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
	)	

REPLY COMMENTS OF THE VERIZON TELEPHONE COMPANIES

Michael E. Glover
Karen Zacharia
Leslie V. Owsley
VERIZON
1515 North Courthouse Road
Suite 500
Arlington, VA 22201-2909
(703) 351-3158

Mark L. Evans
Scott H. Angstreich
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
Sumner Square
1615 M Street, N.W., Suite 400
Washington, DC 20036
(202) 326-7900

Counsel for the Verizon Telephone Companies

February 12, 2002

TABLE OF CONTENTS

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
	)	

REPLY COMMENTS OF THE VERIZON TELEPHONE COMPANIES

INTRODUCTION AND SUMMARY

In its Notice of Proposed Rulemaking ("Notice" or "NPRM"), the Commission proposed a narrowly limited "core set" of performance measurements "intended to cover activities that could be relatively easily measured and that appear to be particularly critical to carriers' ability to compete effectively but that would not increase overall regulatory burdens on carriers." NPRM ¶¶ 25, 27. The Commission explained that it sought "to gauge, in a minimally burdensome way, an incumbent LEC's overall performance in its role as a wholesale provider of both facilities and services." *Id.* ¶ 27. To that end, the Commission "emphasize[d] that . . . commenters should address carefully and specifically *why* their recommended outcomes do not increase carriers' overall regulatory burdens." *Id.* ¶ 34.

The Verizon Telephone Companies ("Verizon")[1] offered a proposal that, pursuant to the goals set out in the Notice, would best "balance competitors' concerns about poor provisioning . . . with the incumbent LECs' concern about the number and cost of state and

[1] The Verizon Telephone Companies are identified in Appendix C to Verizon's comments.

federal measurements and standards." NPRM ¶ 6. Namely, Verizon proposed that the Commission limit the national measurements to those most critical to competition, set performance standards and any penalties in light of the statutory requirement of nondiscriminatory service, and preempt the existing inconsistent and redundant state measurements. *See* Verizon Comments at 3-6, 8-17, 21-36. These measurements would be phased in over an eight month period, with preemption of the existing state reporting requirements to occur once an ILEC reports all of the national measurements, thereby providing ILECs with the incentive to implement the national measurements rapidly. Further, Verizon proposed that CLECs should be required to retain and report their performance data — particularly insofar as this data is relevant to assessing the competitive significance of ILECs' wholesale performance — which will increase the usefulness of any national measurement regime. *See id.* at 17-21.

Verizon also proposed, as an alternative, second-best solution, that the Commission adopt a national performance measurement blueprint, also limited to the most critical measurements and with standards set consistent with federal law. This blueprint would not impose independent obligations on carriers, but instead would provide guidance to state commissions and to carriers about which aspects of an ILEC's performance the Commission considers to be "vital to competition and [to] enforcement efforts." NPRM ¶ 33. Such a blueprint would not increase carriers' regulatory burdens and could both streamline the Commission's review of section 271 applications and potentially rationalize and reduce the existing state reporting requirements. *See* Verizon Comments at 7-8, 51-55. A number of commenters have agreed with Verizon that the Commission should pursue one of these two alternatives and that, in no event, should it adopt measurements that simply add to the existing state and federal regimes. *See*, *e.g.*, Sprint

Comments at 5-7; SBC Comments at 4-11; BellSouth Comments at 15-16; *see also* Qwest Comments at 3. Indeed, if the Commission can do no more than overlay a new set of measurements on top of those existing requirements, it would be better for the Commission to refrain from adopting national measurements entirely.

In contrast, the CLECs responded with wish lists that are almost uniformly unresponsive to the questions posed in the Notice. Indeed, the CLECs' proposals — along with those of the state commissions — fly in the face of the Commission's goals and demonstrate that it is necessary for the Commission to adopt national measurements that preempt the existing state reporting regimes in order to rationalize the current "regulatory patchwork" of performance measurements. NPRM ¶ 3. First, where the Commission proposed a set of twelve measurements, the CLECs have coalesced around WorldCom's proposed measurements, which are so exhaustively disaggregated that they would require ILECs to report their performance on approximately 5,800 measurements per state per month. Second, the CLECs scoff at the notion that reporting these thousands of measurements could impose burdens on ILECs — notwithstanding the tens of millions of dollars ILECs currently spend annually to report their performance under the existing state and federal measurements — and refuse to confront the Commission's concern that the benefits from national measurements could be outweighed by their costs. But the CLECs also argue vociferously that they should not be required to take on *any* reporting requirements because of the burden they say it would impose. Third, the CLECs' proposed performance standards go well beyond the statutory requirement of nondiscriminatory service and require superior or even perfect service, although none purports to find a basis in the Act for such requirements. Fourth, the CLECs have attempted to use this proceeding to alter the scope of ILECs' substantive requirements under the Act, even though the purpose of performance measurements is to assess whether carriers are complying with the requirements of the 1996 Act, not to set those requirements.

Fifth, nearly all of the CLECs claim that the Commission should adopt a self-effectuating liquidated damages rule that places trillions of dollars at risk annually, but only a few even attempt to argue that the Act provides the Commission with the necessary authority to adopt such a rule. And those few CLECs are wrong — the Act establishes express procedures through which the Commission can award damages or impose forfeitures, and does not authorize the creation of a self-effectuating regime under which ILECs would automatically pay CLECs based on their performance under the national measurements.

Finally, neither the CLECs nor the state commissions contemplate that the adoption of national measurements would result in any harmonization or standardization of state and federal performance reporting requirements. Instead, both sets of commenters strongly oppose any action by the Commission to preempt state commissions' authority and propose that national measurements should constitute minimum requirements that the states are free to exceed. Adoption of the CLECs' proposals, therefore, would exacerbate the flaws of the existing regimes by further increasing the "divergent and costly requirements" under which ILECs operate. NPRM ¶ 4.

DISCUSSION

I. CLECS' CONCLUSORY ALLEGATIONS OF ILEC DISCRIMINATION ARE WHOLLY UNSUBSTANTIATED AND ARE BELIED BY THE RAPID GROWTH IN LOCAL COMPETITION

The CLECs contend that the thousands of measurements and the trillions of dollars in penalties they propose are necessary to expose and prevent discrimination by ILECs. But their comments are notably lacking in evidence to support these claims.[2] Instead, the CLEC commenters claim generically that "incumbent LECs have universally refused to embrace competition" and treat CLECs as "competitors who can be suppressed with consistent discrimination in the provision of wholesale services." Covad Comments at 7; *see also*, *e.g.*, XO Comments at 7 ("ILECs routinely reject CLECs' UNE orders for unlawful and anticompetitive reasons."); Focal Comments at 3 ("ILECs have acted precisely as classic economics predicts monopolists will act when new entrants try to break their monopoly — raising one frivolous scheme after another in an effort to handicap their competitors."). Others make the claim — which is belied by the Commission's approval of nine section 271 applications in less than two years — that a "history of ILEC substandard performance" has been "exposed during Section 271 and merger proceedings." BTI Comments at 4.[3] Moreover, ILECs' performance has continued to excel — and even to improve — following approval of those applications.[4]

Moreover, since the passage of the 1996 Act, competition for telephone exchange service has grown in leaps and bounds. For example, according to data sources relied on by the CLECs, the number of competitive access lines in service quadrupled between 1998 and 2001, as CLECs

[2] Appendix A to these reply comments responds to the CLEC criticisms specifically directed at Verizon.

