecommunications Act of 1996.<sup>15</sup>

Given this explicit statement, one would think that the Commission’s authority, pursuant to Section 201(b), to adopt regulations implementing performance metrics under Sections 251 and 252 was unquestionable. However, Frontier/Citizens disagrees with the Supreme Court, arguing that:

[u]nder the Telecommunications Act of 1996, it is up to the state regulatory authorities, not the Commission, to regulate the quality of service provided by ILECs to CLECs. Service standards and reporting are appropriate subjects of interconnection agreements, which pursuant to 47 U.S.C. § 252 are either arbitrated or approved by the states. Service standards for intrastate retail services are regulated by the states, not the Commission, and there is no basis or reason for the Commission to prescribe reporting for intrastate wholesale services.<sup>16</sup>

Contrary to Frontier/Citizen’s argument, the Supreme Court has upheld the Commission’s authority to issue regulations concerning unbundled network elements, pricing standards, and a host of

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<sup>13</sup> *UNE Metrics NPRM* at ¶ 14.

<sup>14</sup> See, e.g., Covad Communications *UNE Metrics Comments* (“Covad UNE”) at 9-11, NARUC at 4, Qwest *UNE* at 3, SBC *UNE* at 10, Sprint Communications, L.P. *UNE Metrics Comments* (“Sprint UNE”) at 7-8, Verizon *UNE* at 41.

<sup>15</sup> *AT&T et. al v. Iowa Utils. Bd.*, 119 S.Ct. 721, 730 (1999).

<sup>16</sup> Frontier and Citizens *Incumbent Local Exchange Carriers UNE Metrics Comments* at 6 (“Frontier/Citizens UNE”).

other issues under Sections 251 and 252 that are “appropriate subjects of interconnection agreements.”

As the Supreme Court found:

[w]hile it is true that the 1996 Act entrusts state commissions with the job of approving interconnection agreements, . . . these assignments . . . do not logically preclude the Commission’s issuance of rules to guide the state commission judgments.<sup>17</sup>

Frontier/Citizens has not, nor can it, distinguish service standards from the multitude of other areas the Commission regulates under Sections 251 and 252. For instance, the Commission did not just designate the loop as a UNE, it also explicitly defined the loop, thereby setting a floor below which state commissions may not go in including unbundled local loops in arbitrated interconnection agreements. Similarly, the Commission can adopt performance metrics to guide states as they arbitrate and approve interconnection agreements that incorporate those metrics.

Nor does Frontier/Citizen’s retail/wholesale argument withstand scrutiny. While it is true that Section 2(b) of the Act reserves jurisdiction to the states over certain intrastate matters (which may include retail service standards), the Telecommunications Act of 1996 (“1996 Act”) specifically grants the Commission jurisdiction over intrastate matters under Sections 251 and 252. As the Supreme Court has found, precluding Commission jurisdiction over all intrastate services “would utterly nullify the 1996 amendments, which clearly ‘apply’ to intrastate service, and clearly confer ‘Commission jurisdiction’ over some [intrastate] matters.”<sup>18</sup> Whether or not state commissions regulate service standards for retail services, Sections 251 and 252 provide the basis upon which the Commission may regulate service standards for UNEs, interconnection, and collocation services ILECs are required to provide CLECs. If the Commission determines, as Joint Commenters argue that it should, that an ILEC’s provisioning of UNEs, interconnection,

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<sup>17</sup> *Iowa Utils. Bd.*, 119 S. Ct. at 733.

and collocation does not meet the “just, reasonable and nondiscriminatory” requirements of Section 251(c) unless it meets the performance metrics, it has the jurisdiction to prescribe such metrics. The Commission may therefore find that it has the authority to establish regulations that are consistent with those recommended by Joint Commenters in their initial comments and these reply comments.

## 2. Enforcement

While almost all Commenters supported the Commission’s authority to adopt UNE performance metrics, BOCs vehemently contested the Commission’s authority to adopt self-effectuating remedies for an ILEC’s failure to meet a metric. Their motivation for conceding the jurisdiction issue but fighting the enforcement issue is clear – the BOCs want weak federal metrics that are not enforceable. As BellSouth has admitted, existing Commission enforcement mechanisms are unlikely to be sufficient to bring about ongoing ILEC compliance with any performance metrics the Commission adopts.<sup>19</sup> Therefore, if the BOCs succeed in convincing the Commission to preempt the states’ UNE performance metrics (which state commissions uniformly oppose), they may continue to provide their competitors poor wholesale service with no consequences. The Commission must not reach this result, which would represent a significant step backward in the implementation of local competition.