[3] In the context of section 271 applications, the Commission has rejected such "conclusory and anecdotal" claims, which are "unsupported by any persuasive evidence." Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, 4106-07, ¶ 295 (1999) ("*New York Order*"); Memorandum Opinion and Order, *Application by SBC Communications Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, 15 FCC Rcd 18354, 18536-37, ¶ 272 (2000) ("*Texas Order*"). It should do so here as well.

[4] *See*, *e.g.*, *Ex Parte* letter from Dee May, Verizon, to Magalie Roman Salas, FCC, CC Docket No. 01-100 (July 19, 2001).

added approximately 14 million lines.[5] Compared to 1996, the growth in competitive access lines is even more pronounced — with the number of lines currently nineteen times larger than when the 1996 Act was enacted.[6] Overall, less than six years after the enactment of the 1996 Act, CLECs have captured more than 10 percent of the local market.[7] Moreover, as of the end of 2000, CLECs had already captured more than 20 percent of the lucrative market for medium and large business, institutional, and government customers.[8]

CLECs are also investing heavily in their own facilities, voting with their wallets and demonstrating their own belief that local markets are open and will stay that way. As the Department of Justice has explained, the fact that competitors have "commit[ted] significant irreversible investments to the market (sunk costs) signals their perception that the requisite cooperation from incumbents has been secured or that any future difficulties are manageable."[9] For example, by the end of 2001, CLECs had deployed more than 1,000 switches, at least 1,600 data switches, and at least 184,000 route-miles of local and long-haul fiber — each of which represents a near doubling of the number of switches and route-miles of fiber that CLECs had

---

[5] *See* ALTS, *The State of Local Competition 2001*, at 25 (Feb. 2001) ("*State of Local Competition 2001*"); New Paradigm Resources Group, *CLEC Report 2002*, ch. 4, at 20 (15th ed. 2002) ("*CLEC Report 2002*"); Mark Kastan, et al., Credit Suisse First Boston, *Telecom Services: CLECs, Third Quarter Vital Signs Review* at 14 (Dec. 2001) ("*Telecom Services 2001*"); Mark Kastan, et al., Credit Suisse First Boston, *Telecom Services — CLECs* at 16 (Apr. 2001).

[6] *See State of Local Competition 2001*, at 25; *CLEC Report 2002*, at 20; *Telecom Services 2001*, at 14.

[7] *See Telecom Services 2001*, at 14.

[8] *See* Industry Analysis Division, FCC, *Local Telephone Competition: Status as of December 31, 2000*, at Table 2 (May 2001).

[9] Affidavit of Marius Schwartz ¶ 174, *Competitive Implications of Bell Operating Company Entry Into Long-Distance Telecommunications Services* (May 14, 1997), attached at Tab C to Evaluation of the United States Department of Justice, *Application of SBC Communications Inc. et al. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in the State of Oklahoma*, CC Docket No. 97-121 (FCC filed May 16, 1997).

deployed as of 1998.[10] CLECs are currently serving more than 4.5 million access lines entirely over their own facilities and another approximately 9 million access lines through a combination of their own facilities and UNEs.[11]

These dramatic increases in facilities-based competition belie CLECs' claims here that the existing state performance measurements and remedy plans are insufficient. *See*, *e.g.*, WorldCom Comments App. A (State Metrics Matrix). Moreover, they demonstrate that "the establishment of a *select group* of performance measurements can promote the goal of efficient and effective processes between competing carriers and incumbent LECs without increasing overall regulatory burdens on carriers." NPRM ¶ 25 (emphasis added).

II. CLECS' PROPOSALS TO ADD THOUSANDS OF NATIONAL MEASUREMENTS TO THE EXISTING STATE MEASUREMENTS WOULD DRAMATICALLY INCREASE CARRIERS' BURDENS WITH NO CORRESPONDING BENEFITS

In the Notice, the Commission rightly recognizes that, while national measurements could help to eliminate the current "inconsistency [and] redundancy" in the existing performance reporting regimes, they could also become simply "a new set of substantial and burdensome requirements imposed on carriers" that "merely increase the overall reporting burden on incumbent LECs." *Id.* ¶¶ 3, 16-17. The CLECs' proposed measurements, business rules, and performance standards would do nothing to harmonize or streamline either the existing

[10] *See generally CLEC Report 2002*, ch. 4; New Paradigm Resources Group, *CLEC Report 2000*, ch. 6 (12th ed. 2000); New Paradigm Resources Group, *CLEC Report 1999*, ch. 6 (10th ed. 1999). As those reports make clear, these are highly conservative estimates and the actual current deployment and growth since 1998 are likely significantly higher. For example, the data for 2001 do not include the 117,000 route-miles of fiber, 200 voice switches, and 840 data switches that New Paradigm Resources Group reports for competitive Independent Operating Companies, utility CLECs, data providers, Gig-E providers, fiber layers, and other providers, let alone the 7,000 data switches reported for AT&T. *See CLEC Report 2002*, ch. 6.

[11] *See Telecom Services 2001*, at 14, 22.

performance reporting requirements or the Commission's review of section 271 applications and post-entry compliance. *See id.* ¶¶ 17-19. As a result, if these proposals are adopted, "the potential benefits of national standards" will inevitably "be outweighed by the likely burdens imposed on carriers." *Id.* ¶ 26.

A. The Commission Must Either Preempt State Reporting Requirements or Promulgate a Measurements Blueprint that Imposes No Legal Obligations

As Verizon explained, in the three years since the release of the *OSS Notice*,[12] state commissions have proved more than capable of developing "comprehensive measures for reporting of performance," NPRM ¶ 27 n.40, and the pressing need today is for a reduction in the number of measurements, retaining only those that are the most critical to competition. Verizon Comments at 32-36, 53-55. For this reason, Verizon supports the creation of legally binding national measurements only if they supplant, rather than supplement, the existing state and federal reporting requirements and remedy plans. Other commenters reached the same conclusion. *See* Sprint Comments at 5-7; SBC Comments at 4-11; BellSouth Comments at 15-16.