### a) The Streamlined Process Proposed In Joint Commenters Initial Comments Complies With The Statutory Requirements.

The BOCs’ analysis of the Commission’s forfeiture authority focuses primarily on why the Commission cannot use that authority to adopt “self-effectuating” forfeitures paid to the U.S. Treasury or liquidated damages paid to CLECs. However, their protestations about the “self-

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<sup>18</sup> *Iowa Utils. Bd.*, 119 S.Ct. at 730; *see also id.*, 119 S.Ct. at n. 8 (“Congress, by extending the Communications Act

effectuating” nature of the forfeitures widely miss their mark. In initial comments, Joint Commenters proposed a streamlined process for assessing forfeitures that complies with the statutory requirements. Specifically, Joint Commenters proposed that the Commission adopt (1) a form notice of apparent liability (“NAL”) that would be automatically issued any time a Tier 1 ILEC failed to meet a federal performance metric; (2) a base forfeiture of the maximum statutory amount for any metric or sub-metric violation; and (3) a set period of time for Tier 1 ILECs to respond to the NAL.<sup>20</sup> As explained in more detail below, Joint Commenters believe that their proposal meets the statutory requirements.

If the Commission adopts national performance metrics, those metrics become “a rule, regulation or order” of the Commission. Whether the Commission adopts a specific benchmark or a parity standard for each metric or sub-metric, an ILEC that fails to meet the benchmark or standard for any metric or sub-metric in any given month would be in violation of a Commission rule. A violation is “willful” if the violator knew that it was taking the action in question, irrespective of any intent to violate the rule.<sup>21</sup> When an ILEC provisions a service to a CLEC and its provisioning does not comply with the metric, the ILEC “knows” it is taking the action of providing poor service, even if it does not “intend” to violate the metric. (Of course, it is quite possible that ILECs may “intend” to violate metrics as merely the purchase price of discrimination against CLECs.) Therefore, failing to meet a metric is a willful violation of a rule. A “repeated” violation merely means the violation has occurred more than once.<sup>22</sup> Furthermore, a “continuous violation is made a separate offense each day it occurs and so

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into local competition, has removed a significant area from the State’s exclusive control.”).

<sup>19</sup> BellSouth UNE at 18-20.

<sup>20</sup> Focal/Pac-West/ US LEC at 27-33.

<sup>21</sup> See, e.g. *Jerry Szoka*, 14 FCC Rcd 9857, ¶ 21 (1999).

<sup>22</sup> See, e.g., *Hale Broadcasting Corp.*, 79 FCC 2d 169, ¶ 5 (1980).

becomes ‘repeated’ on the second day of the violation.”<sup>23</sup> Thus if the ILEC violates the same metric more than once, or its violation continues for even a single day, it has engaged in a repeated violation. Whether the failure to meet a metric is classified as willful or repeated, Section 503(b)(1)(B) grants the Commission the authority to impose a forfeiture.

By adopting a form that constitutes an NAL if performance standards are violated, and requiring the Tier 1 ILEC to complete it any time it misses a metric, the Commission has “issued” the NAL under Section 503(b)(2)(D). Furthermore, the Commission may satisfy the requirements of Section 503(b)(4) by requiring the Tier 1 ILEC to provide on such a form the following information: (1) the type of performance metric (UNE or special access) violated and the specific metric violated; (2) the service the ILEC performed and by what measure it failed to meet the metric; (3) the amount of the forfeiture; and (4) the date the violation occurred (which could be defined as the date the violation was reported). Such a form NAL would meet the BOCs’ objections that the Commission must specify the rule violated, facts underlying the violation, and the amount of the forfeiture and date of the violation.<sup>24</sup> Finally, as part of the form the Commission can include the period of time (Joint Commenters suggest 15 days) within which the ILEC must respond to the NAL. This would meet the BOCs’ objections that proper notice procedures must be followed.<sup>25</sup>

While it may not be common for the Commission to set the baseline forfeiture at the maximum statutory amount, the Commission has set base forfeiture amounts very near the

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<sup>23</sup> See, e.g., *United States v. WIYN Radio, Inc.*, 614 F.2d 495, 497 (5<sup>th</sup> Cir. 1980).

<sup>24</sup> See, e.g., Verizon UNE at 44.

<sup>25</sup> See, e.g., SBC UNE at 39.

statutory maximum for some classes of violators,<sup>26</sup> and Joint Commenters believe such a baseline figure is warranted for violation of performance metrics. BellSouth argues that it would be inappropriate to set a baseline amount for a single violation of a metric because the Commission should take into consideration whether the failure was of large or small magnitude.<sup>27</sup> This concern is unfounded because adjustments to forfeitures based on the facts and circumstances of the particular case can be made after the ILEC responds and presents its defenses.<sup>28</sup> For example, even after MCI raised concerns that slamming violations could result from human error, the Commission set a baseline forfeiture amount for slamming violations of \$40,000, which was amount the Commission has previously assessed in cases of fraud or gross negligence.<sup>29</sup> Whether the rule violation, and the injury to a customer and carrier, results from an unauthorized change of the customer's preferred carrier or from poor performance by the ILEC that delayed or impaired the service the CLEC provided to its customer, the end result is the same. In either case, a Commission rule is violated and both the customer and carrier suffer injury. The Commission should therefore set a baseline forfeiture amount that shows it takes violations of performance metrics seriously.