1. Current State and Federal Reporting Requirements Are Overly Burdensome

As Verizon and other ILECs have demonstrated, the existing state and federal performance reporting requirements impose substantial burdens. Verizon reports approximately 2.4 million wholesale performance results each month, under at least seven separate sets of state reporting requirements and two sets of federal requirements. *See* Verizon Comments at i. In its thirteen states, SBC reports between 659 and 3,137 submeasurements monthly, each of which

[12] Notice of Proposed Rulemaking, *Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, 13 FCC Rcd 12817 (1998) ("*OSS Notice*").

must also be tracked on a CLEC-by-CLEC basis. *See* SBC Comments at 6. BellSouth is required to report its performance on more than 13,000 submeasurements in Louisiana alone and its performance measurement systems process the equivalent of 55 million pages of information every month. *See* BellSouth Comments at 11-12. The ILECs employ hundreds of people simply to report their performance on all of these measurements, at a cost of tens of millions of dollars annually, in addition to the comparable sums required to develop the performance reporting systems and to pay for third-party audits. *See* Verizon Comments at 2-3, 69; SBC Comments at 6-7.

The CLEC commenters, however, claim that "performance measures and standards are not burdensome." AT&T Comments at 39. AT&T asserts (*id.*), without any support, that these tens of thousands of performance measurements "merely emulate the operation of the competitive marketplace in a relatively non-regulatory manner." CompTel claims (at 7) that any burdens are "modest," while WorldCom declares (at 7) that the "ILECs are not being unduly burdened by multiple state reporting requirements." These CLECs do not actually dispute that the ILECs each spend tens of millions of dollars annually on performance reporting — indeed, WorldCom at one point admits (at 53) that tracking performance is "burdensome and costly" — nor do they even attempt to demonstrate that the benefits obtained from the current reporting regimes equal or exceed those costs. Instead, the CLECs suggest that these are burdens that ILECs must bear, simply because they are incumbents. *See* WorldCom Comments App. B at 31 ("Dominant carriers on which CLECs depend must bear the burden of assuring the performance provided to their customers . . . ."); AT&T Comments at 40 ("Even if the imposition of regulatory plans could be viewed as a burden, it is a burden that Congress inherently mandated until local competition is firmly established."). In making such claims, however, the CLECs ignore "the *deregulatory* emphasis of the Act" and take no account of the Commission's "goal of fostering facilities-based competition while promoting simultaneously competition, innovation, *and deregulation*." NPRM ¶¶ 5, 18 (emphases added).

Moreover, the burdensomeness of performance reporting is demonstrated by the fact that the non-BOC ILECs and the CLECs adamantly oppose any extension of the existing performance reporting requirements. Thus, Cincinnati Bell argues (at 3) that "[s]mall and mid-sized ILECs that are not already subject to performance measurements mandated by state or federal regulators should not be subject to any new requirements that the Commission may develop in this proceeding." Frontier contends (at 1) that requiring small and mid-sized ILECs to report their performance under even the limited set of national measurements in the Notice "would be exceedingly costly and burdensome." Although CLECs are willing to expand the set of ILECs subject to reporting requirements, *see*, *e.g.*, Dynegy Comments at 18-19,[13] they likewise reject any suggestion that they should be required to provide performance reports. For example, Allegiance states (at 38) that it is "completely unnecessary and would be affirmatively harmful to consider further the imposition of performance rules of any kind on CLECs." AT&T similarly asserts (at 37) that "there is no need for the Commission to impose performance measurement or reporting requirements on competitors." These carriers' resistance to even the

[13] The CLECs also are not shy about imposing burdens on state and federal regulators. *See*, *e.g.*, WorldCom Comments at 23 (Commission should "establish a team specifically tasked to handle performance measurement and standards issues . . . [and] announce expedited time frames for resolving any performance violations"); Covad Comments at 51 ("The Commission should adopt specific audit requirements, overseen by the Commission (not the incumbent LEC) and conducted by the Commission staff with assistance from independent auditors if necessary."); Allegiance Comments at 26-27 ("the Commission should require each state commission to submit a report to the Commission detailing comparable state measurements").

most limited requirements to retain or report data[14] is the clearest possible evidence of the burdens that performance measurements impose.

2. Legally Binding National Measurements Will Necessarily Increase Those Burdens Unless Existing State Reporting Regimes Are Preempted

The comments filed by the various state commissions in this proceeding confirm Verizon's prediction (at 35) that the adoption of national measurements will not stem the "proliferation of differing state requirements [that] impose increasingly divergent and costly requirements on carriers" unless the Commission also preempts the existing state performance reporting regimes. NPRM ¶ 4. Indeed, the state commissions uniformly oppose preemption of their existing measurements. *See* California Comments at 4; Colorado Comments at 2-3; Florida Comments at 3; Minnesota Comments at 2; Missouri Comments at 6; New York Comments at 2; Ohio Comments at 2; Oklahoma Comments at 3; Texas Comments at 3; Virginia Comments at 1-2.[15] Although two state commissions suggest that "various state and federal monitoring programs will converge naturally over time," New York Comments at 2; *accord* Ohio Comments at 2, the vast majority of the state commissions state that they intend to continue to apply their own sets of measurements. For example, the Colorado Public Utilities Commission ("PUC") contends (at 6) that "[e]ach state commission should be left alone to act in what it determines is the best interest of developing a competitive *local* exchange telecommunications market." The

[14] *See* Verizon Comments at A-5, A-12, A-16, A-23, A-28 (proposing limited CLEC reporting requirements).

[15] Contrary to the state commissions' claims, the Act does not expressly prohibit the Commission from preempting the performance reporting regimes that state commissions have established. Instead, the Commission can conclude that state actions requiring ILECs to report their performance under any measurements that differ from those the Commission adopts "substantially prevent implementation of the . . . purposes" of the local competition provisions of the 1996 Act. 47 U.S.C. § 251(d)(3)(C); *see* Verizon Comments at 47-51; SBC Comments at 9-10; Sprint Comments at 7-8.

California PUC likewise argues (at 4) that the Commission should "allow states to continue implementing their own standards."

Therefore, the Commission cannot, consistent with its goal of "rationaliz[ing] the multiple regulatory requirements, and thereby not increas[ing] incumbent carriers' regulatory burdens," give states free reign to expand or alter any mandatory national measurements that it adopts. NPRM ¶ 16.[16] As both Verizon and SBC explained, because the Commission's list of measurements should include all those that are "critical to competition and/or enforcement," "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." SBC Comments at 9; *see* Verizon Comments at 47-48 & n.107. Furthermore, the Commission's adoption of a particular standard for a measurement must represent its interpretation of the requirements of the 1996 Act, and state commissions have no authority to disagree with the Commission's interpretation of what federal law requires. *See* Verizon Comments at 35 & n.75 (national measurements that are "based on the 1996 Act's requirement of nondiscriminatory service are both a floor *and a ceiling* in determining 'whether incumbent LECs are in compliance with the[] duties and other requirements under the Act'") (quoting NPRM ¶ 14). Therefore, even if states had authority under the Act to require ILECs to provide CLECs with superior service — which they do not — the failure to comply with those standards could not constitute a violation of the requirements of the 1996 Act.

[16] As Verizon explained, to the extent that state-specific issues arise with respect to the national measurements, the Commission should address those issues through a waiver process rather than by giving state commissions blanket authority to adopt modifications of, or additions to, the list of national measurements. *See* Verizon Comments at 25, 35-36, 60, 66-67.

Most of the CLEC commenters join the state commissions in opposing the preemption of state commission authority. These commenters propose, instead, that the Commission should adopt mandatory national measurements that would "serve as a baseline that the states are free to exceed." WorldCom Comments at 4; *see* CompTel Comments at 3-4; Allegiance Comments at 9. Notwithstanding these CLECs' purported opposition to the preemption of state commission authority, their proposal that WorldCom's so-called (at 24) "best of the best" measurements be adopted as a national minimum set of measurements requires the Commission to preempt a number of state commission performance measurement regimes. Some of the CLEC commenters, and at least one state commission, recognize as much. *See*, *e.g.*, Allegiance Comments at 9 (Commission "should preempt any state performance standard that is less exacting than the federal rule"); California Comments at 5 ("the federal standards will supplant less stringent state standards"). For example, WorldCom has proposed that the Commission include an average completion interval measurement within the national measurements. *See* WorldCom Comments App. B at 25. Yet the New York Public Service Commission recently eliminated all of the average completed interval measurements it had previously adopted — based on a consensus proposal of the New York Carrier Working Group, which includes WorldCom and other CLECs that support its proposed measurements.[17] Therefore, if WorldCom's proposal were adopted as a national minimum set of measurements, New York's decision to eliminate the average completion interval measurement would be preempted and measures that the Commission already found flawed would be reinstated. As a result, the WorldCom measurements would necessarily and dramatically increase the regulatory burdens

[17] *See* Order Modifying Existing and Establishing Additional Inter-Carrier Service Quality Guidelines at 3, *Proceeding on Motion of the Commission to Review Service Quality Standards for Telephone Companies*, Case 97-C-0139 (NY PSC Oct. 29, 2001).

imposed on ILECs with no countervailing benefit; permitting state commissions to add still more measurements would guarantee that there will be no reduction in those burdens.

B. CLECs Have Not Shown that Additional Measurements, Beyond Those in the Notice, are Vital to Competition

Verizon supports the Commission's proposal to limit the national performance measurements to a "core set" of measurements that are "vital to competition." NPRM ¶¶ 25, 33; *see* Verizon Comments at 9-17. The CLEC commenters, however, have predictably insisted that the Commission has proposed too few measurements. *See* Verizon Comments at 9. For example, CompTel contends that the set of measurements WorldCom proposes — which, as explained further below, consist of approximately 5,800 measurements when fully disaggregated — "represent the minimum number of measures and standards that will provide a baseline picture of ILEC provisioning performance for all competitive carriers, regardless of business strategy." CompTel Comments at 10; *see* McLeodUSA Comments at 5. But the CLECs' comments make clear that they have proposed a larger number of measurements because they disagree with the fundamental premise of the Notice, namely that "the establishment of a select group of performance measurements" can "gauge, in a minimally burdensome way, an incumbent LEC's overall performance." NPRM ¶¶ 25, 27; *see*, *e.g.*, WorldCom Comments at 10.

Moreover, the CLECs' proposals demonstrate that they cannot distinguish between the measurements that are "vital to competition," because they "provide the clearest indication of an incumbent LEC's provisioning practices," and those measurements that are merely "duplicative, or otherwise burdensome regulation" and, therefore, "unnecessary." NPRM ¶¶ 26, 33. Indeed, they have proposed measurements that the Commission has previously found are *not* among the most essential measurements, that duplicate other measurements, and that actually reveal the competence of the CLECs rather than the capabilities of the ILECs' OSS.[18]

For example, WorldCom proposes a measurement of designed, or achieved, flow through — that is, the percentage of orders designed to flow through that do, in fact, flow through — notwithstanding the fact that the Commission has previously held that, "[c]ontrary to the claims of some commenters," including WorldCom, "we do not specifically require Verizon to provide data on its achieved flow-through rate."[19] More generally, the Commission has found that flow-through rates "are not so much an end in themselves" and are relevant "not as a 'conclusive measure of nondiscriminatory access to ordering functions,' but as one indicium among many."[20] In other words, the Commission has concluded that flow through is not among the "most essential measurements." NPRM ¶ 28. Moreover, the Commission has repeatedly recognized that both total and designed flow through rates are highly dependent on CLECs' ability to submit valid orders. In numerous section 271 applications, Verizon and SBC have demonstrated that "some competing carriers . . . attain much higher flow-through rates than others" even though "all competing carriers interface with the same" OSS.[21] For example, in its

[18] Appendix B to these reply comments contains a discussion of the most significant defects in the measurements that WorldCom has proposed.

[19] Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc., et al., for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd 17419, 17449, ¶ 48 & nn.182-183 (2001) ("*Pennsylvania Order*").

[20] Memorandum Opinion and Order, *Application of Verizon New England Inc., et al., For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, 16 FCC Rcd 8988, 9029-30, ¶ 77 (2001) ("*Massachusetts Order*"); *see also*, *e.g.*, *Pennsylvania Order*, 16 FCC Rcd at 17448, ¶ 46; Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., et al., for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, 16 FCC Rcd 6237, 6305, ¶ 144 n.397 (2001) ("*Kansas/Oklahoma Order*").

[21] *Pennsylvania Order*, 16 FCC Rcd at 17449-50, ¶ 49; *see also Kansas/Oklahoma Order*, 16 FCC Rcd at 6305-06, ¶¶ 145-146; Memorandum Opinion and Order, *Application of*

application for Connecticut, Verizon demonstrated that CLECs' flow through rates for UNE Platform orders in New York ranged from less than 10% to more than 93%.[22] In light of this evidence, the Commission has held that "it would not be appropriate to attribute this wide range of results entirely to Verizon" because "a BOC is not accountable for orders that fail to flow-through due to competing carrier-caused errors."[23] In contrast, CLECs' claims that, for designed flow through, there "is no reason to expect performance below 100%" and "a 3% margin of error represents a reasonable accommodation for the ILECs in this context," ignore the reality that flow through is heavily influenced by CLEC capabilities. Dynegy Comments at 8; *accord* WorldCom Comments at 41-42.[24] For these reasons, there is no need for a national flow-through measurement.