The BOCs' primary objection to forfeitures also seem to be based on a fundamental misunderstanding. They seem to imply that the Commission proposes to adopt rules that would require a forfeiture payment immediately upon violation of the metric with no chance for adjustment or appeal. As shown above, that is not at all what Joint Commenters propose, and Joint Commenters did not read the Commission's *UNE Metrics NPRM* to propose such a drastic

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<sup>26</sup> See *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, ¶ 23 (1997) ("base forfeiture amounts are indeed very close to the maximum forfeiture that may be assessed against these ["other"] entities") ("*Forfeiture Policy Statement*").

<sup>27</sup> BellSouth UNE at 19-20.

<sup>28</sup> 47 C.F.R. § 1.80(f)(4).

measure either. However, the Commission should take note that the BOCs' arguments against "self-effectuating" forfeitures are essentially implicit threats: we will refuse to pay any Commission streamlined forfeiture assessments adopted for metrics and the only way you can make us pay is to have the Attorney General sue us in federal court.<sup>30</sup> This argument is the very reason that the Commission must adopt not only streamlined forfeiture rules, but also self-effectuating liquidated damages. Without such remedies, the Tier 1 ILECs will continue to violate their statutory duties without suffering any consequences. The Tier 1 ILECs have paid insufficient attention to their duty to open their networks to competitors and to provide competitors nondiscriminatory treatment for far too long. The Commission should adopt streamlined remedies sufficient to bring about ongoing compliance with the Act and its rules.

b) The Commission Does Not Need To Rely On Section 208 Or 503 To Establish Self-Effectuating Damages For Carriers.

The BOCs object to liquidated damages or self-effectuating remedies for violations of performance metrics as inconsistent with the statutory notice, hearing, and proof requirements of Sections 206, 208 and 503. However, Joint Commenters do not rely on these statutory sections.<sup>31</sup> Rather, Joint Commenters proposed that the Commission find that the 251(c) reasonableness standard, and the Section 251(c)(1) duty to negotiate in good faith, includes a duty to pay liquidated damages for discriminatory provisioning and to negotiate liquidated damages provisions in interconnection agreements.<sup>32</sup>

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<sup>29</sup> *Forfeiture Policy Statement* at ¶¶ 37-38 .

<sup>30</sup> Qwest UNE at 29-30, SBC UNE at 40, Verizon UNE at 44-45.

<sup>31</sup> Both Covad (UNE at 32) and Sprint (UNE at 8, 10) relied on these Sections and will presumably refute the ILECs' arguments in this regard.

<sup>32</sup> Focal/Pac-West/US LEC at 23-27.

Although the Commission initially determined not to adopt rules implementing ILECs' provisioning performance<sup>33</sup> or the Section 251(c) duty to negotiate in good faith,<sup>34</sup> it should do so now. As Joint Commenters showed in initial comments, although liquidated damages provisions are common in commercial contracts, ILECs have refused to negotiate such provisions.<sup>35</sup> Therefore, the Commission should adopt a rule requiring ILECs to negotiate such damages.

## **B. Special Access**

### **1. Provisioning Standards**

The Commission, and most Commenters, believe that the Commission has the authority to adopt performance metrics to govern the provisioning of interstate special access.<sup>36</sup> BellSouth, however, disagrees. BellSouth argues that under Section 201, the Commission only has the authority to adopt general guidelines, not specific metrics; under Section 202(a), the unjust and unreasonable discrimination standard raises a question of fact that cannot be resolved through rulemaking; and under Section 205, the Commission must first make a finding that existing tariff provisions are unjust and unreasonable.<sup>37</sup> For the reasons specified below, each of these arguments is unpersuasive and the Commission should reject them.

First, Section 201 does not limit the Commission to adopting general guidelines for performance metrics. As Joint Commenters noted in their initial comments, the Commission

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<sup>33</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-88, First Report and Order, 11 FCC Rcd 15499, ¶¶ 310-11 (1996) (subsequent history omitted) (“*Local Competition Order*”).

<sup>34</sup> *Local Competition Order* at ¶ 142 (identifying factors or practices that may be evidence of a failure to negotiate in good faith).

<sup>35</sup> Focal, Pac-West, US LEC at 24-27.

<sup>36</sup> See, e.g., Verizon Telephone Companies Special Access Metrics Comments (“Verizon Special Access”) at 12 (implicitly acknowledging Commission’s authority to adopt reporting requirements). See also *Special Access Metrics NPRM*, ¶ 8.