For similar reasons, the national measurements should not include an average completion interval, let alone WorldCom's proposed requirement that ILECs also measure and report "dispersion around average." WorldCom Comments at 47. Although WorldCom claims that this is a "crucial" measurement, *id.*, as noted above, the New York PSC has eliminated the average completion interval from the New York measurements, as a result of a consensus proposal from the Carrier Working Group, in which WorldCom participates. Moreover, the Commission has recognized that average completion interval measurements are inherently flawed and "are not an accurate indicator of [a carrier's] performance," because they are skewed

---

Verizon New York Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Connecticut, 16 FCC Rcd 14147, 14171-72, ¶ 55 (2001) ("*Connecticut Order*").

[22] *See Connecticut Order*, 16 FCC Rcd at 14172, ¶ 55 n.133.

[23] *Id.* at 14172, ¶ 56; *see also Pennsylvania Order*, 16 FCC Rcd at 17449-50, ¶ 49; *see also Kansas/Oklahoma Order*, 16 FCC Rcd at 6306, ¶ 146.

[24] Notably, WorldCom's proposed measurement does not exclude orders that fail to flow through as a result of CLEC errors. *See* WorldCom Comments App. B at 15.

by factors outside of an ILEC's control.[25] Finally, Verizon is unaware of any state commission that has required reporting of dispersion around average for this measurement, nor is there any reason to adopt a national measurement that even WorldCom admits does not directly measure ILEC performance and is, at most, only potentially useful. WorldCom Comments at 47 ("The dispersion reporting part of this metric[] can be used to help periodically reset benchmark intervals for the products disaggregated under this metric."). As Verizon explained (at 71), the burdens of requiring data collection for measurements that are not now, and may never be, essential to competition clearly outweigh the remote possibility of future benefits.

The CLECs have also proposed measurements that are highly correlated, so that poor performance on one measurement is likely to result in poor performance on another measurement. As Verizon explained (at 13-14), only one measurement, at most, out of such a group is necessary, and the others simply provide redundant information at added cost. For example, WorldCom has proposed a measurement of open orders held for greater than 5, 15, and 30 days. *See* WorldCom Comments at 50. However, orders open for 30 days will necessarily be held open for 5 and for 15 days, rendering those measurements duplicative.[26] Verizon is also unaware of any state commission having adopted 5- or 15-day reporting requirements for an open orders in hold status measurement. In any event, the Commission has expressly declined to rely on an open orders in hold status measurement in the context of section 271 applications.[27]

---

[25] *Massachusetts Order*, 16 FCC Rcd at 9038, ¶ 92; *see New York Order*, 15 FCC Rcd at 4061-65, ¶¶ 202-209, 4101-03, ¶¶ 285-288.

[26] This measurement is also duplicative of the missed appointment and average delay days measurements, as WorldCom admits. *See* WorldCom Comments App. B at 34 (open orders measurement "work[s] in tandem" with other measurements); Verizon Comments at 14, 57.

[27] *See Connecticut Order*, 16 FCC Rcd at 14155-56, ¶ 19.

WorldCom and the CLECs have "offered no persuasive reason" why this should now be deemed an essential measurement.[28]

Similarly, there is no need for the CLECs' proposed measurement of missed installation appointments due to lack of facilities, because facility misses are simply one type of missed installation appointment that is beyond an ILEC's control. *See* Verizon Comments at A-15. Nor is such a measurement necessary to "signal to all parties the need for additional facilities," NPRM ¶ 60, because past results are at best an imprecise guide to future levels of CLEC demand. In addition, ILECs currently have no obligation to expand their existing facilities simply to meet CLEC demand for UNEs. Nonetheless, various CLECs contend that a "no facilities" measurement is necessary in order to "detect and preclude" alleged ILEC "gamesmanship." BTI Comments at 12-13; *see also*, *e.g.*, Mpower Comments at 12-15. These CLECs, however, incorrectly presume that ILECs have an existing obligation to provide UNEs even when doing so would require them to improve their existing facilities or construct new facilities. *See*, *e.g.*, BTI Comments at 13-20. The Eighth Circuit, however, held that the 1996 Act "requires unbundled access only to an incumbent LEC's *existing* network — not to a yet unbuilt superior one."[29] The Act, therefore, "does not mandate that incumbent LECs cater to every desire of every requesting carrier."[30] Indeed, when faced with the exact same claims

[28] *Id.*

[29] *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

[30] *Id.* BTI's reliance (at 15) on the portion of the Eighth Circuit's decision stating that "the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to [ILEC] facilities to the extent necessary to accommodate interconnection or access to network elements" is misplaced. *Iowa Utils. Bd.*, 120 F.3d at 813 n.33. With respect to high capacity loops, that statement means only that an ILEC must *remove* equipment that disables a loop from supporting certain services; it does not obligate an ILEC to *install* additional equipment. *See* 47 C.F.R. § 51.319(a)(3)(i); Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15

raised here, the Commission recently held that it "disagree[d] with commenters that Verizon's policies and practices concerning the provisioning of high capacity loops . . . expressly violate the Commission's unbundling rules."[31] Moreover, the present rulemaking is not the appropriate proceeding in which to "establish a precise definition of 'no facilities'" that would require the Commission to modify its unbundling rules. BTI Comments at 19. There is already an ongoing proceeding, namely the *First Triennial Review*, in which the Commission is reviewing ILECs' obligations to provide unbundled network elements, including the question of the precise extent to which ILECs are required to modify their existing networks to provide access to network elements in response to CLECs' requests.[32]

As noted above, some of the measurements the CLECs have proposed actually reveal the competence of the CLECs rather than the capabilities of the ILECs' OSS. One paradigm example is the "Serial Rejects on Same Order" measurement proposed by Allegiance, which would require ILECs to measure situations in which a CLEC submits a local service request and receives a "rejection citing one, but not all, of the errors in the LSR," which results in the CLEC receiving another rejection notice after it "corrects the error identified in the rejection notice and resubmits the LSR." Allegiance Comments at 15. Yet it is CLECs that are responsible for submitting valid local service requests — indeed, Allegiance acknowledges that these rejects are

---

FCC Rcd 3696, 3775, ¶¶ 172-173, 3783, ¶ 190 (1999), *petitions for review pending*, *United States Telecom Ass'n v. FCC*, Nos. 00-1015 & 00-1025 (D.C. Cir.) (oral arg. scheduled for Mar. 7, 2002).

[31] *Pennsylvania Order*, 16 FCC Rcd at 17470, ¶ 92 ("we decline to find that these allegations warrant a finding of checklist non-compliance"); *see also infra* Appendix A at A-4 to A-5.

[32] *See*, *e.g.*, Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-339, 96-98, 98-147, FCC 01-361, ¶ 63 (rel. Dec. 20, 2001) ("*First Triennial Review*").