<sup>37</sup> BellSouth Special Access Metrics Comments (“BellSouth Special Access”) at 21-23.

relied on its broad Section 2(a) authority to adopt detailed reports to monitor a BOC's provision of services to enhanced service providers vis-à-vis the BOC's provision of such services to its own enhanced service operations.<sup>38</sup> Similarly, the Commission may establish detailed specific metrics under its broad Section 201(b) authority to ensure that the "practices, classifications, and regulations for and in connection with"<sup>39</sup> interstate special access service are just and reasonable. In this connection, Joint Commenters stress that their goal in this proceeding is to establish effective performance standards and remedies for wholesale customers only. Joint Commenters anticipate that existing remedies will continue to apply to retail customers.

Second, Section 202(a)'s nondiscrimination standard may be implemented through a rulemaking.<sup>40</sup> The Commission may determine in the abstract, whether an ILEC provisions a particular type of special access circuit to an end user customer, an interexchange carrier, or a CLEC, that the special access services provided to all three classes of customers are "like."<sup>41</sup> Once the Commission makes such a determination, if an ILEC provisions that type of circuit to an end user customer more readily than it provisions that type of circuit to a carrier customer, the ILEC has engaged in unreasonable discrimination.<sup>42</sup> In other words, defining the metric is a determination that the service provided is "like" and failure to meet the metric for a class of customers shows that the ILEC's service is discriminatory.

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<sup>38</sup> Focal, Pac-West, US LEC at n. 19.

<sup>39</sup> 47 U.S.C. § 201(b).

<sup>40</sup> See, e.g., *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, First Report and Order, 11 FCC Rcd 18455, ¶¶ 12, 35 (1996); 47 C.F.R. § 20.12(b)(1).

<sup>41</sup> See, e.g., *Local Exchange Carriers' Individual Case Basis DS3 Service Offerings; GTE Telephone Operating Companies Revisions to Tariff F.C.C. No. 1*, CC Docket Nos. 88-136, 89-305, Memorandum Opinion and Order, 4 FCC Rcd 8634, ¶ 66 (1989) ("It might theoretically be possible to devise a scheme for developing individual rates for each [DS3] facility that does not produce discrimination [under Section 202(a)], but it would be extremely difficult to establish a scheme that would produce individual facility rates that are rationally related to each other in some manner that is fair, just, and reasonable.").

Third, the Commission can rely on Section 201 alone to establish performance metrics, and need not rely on Section 202(a) or 205. Just as it did when it adopted the federal access charge regime, price cap regulation, or any other specific regulations to implement the Act, the Commission may adopt rules and require carriers to implement those rules by filing tariffs. It would be nonsensical to require that a tariff provision exist before the Commission could find that a practice is unreasonable, because it is more likely than not that the “practice” will not be incorporated in the tariff. For example, after divestiture, the FCC abandoned the ENFIA settlement agreement that governed payments between local exchange and other common carriers, adopted an access charge regime, and required carriers to file tariffs implementing that regime.<sup>43</sup> Under Section 201(b), once the Commission finds that existing special access provisioning is unjust or unreasonable, it has the authority to prescribe what classification, regulation or practice will be just and reasonable and require carriers to implement it in a tariff filing. Joint Commenters urge the Commission to make that finding here and prescribe performance metrics for Tier 1 ILEC provisioning of special access services. Joint Commenters note that to the extent existing tariff provisions govern provisioning, such metrics would be in addition to, and not in lieu of, any existing ILEC tariff provisions.

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<sup>42</sup> See, e.g., *id.* at ¶ 86 (“the argument that these [DS3s] are unique is subject to abuse. . . . To the extent that particular types of circuits do, in fact, possess unique characteristics, carriers have the option of tariffing additional charges to account for these peculiarities.”).

<sup>43</sup> See *AT&T Corp. Petition for Rulemaking to Establish Performance Standards, Reporting Requirements, and Self-Executing Remedies Needed to Ensure Compliance by ILECs with their Statutory Obligations Regarding the Provision of Interstate Special Access Services*, Petition for Rulemaking, 32 (filed Oct. 20, 2001) (“*AT&T Petition*”).

2. Enforcement

- a) The Commission may adopt streamlined forfeiture procedures for violations of special access metrics.

As noted in Section III.A.2.a. *infra*, ILEC objections to streamlined forfeitures for metrics failures are misplaced. Joint Commenters have proposed a streamlined forfeiture mechanism that complies with the Act and urge the Commission to adopt it to supplement existing credits or other remedies contained in ILEC special access tariffs.