"caused by CLEC-entered errors," *id.* — and such a measurement would absolve CLECs of the responsibility to review their local service requests before resubmission, and might encourage them *not* to review those orders. Moreover, the Commission has previously determined that it will not "hold a BOC accountable for rejects that occur for reasons within a competing carrier's control."[33] Notably, Allegiance does not discuss the impact of such a measurement on carriers' regulatory burdens. *See* Allegiance Comments App. A at 2.[34]

More broadly, some of the CLEC commenters have opposed the use of exclusions that are necessary to ensure that the national measurements require reporting only of performance that is within an ILEC's control. *See* NPRM ¶ 30. Covad, for example, views exclusions as "excuses that . . . provide[] the incumbents an opportunity . . . to avoid reporting on their actual performance." Covad Comments at 40; *see id.* at 41-42. For this reason, its proposed "Percent Joint Acceptance Test of UBL" measurement does not exclude instances in which a CLEC refuses to participate in joint testing, and its proposed "Percent Commitment Met" measurement does not exclude instances in which an order is not provisioned on time due to CLEC or CLEC-customer reasons. *See id.* 63-64. Covad, however, does not dispute that such situations are irrelevant to assessing an ILEC's performance. Instead, it asserts that its proposed 95-percent benchmarks have "a 5% noncompliance rate . . . automatically built-in to provide the incumbent

[33] *E.g.*, *Massachusetts Order*, 16 FCC Rcd at 9028-29, ¶ 75.

[34] Allegiance contends (at 15) that "the ILEC could just as easily deliver a single initial rejection notice citing all errors with an LSR." Allegiance is wrong. An LSR that a CLEC submits to Verizon must pass a series of checks applied in Verizon's interfaces, in the gateway systems, and in the service order processor before it can be confirmed. An initial check verifies that the CLEC has submitted appropriate forms for the order scenario requested, and that all the required fields for the particular type of service or product are populated. If not, the LSR is rejected at this point, and Verizon's internal systems have no opportunity to determine whether there are other errors on the LSR. Moreover, certain errors will appear only after the CLEC corrects its local service request, because the business rules for one field often are based on the contents of another field. ILECs cannot predict such errors.

LEC a performance cushion to satisfy the need for exclusions." *Id.* at 40. Covad thus misapprehends the purpose of exclusions, which is to ensure that the performance measurements provide an accurate depiction of the ILEC's performance. Including instances that are within the control of CLECs not only yields inaccurate results, but also enables the CLECs to cause an ILEC to "miss" the performance standard and, in some cases, to pay performance penalties to the CLECs themselves. For similar reasons, the Commission should reject WorldCom's proposal to include trouble reports where no trouble is found in the ILEC's network. *See* WorldCom Comments at 53. WorldCom provides no legitimate reason why CLECs' failures to fulfill their obligation to investigate troubles before reporting them to ILECs should be counted in the ILECs' reported performance. *See* Verizon Comments at 19-20, 61.[35]

The fact that CLECs' actions can affect ILECs' reported performance demonstrates the need for CLEC reporting of their performance in such circumstances. *See* Verizon Comments at 19-20. Such reporting can assist the Commission in determining whether "statistically significant differences in measured performance . . . have little or no competitive significance in the marketplace."[36] And, as Verizon explained (at 17-18), requiring CLECs to retain data could render disputes about the accuracy of ILECs' data easier to resolve. In claiming that they should not have any obligations under the national measurements, *see*, *e.g.*, AT&T Comments at 37-38;

[35] Although WorldCom contends that CLECs have "an incentive against false reporting," WorldCom Comments at 53, it neither denies that false reporting occurs nor disputes that some CLECs are less able than others to diagnose problems correctly. In fact, as Verizon has demonstrated (at 15 n.18), a score of former Covad employees have come forward with sworn statements about Covad's practice of submitting false trouble tickets. In any event, even if it might be "burdensome and costly" for CLECs to reconcile such exclusions, WorldCom Comments at 53, it is far more burdensome and costly for an ILEC to be required to pay penalties as a result of trouble reports where there is no trouble in the ILEC's network.

[36] *New York Order*, 15 FCC Rcd at 3976, ¶ 59; *accord*, *e.g.*, *Pennsylvania Order*, 16 FCC Rcd at 17513, App. C, ¶ 8.

Covad Comments at 35-36, CLECs do not dispute these points. Instead, CLECs assert that performance reporting would be burdensome — for themselves, though not, they claim, for ILECs — and also contend that their non-incumbent status should render them immune from such obligations. *See*, *e.g.*, AT&T Comments at 37-38; BTI Comments at 24. However, the fact that CLECs are not incumbents does not change the fact that retention and reporting of the data they possess would increase the overall utility of any national performance measurements beyond any costs imposed on these carriers. Moreover, as Verizon explained (at 20), in the context of CLEC-to-CLEC conversions — that is, when an end user currently served by CLEC A chooses CLEC B as his local service provider — CLEC A is in a position to stymie competition. In order to ensure that an end user can as easily switch from an incumbent to CLEC A as from CLEC A to CLEC B or back to the incumbent, the New York PSC has sought comment on proposed guidelines that would govern CLECs' sharing of the information needed for their end user customers to be able to switch to another LEC.[37] For this reason, Verizon proposed that CLECs should be required to report on the average time in which they release this information.

C. The CLECs Propose an Excessive Level of Disaggregation that Would Increase Carriers' Burdens and Decrease the Utility of National Measurements

Although WorldCom contends (at 26) that it has proposed "far fewer measurements than most states have adopted," those measurements are so exhaustively disaggregated that ILECs would be required to report their performance on approximately 5,800 measurements per month in every state in which they operate. *See* NPRM ¶ 33 ("disaggregation . . . may, effectively, multiply the number of measurements reported"). For example, WorldCom's measurements would require an ILEC to report its performance for as many as 26 different products, each of

[37] *See* Notice Inviting Comments, *Proceeding on Motion of the Commission to Examine the Migration of Customers Between Local Carriers*, Case 00-C-0188 (NY PSC Oct. 16, 2000).

which is further disaggregated by mode of provisioning and availability of facilities. *See*, *e.g.*, WorldCom Comments App. B at 33, 43-44.[38] The measurements also include multiple reporting standards and require reporting for multiple geographies within states. *See* WorldCom Comments App. B at 25-26. As a result, the WorldCom measurements are so granular that Verizon would be required, for example, to report its performance on Average Completion Interval – UNE Loop-4 wire analog basic loops – Dispatch – Distribution 5-10 Days Shorter than Standard Interval – Manhattan, along with *seventeen* other average completion interval measurements for this one product and more than *two thousand* other average interval measurements. *See id.*[39]

The CLEC commenters consistently ignore the costs of disaggregation. As explained above, WorldCom has proposed approximately 5,800 disaggregated measurements — not considering its proposed requirement that ILECs provide separate CLEC-aggregate, CLEC-specific, and ILEC-affiliate reports. These measurements, therefore, would dramatically increase ILECs reporting requirements in nearly every state in the nation, requiring these carriers to spend tens of millions of dollars, beyond their current expenditures, to put in place the systems, programming, processes, and staff to track and report their performance on these measurements. *See* Verizon Comments at 1-3, 37-38; SBC Comments at 6; BellSouth Comments at 11-12.