BellSouth also argues that because interstate special access is a tariffed service, the maximum forfeiture is limited by the much lower cap of \$6,000 per offense plus \$300 per day for continuing violations prescribed by Section 203.<sup>44</sup> Joint Commenters disagree. Section 203 governs the procedures for tariff filing and amendment. For instance, when the Commission has ordered detariffing, it has forborne from enforcing the requirements of Section 203.<sup>45</sup> Section 201, on the other hand, governs the charges, classifications, regulations or practices that are included in the tariff and requires that they be just and reasonable. As explained in Section III.B.1 *infra*, the Commission should use its authority under Section 201(b) to adopt performance metrics. Because Section 201 contains no cap on forfeitures, violations of Section 201 and rules established thereunder are subject to forfeiture under Section 503. Thus the Commission may apply the Section 503 maximum fines for violations of any special access metrics it adopts in this proceeding.

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<sup>44</sup> BellSouth Special Access at 24-25.

<sup>45</sup> See, e.g., *MCIWorldCom, Inc. v. FCC*, 209 F.3d 760 (D.C. Cir. 2000) (upholding Commission authority to prohibit filing of tariffs by forbearing from applying Section 203).

- b) The Commission may require federal tariffs to include damages provisions for special access.

The Commission also has the authority to adopt self-effectuating payments to carriers when Tier 1 ILECs fail to meet provisioning metrics for interstate special access services.<sup>46</sup> Although the local competition provisions of Section 251(c) do not apply in this instance, the Commission may use its authority under Sections 4(i) and 201(b) to require that Tier 1 ILECs include damages provisions in their special access tariffs. As AT&T has noted, the FCC has in the past ordered modifications to tariff or carrier-to-carrier contract provisions to specify not only performance standards, but also remedies/penalties.<sup>47</sup> The Commission has also previously ordered credits for services paid for but not fully received, refunds for overpayment based upon unjust and unreasonable charges, and removal of undue restrictions on an ILEC's liability to interconnectors.<sup>48</sup> The Commission should similarly determine that because poor provisioning of special access service diminishes the quality of the service provided, Tier 1 ILECs should include damages provisions in their tariffs and make payments to customers when the ILEC violates the performance metric.

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<sup>46</sup> Again, to the extent existing tariff provisions are not inconsistent with the new rules adopted in this proceeding, these self-effectuating payments would be in addition to remedies already provided for in the ILEC's tariff.

<sup>47</sup> *AT&T Petition* at 34-35.

<sup>48</sup> See *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, 12 FCC Rcd 18,730, ¶¶ 4, 54-56, 357-60 (1997) (subsequent history omitted).

#### **IV. THE SPECIAL ACCESS MARKET IS NOT COMPETITIVE, AND PERFORMANCE METRICS ARE ESSENTIAL**

##### **A. The Market for Special Access Circuits is Not Competitive**

Verizon, SBC, and BellSouth also propose that the Commission not adopt performance metrics for the provision of interstate special access circuits.<sup>49</sup> These BOCs contend that the market for special access circuits is competitive and regulatory oversight of provisioning is not necessary. This contention, however, is refuted by the simple fact that ILECs would not be able to cavalierly reject requests for performance standards but for their market power in the provision of special access services. The competitive industry spends hundreds of millions of dollars per year to obtain ILEC special access services. If the special access market were competitive, ILECs would be trying to compete based on service quality, not resisting performance oversight. The fact that ILECs neither know nor apparently care about the quality of their special access services is a compelling demonstration that no meaningful competition exists.

Moreover, the CLEC Comments demonstrate that the special access market is not competitive. As Focal explained in the Joint Comments, Focal purchases special access circuits from the ILEC only when no other provider is available.<sup>50</sup> Nevertheless, a substantial majority of Focal's special access circuits are provisioned by the ILEC. Like Focal, WorldCom always purchases special access from competitive providers when competitive service is available. WorldCom notes that 87% of the buildings where its customers are located are served only by the ILEC.<sup>51</sup> CLECs simply do not have access to

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<sup>49</sup> SBC Communications, Inc. Special Access Metrics Comments ("SBC Special Access") at 3-4; Verizon Special Access at 1; BellSouth Special Access at 8. As the CLEC comments point out, "interstate" special access is something of a misnomer. Because of the "10% rule" that assigns to the interstate jurisdiction all special access circuits that have any more than 10% interstate traffic, virtually all special access circuits are "interstate" special access circuits. WorldCom makes the remarkable point that 99.4% of special access circuits in Massachusetts are considered interstate special access circuits. WorldCom, Inc. UNE Metrics Comments ("WorldCom UNE") at n.43.

<sup>50</sup> Focal/Pac-West/US LEC at 12-13.

<sup>51</sup> WorldCom, Inc. Special Access Metrics Comments ("WorldCom Special Access") at 11.

competitive alternatives to the special access circuits provided by ILECs in most local calling areas. These facts belie the ILEC claim that the special access market is competitive.

As dominant providers of special access circuits, ILECs have every incentive to discriminate against CLECs in order to undermine CLEC service that would otherwise compete with the ILEC's service. As long as its competitor provides an essential input for its service, the CLEC will be at a competitive disadvantage unless regulators strictly oversee ILEC performance. And as long as ILECs remain the dominant providers of special access circuits, CLECs must rely on ILECs for essential inputs. As Joint Commenters stated, federal rules can, and must, assure that ILEC provisioning of special access and UNEs to CLECs is on parity with its provisioning of special access and UNEs to itself, its affiliates, and its retail customers. As controllers of bottleneck facilities, if ILECs are permitted to discriminate against CLECs in quality or cost of service, there can be little hope for robust competition in the local markets. The objective level of quality or cost of service from the ILECs is less important to the Joint Commenters than CLECs obtaining bottleneck facilities from the ILEC on a performance level *equivalent* to the service the ILEC provides to itself. Once provisioning parity is established, ILECs and CLECs can compete on grounds that they *both* can control, including price, quality of service, customer support, and additional features.

Further, the ILECs reliance on the *Pricing Flexibility* cases to support their claim of a competitive market is misplaced. As Mpower explains, the standards used in the *Pricing Flexibility* cases are fairly minimal standards. To argue that they are sufficient to identify a competitive marketplace is just not credible.<sup>52</sup> As Time Warner/XO states, a grant of pricing flexibility based on the standards in the *Pricing Flexibility* cases does not bestow competitive

status on the market. It provides for some deregulation with the understanding that ILECs remain the dominant providers of special access whose market power must continue to be restrained.<sup>53</sup>

**B. The Commission Has the Authority to Establish Special Access Performance Metrics**

ILEC provisioning of special access circuits must be subject to performance metrics for the same reasons that UNEs must be subject to performance metrics. ILECs have the incentive, and the ability, to discriminate against CLECs in their provisioning of special access circuits. As discussed above in Section III.B, the Commission has the legal authority to issue special access performance metrics in order to monitor ILEC compliance with the non-discrimination provisions of the Act.

BellSouth's argument regarding the application of Section 205 to special access performance metrics is also misplaced. BellSouth contends that if the FCC uses its Section 201 rulemaking authority in this proceeding, it could only adopt general rules, not specific metrics, to be included in the ILEC's tariffs.<sup>54</sup> BellSouth contends that specific metrics would be practices and regulations in connection with special access service and subject to Section 205, such that the FCC would first have to make a finding that a LEC's existing tariff provisions are unjust and unreasonable.<sup>55</sup> In this instance, however, BellSouth's invocation of Section 205 is a straw-man because Section 205 is not implicated in this proceeding. The Commission may establish performance standards for special access services by virtue of its authority under Section 201 of the Act without the findings necessary for a Section 205 ruling.

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<sup>52</sup> Mpower Communications Corp. Special Access Metrics Comments ("Mpower Special Access") at 9.

<sup>53</sup> Time Warner Telecom and XO Communications, Inc. Special Access Metrics Comments at 10-11.

<sup>54</sup> BellSouth Special Access at 21.

<sup>55</sup> *Id.* at 21-23.

**C. Special Access Performance Metrics Must be the Same as the UNE Performance Metrics**

In initial comments, the Joint Commenters stated that the Commission's statutory authority to issue performance standards for special access and UNEs was broad enough to require ILECs to provision interstate special access circuits to CLECs subject to the same standard that ILECs provide UNEs.<sup>56</sup> The Minnesota Department of Commerce ("DOC") agrees that the performance metrics for UNEs and special access circuits should be the same. The Minnesota DOC makes the salient point that the Commission's metrics should not distinguish between UNEs and special access because such distinctions could encourage discriminatory treatment and result in attempts to game the system.<sup>57</sup> PaeTec and Mpower agree.<sup>58</sup> As stated above, it is clear that ILECs are gaming the system now. Special access circuits are substitutes for UNE loops for a number of reasons, including this Commission's restrictions on the use of UNE loops in combination with other UNEs.<sup>59</sup> The facilities used for special access circuits are identical to UNE loop combinations, so the regulatory supervision of their provisioning by the ILEC should also be identical. Accordingly, the Commission should establish the same performance standards for UNEs and special access. While Joint Commenters do not demand perfection in this regard, standards for UNEs and special access should be sufficiently the same so that ILECs are not able to manipulate terms and conditions of these offerings to harm competition as described in Joint Commenters initial comments.

Because the market for special access circuits is not yet competitive, and because CLECs must rely on ILEC provisioning of special access circuits for the foreseeable future, the

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<sup>56</sup> Focal/Pac-West/US LEC at 10.

<sup>57</sup> Minnesota Department of Commerce UNE Metrics Comments ("Minnesota DOC") at 4.

<sup>58</sup> PaeTec Communications Comments at 1-2; Mpower Special Access at 7, 15.

<sup>59</sup> Focal/Pac-West/US LEC at 5, 19.