Disaggregation also renders the performance measurements less useful by reducing the sample size for each individual measurement. As the Commission has noted, "performance data

---

[38] *See also* Dynegy Comments at 7 (proposing disaggregation by as many as 17 different product types); Mpower Comments Exh. A at 12 (proposing disaggregation by as many as 23 different product types).

[39] CLECs also propose requiring reporting for products with little or no CLEC order volumes. *See* Verizon Comments at 9-11. For example, WorldCom includes line splitting among its disaggregated products, despite a near absence of such orders. *See* WorldCom Comments App. B.

based on low volumes of orders or other transactions is not as reliable an indicator" of compliance with statutory requirements "as performance based on larger numbers of observations."[40] In fact, a review of the CLEC aggregate reports that Verizon was required to produce in three states in December 2001 revealed that between 30 and 60 percent of the measurements on those reports — which are not as exhaustively disaggregated as WorldCom proposes — do not yield useful data because the number of observations is either small or non-existent. For example, in New York, Verizon determined that more than 10 percent of the measurements had no CLEC observations and that more than 20 percent had fewer than 30 CLEC observations. Similarly, in Massachusetts and New Jersey approximately 40 percent and 60 percent, respectively, of the measurements Verizon reported in those states either had no, or fewer than 30, CLEC observations. These percentages were necessarily higher for the hundreds of CLEC-specific reports that Verizon was required to produce in those states. Therefore, as BellSouth explained (at 14), ILECs have been required to devote "hundreds of employees and . . . millions of dollars" to "create a system that measures performance at such an extreme level of granularity that . . . there is frequently no performance to measure." National measurements that consistently record no activity or limited CLEC activity clearly impose burdens that far outweigh their benefits. *See* NPRM ¶ 26.

Not only do the CLECs ignore the costs of their proposed level of disaggregation, their assertions that this level of disaggregation is "critical" to obtain beneficial information from national measurements are meritless. *E.g.*, XO Comments at 13. For example, WorldCom contends (at 27) that, "[l]umping together one type of order that has a 2-day interval with another type of order that has a 10-day interval and producing a report[] showing that on average the

[40] *Kansas/Oklahoma Order*, 16 FCC Rcd at 6254, ¶ 36.

orders were provisioned in 6 days tells a carrier nothing about whether either type of order was completed within the benchmark." But neither Verizon nor any other carrier has proposed such aggregation — instead, the sensible measurement would be whether the ILEC met its provisioning appointment for each order, with the result reported as a percentage. *See* Verizon Comments at A-12 (proposed percentage on time / missed appointment measurement).

The CLECs' only response is that such aggregation would allow ILECs to hide poor performance on one product or in one area with superior performance on other products or in other areas. *See*, *e.g.*, AT&T Comments at 20-21; WorldCom Comments at 27. Verizon explained in its comments (at 16) that such an effort not only would be easily detected and severely punished, but also would be irrational. For example, Verizon has proposed that the repeat trouble report rate measure an ILECs' aggregate performance for UNE Loops, UNE Platforms, and UNE xDSL Loops, with wholesale performance compared to the ILEC's performance for retail POTS lines. *See* Verizon Comments at A-28. Assume that the repeat trouble report rate for an ILEC's retail POTS lines in a given state in February 2002 is 5 percent. On the CLECs' assumption, this ILEC could allow UNE Platforms to have a repeat trouble report rate higher than 5 percent, while still providing parity service overall for this measurement. However, in order to do so, the ILEC would have to ensure that the repeat trouble report rate on UNE Loops and UNE xDSL Loops is *less than* 5 percent — in other words, it would have to provide CLECs with *superior* service in resolving their UNE Loop and UNE xDSL Loop trouble reports — in order to meet the measurement overall. The CLECs offer no reason why it would be rational for ILECs to discriminate against CLECs on one product while discriminating in their favor on two other products. Nor do they explain why CLECs could not readily identify any instance in which an ILEC's performance on a specific product is significantly below its overall performance for a group of products.

There is also no basis for disaggregating performance reporting on a geographic basis, whether by sub-state operating region, LATA, or metropolitan statistical area ("MSA"). *See*, *e.g.*, WorldCom Comments at 28 (operating regions); Cox Comments at 17 (LATA); BTI Comments at 27 (MSA); Focal Comments at 40-41 (same). Because an ILEC normally employs the same systems, processes, and procedures in multiple LATAs and MSAs, this level of geographic disaggregation would draw arbitrary distinctions among orders. In addition, MSAs are poorly suited for use with national performance measurements. Not only are large parts of the country not encompassed within a *metropolitan* statistical area, but MSAs also often encompass multiple states, each of which separately regulates the ILECs' retail operations, thus rendering wholesale to retail comparisons inapt. Although geographic disaggregations based on an ILEC's retail operating regions would at least have the advantage of bearing some relation to the ILEC's provisioning processes, there is no justification for multiplying the number of performance measurements in this manner — only the CLECs' unsubstantiated supposition that ILECs can hide poor performance in one area with superior performance in others.

D. CLECs' Proposed Performance Standards Exceed the Statutory Requirement of Nondiscriminatory, or Parity, Service

As Verizon demonstrated (at 21-24), the 1996 Act neither establishes an objective standard of service that ILECs must provide nor "mandate[s] that requesting carriers receive superior quality access to network elements."[41] Instead, as the Commission has found, the Act requires parity service.[42] Therefore, when a comparable retail product, service, or function

[41] *Iowa Utils. Bd.*, 120 F.3d at 812.

[42] *See*, *e.g.*, *New York Order*, 15 FCC Rcd at 3971-72, ¶¶ 44-45.

exists, the appropriate performance standard is parity. *See* Sprint Comments at 13. And, as the Commission has recognized, parity means that the results are sometimes better for the CLECs and sometimes better for the ILEC's retail customers.[43] When there is no analogous retail product, service, or function, the Commission should adopt benchmark standards. *See id.*; Verizon Comments at 59-60; SBC Comments at 32-33; BellSouth Comments at 27-28. However, as Verizon explained (at 24-25), because ILECs' performance varies across states, performance benchmarks are likely to be particularly unsuitable for national measurements. *See also*, *e.g.*, SBC Comments at 33-35; Florida Comments at 2; Virginia Comments at 4. Therefore, Verizon proposed that carriers and state commissions be permitted to seek waivers to modify any benchmark standards the Commission adopts to allow for state-specific, or LEC-specific, benchmarks that more accurately reflect the statutory requirement of nondiscriminatory service.