Commission should establish performance metrics for special access circuits. Because special access circuits use the identical facilities as UNEs, the performance metrics should be the same for both services.

**V. PERFORMANCE METRICS SHOULD APPLY ONLY TO TIER 1 ILECS**

**A. CLECs Should Not Be Subject To Reporting Requirements**

SBC, Verizon, and BellSouth assert that if they must record and report their performance in provisioning UNEs, CLECs should also be subject to the same requirements.<sup>60</sup> This proposal should be rejected. Performance metrics are necessary to monitor ILEC compliance with the market-opening provisions of the Telecom Act and to eliminate anticompetitive behavior by the ILECs based on their control of bottleneck facilities. There is no reason to require CLECs to incur the costs of developing, deploying, and maintaining performance measurement systems. Several state commissions agree.<sup>61</sup>

**B. ILECs Other Than Tier 1 ILECs Should Not Be Included Now, But Possibly Should Be Included In The Future**

The Joint Commenters agree with the comments of the numerous rural and small ILECs that the performance metrics established in this proceeding should not apply to them at this time.<sup>62</sup> Joint Commenters have already proposed that only Tier 1 ILECs should be subject to the

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<sup>60</sup> SBC UNE at 46; Verizon UNE at 17-20, 68; BellSouth UNE at 24-25.

<sup>61</sup> California UNE Metrics Comments (“California”) at 6; *see also* Missouri Public Service Commission UNE Metrics Comments at 2, PUCO at 9 (proposing that performance metrics apply only to ILECs.)

<sup>62</sup> National Exchange Carrier Association, Inc., National Rural Telecom Association, Organization for the Promotion and Advancement of Small Telecommunications Companies (“NECA/NRTA/OPASTCO”) Special Access Metrics Comments at 3; NECA/NRTA/OPASTCO UNE Metrics Comments at 5; National Telephone Cooperative Association (“NTCA”) UNE Metrics Comments at 2; NTCA Special Access Metrics Comments at 4; Small Independent Telephone Companies (“Small ITCs”) Special Access Metrics Comments on Information Collection at 5; Small ITCs UNE Metrics Comments on Information Collection at 5, Small ITCs UNE Metrics Comments at 8; Frontier/Citizens UNE at 1; Frontier/Citizens Special Access Metrics Comments at 1; Rural ILEC Coalition Special Access Metrics Comments at 2, 7.

federal performance metrics.<sup>63</sup> However, mid-sized, small, and rural ILECs that are already subject to state performance measurements—e.g., Frontier Telephone of Rochester, Inc.—should continue to be monitored under those state plans. As stated above, the Commission should not undermine the decisions of the state commissions that have already developed performance measurement plans to the extent they meet or exceed federal rules. The Joint Commenters do not believe, however, that mid-sized, small and rural ILECs should be exempt from federal performance metrics permanently. It is not possible to know at this time when local competition will reach a point that CLECs will want to enter mid-sized, small, and rural ILEC service territories. Accordingly, CLECs should be able to petition the Commission to have a particular ILEC subject to the federal requirements.

## **VI. THE CLEC IMPLEMENTATION PROPOSALS SHOULD BE ADOPTED**

The Joint Commenters made a number of proposals for procedures that the Commission should adopt to ensure the integrity and validity of the underlying data collected by ILECs to produce performance metrics reports as well as the reports themselves.<sup>64</sup> The comments of the ILECs indicate a desire to have only weak procedural requirements imposed on them, and to have the performance metrics requirements removed as soon as possible. The Commission should accept the CLEC proposals on these issues.

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<sup>63</sup> Focal/Pac-West/US LEC at 18; *accord* WorldCom Special Access at 47.

<sup>64</sup> Focal/Pac-West/US LEC at 34-43.

**A. Reports Should be as Frequent and as Detailed as Necessary to Ensure Compliance**

SBC and Verizon propose that they should be required to submit performance reports on a quarterly basis.<sup>65</sup> This proposal should be rejected because quarterly reports are insufficient to monitor ILEC compliance with its provisioning obligations. As Cox Communications points out, monthly reports are appropriate because “a month is long enough to even out most spikes from unusual events, but short enough to make it difficult to conceal noncompliance or service failures.”<sup>66</sup> Joint Commenters agree. Any reporting period longer than one month would enable an ILEC to average out performance misses with performance hits. The performance misses that threaten local competition could be overlooked in quarterly reports. Several states agree that performance should be reported on a monthly basis.<sup>67</sup>

Likewise, SBC and Verizon assert that the lowest geographical level of reporting should be the state level.<sup>68</sup> Verizon even proposes multi-state region reporting where an ILEC’s OSS is the same throughout multiple states. This proposal should also be rejected. State-wide performance reporting would not be very helpful in a large state such as California or New York. Performance reports must be disaggregated on a geographic level to give an accurate depiction of where ILECs need to focus their service improvements. Joint Commenters proposed reporting on an MSA basis. Joint Commenters would also agree to reporting on a LATA-by-LATA basis as proposed by Cox Communications.<sup>69</sup>

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<sup>65</sup> SBC UNE at 46; Verizon UNE at 73.

<sup>66</sup> Cox Communications, Inc. UNE Metrics Comments (“Cox UNE”) at 17.

<sup>67</sup> Colorado Public Utility UNE Metrics Comments at 11-12; Minnesota DOC at 5; Texas Public Utility Commission UNE Metrics Comments (“Texas PUC”) at 9-10.

<sup>68</sup> SBC UNE at 46; Verizon UNE at 71.

<sup>69</sup> Cox UNE at 17.

**B. Data Validation, Audits, and Periodic Review are Essential to Ensure ILEC Compliance**

Contrary to the view expressed by SBC,<sup>70</sup> validation of ILEC performance data and routine audits are essential to ensure the credibility of ILEC performance measurement reports. BellSouth apparently agrees and proposes extensive review processes.<sup>71</sup> Joint Commenters agree with the Texas Public Utility Commission that ILEC performance data should be reviewed every six months.<sup>72</sup> State commissions should have the authority to impose more frequent audits, as requested by the Public Utilities Commission of Ohio, including quarterly audits by each competitive carrier as requested by WorldCom.<sup>73</sup>

Periodic review of performance metrics should be implemented in addition to audits. Periodic review will allow the industry to evaluate the efficacy of the performance metrics on a regular basis. Over time, the review process will likely lead to the convergence of differing state performance measurements as the industry develops consensus on what information is necessary to monitor ILEC performance sufficiently.<sup>74</sup>

**C. States and CLECs Agree That No Sunset Should Be Planned Now**

Although Verizon and BellSouth want the national performance metrics to sunset as quickly as possible,<sup>75</sup> the consensus among the state commissions and CLECs is that it is premature to consider a sunset date for any national performance metrics established in this

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<sup>70</sup> SBC UNE at 43-44.

<sup>71</sup> BellSouth UNE at 67-69.

<sup>72</sup> Texas PUC at 2-3.

<sup>73</sup> PUCO at 15-16; WorldCom UNE at 23-24; WorldCom Special Access at 51-52.

<sup>74</sup> Mpower Communications Corp. UNE Metrics Comments ("Mpower UNE") at 18; XO Communications, Inc. UNE Metrics Comments at 2.

<sup>75</sup> BellSouth UNE at 72-74 (within 1-3 years); Verizon UNE at 67 (no later than 2 years); Verizon Special Access at 19-20 (same).

proceeding.<sup>76</sup> Instead, the regulators and competitors think the performance metrics should continue until competition makes them no longer necessary. Periodic review will help determine when competition reaches a level sufficient to justify terminating performance measurement.

## **VII. CERTAIN NON-MONETARY PENALTIES SHOULD BE ADOPTED**

In order to maximize the deterrent effect of the new performance standards, the Joint Commenters proposed that the enforcement scheme should include both a streamlined forfeiture penalty component and an automatic, self-executing compensation component (including liquidated damages provisions), to facilitate the efficient and speedy recovery of damages suffered by carriers as a result of ILEC discrimination and substandard performance. Other Commenters suggest non-monetary penalties as remedies for ILEC non-compliance. Joint Commenters see significant value in non-monetary penalties that strip ILECs of certain kinds of authority to do business.

For example, Sprint proposes that BOCs with Section 271 authority be stripped of their authority to market and sign up new long distance customers.<sup>77</sup> WorldCom proposes non-monetary penalties that could include initiation of an investigation by the Commission, suspension of the BOC's Section 271 authority, suspension of special access pricing flexibility, revocation of licenses, and prohibitions on entering into government contracts.<sup>78</sup> The Joint Commenters believe that non-monetary penalties such as those proposed by Sprint and WorldCom would certainly get the ILEC's attention. The Commission should seriously

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<sup>76</sup> New York Department of Public Service UNE Metrics Comments at 4; Oklahoma Corporation Commission UNE Metrics Comments at 5; California at 10; PUCO at 17; Sprint UNE at 20; Mpower UNE at 10; API Comments at 8; Sprint UNE at 10-11; AT&T Wireless Services Comments at 19; ASCENT Comments at 10; PaeTec at 4; WorldCom Special Access at 44.

<sup>77</sup> Sprint UNE at 11-12.

consider implementing such non-monetary penalties that strip ILECs of certain kinds of authority to do business.

### VIII. CONCLUSION

For the foregoing reasons, the Commission should adopt national performance measurements and standards for unbundled network elements and interstate special access circuits as proposed herein and in the initial Comments of Focal, Pac-West, and US LEC.

Respectfully submitted,



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<sup>78</sup> WorldCom Special Access at 53-54.