Notwithstanding the Act's clear language and the Commission's consistent interpretation, the CLEC commenters treat the parity standard as though it were an ILEC-invented inconvenience, rather than the law enacted by Congress. For example, Mpower complains (at 16) that "'parity' is usually a moving target," and Covad gripes (at 14) about the "always-shifting sands of 'parity.'" WorldCom similarly protests the use of "a rolling parity determinant that may change from month to month" and, instead, proposes that the "standards tied to federal measures should be fixed benchmarks, rather than parity comparisons to the ILECs' variable service levels." WorldCom Comments at 17-18. Although WorldCom insists (at 18) that it "is not ignoring the concept of parity," it later claims (at 54) that benchmarks are necessary because "[s]ometimes the retail analog for a parity comparison is a weak one." Other CLECs also expressly state that, in their view, parity service is not good enough. Allegiance, for example,

[43] *See id.* at 4182, App. B, ¶ 2 n.2.

asserts (at 10) that "a parity standard would not allow CLECs a meaningful opportunity to compete because in many cases ILEC retail service quality is so bad that a parity standard would simply force CLECs to the 'lowest common denominator.'" Covad similarly states (at 19) that "competitive LECs suffer from the Commission's use of a 'parity' standard to measure loop performance," because CLECs "cannot differentiate their services from the incumbent LEC by providing better service quality and timeliness."[44]

Despite their dissatisfaction with the parity standard, no CLEC points to any basis in the Act for requiring ILECs to meet fixed performance benchmarks irrespective of their performance in providing analogous retail products, services, and functions. CLECs are entitled to "access only to an incumbent LEC's *existing* network — not to a yet unbuilt superior one."[45] And, when a retail analog exists, a CLEC is entitled to receive "access that is equal to (*i.e.*, substantially the same as) the level of access that the [ILEC] provides itself, its customers, or its affiliates, in terms of quality, accuracy, and timeliness," not a superior level of access.[46] In contrast, WorldCom's proposed measurements would require ILECs to meet a fixed benchmark every single month, no matter if its performance for retail customers in a given month was substantially better than or worse than that benchmark.

---

[44] Cox and Covad are mistaken in contending that existing parity measurements compare the time when a CLEC "can *begin* to provide service to its retail customer" with the time an ILEC "has *completed* providing service to its retail customer." Covad Comments at 22; *see* Cox Comments at 10 & n.9. In fact, the parity standard is based on a comparison of like processes — the same start and stop points in the provisioning of the physical facilities are used to measure both retail and wholesale provisioning.

[45] *Id.* at 813; *see Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 758 (8th Cir. 2000) ("Nothing in the statute requires the ILECs to provide superior quality [service] to its competitors."), *cert. granted in part sub nom. Verizon Communications Inc. v. FCC*, 531 U.S. 1124 (2001).

[46] *Pennsylvania Order*, 16 FCC Rcd at 17511-12, App. C, ¶ 5.

And, because the benchmark standards that the CLECs have proposed clearly reflect their unwillingness to accept that the Act requires nondiscriminatory service — WorldCom concedes (at 43, 46) that the benchmarks it has proposed are "aggressive" — these measurements would more often than not require ILECs to provide superior service. WorldCom's rationalization (at 18) that "nearly all" of its proposed benchmarks are "less than 100%" does not change the fact they require ILECs to provide service at levels far beyond the statutory standard. Indeed, WorldCom's benchmarks are equal to, or higher than, the benchmarks that the New York PSC adopted for comparable measurements and that the New York PSC has acknowledged "go well beyond the Checklist requirements," "exceed[ing them] in specificity and degree."[47] For example, while WorldCom has proposed a 97-percent benchmark for its designed flow through measurement, discussed above, the New York PSC adopted a benchmark of 95 percent. *See* WorldCom Comments App. B at 15-16. Moreover, unlike WorldCom's proposal, the New York measurement *excludes* orders that do not flow through as a result of CLEC errors, making WorldCom's proposed standard wholly unreasonable. Similarly, WorldCom has proposed a service order accuracy measurement with a 98-percent benchmark and requires comparison of "all service attributes and account detail changes," while the comparable New York measurement has a 95-percent benchmark and includes a select list of key fields for comparison. WorldCom Comments App. B. at 13-14. WorldCom does not attempt to justify these higher

[47] Evaluation of the New York Public Service Commission at 3-4, *Application by Bell Atlantic New York for Authorization under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295 (FCC filed Oct. 19, 1999); *see* Order Adopting the Amended Performance Assurance Plan and Amended Change Control Plan at 31, *Petition of New York Telephone Company for Approval of its Statement of Generally Available Terms and Conditions*, Case Nos. 97-C-0271 & 99-C-0949 (NY PSC Nov. 3, 1999); *see also* Consultative Report of the Pennsylvania PUC at 258, CC Docket No. 01-138 (FCC filed June 25, 2001) ("many of the Pennsylvania metrics . . . go beyond 271 requirements").

benchmarks by reference to the statutory standard, but instead simply asserts (at 40) that "CLECs require" service at this level.

A number of commenters similarly argue for hot cut benchmarks that are beyond what the Commission has found to meet the requirements of the Act.[48] WorldCom, for example, has argued for a 90-minute interval for orders of 10 to 25 lines — rather than the two hour interval for orders of 10 to 49 lines that the New York PSC has approved — for the simple reason that "most of its cuts fall into this volume category." WorldCom Comments at 49, App. B at 30.[49] Thus, WorldCom admits that it has proposed the standard it would like, rather than one required by the Act. Allegiance similarly proposes a standard that would best fit its business practices, suggesting (at 19) that the interval for orders of 1 to 5 lines should be reduced from one hour to 15 minutes. AT&T asserts (at 36) that, notwithstanding the Commission's prior judgments, only standards of 98 percent on-time performance and no more than 1 percent of installation troubles satisfy the statutory standard of a meaningful opportunity to compete. Yet, the Commission has previously rejected AT&T's attempt to require a hot cut standard of "the fewest number of outages and best on-time performance that it is technically feasible and commercially reasonable

---

[48] *See*, *e.g.*, *New York Order*, 15 FCC Rcd at 4105-11, ¶¶ 292-303, 4114-15, ¶ 309 (finding that BOC provides nondiscriminatory access to unbundled loops, providing carriers a meaningful opportunity to compete, by completing 90 percent of coordinated conversions involving fewer than 10 lines within 1 hour, with no more than 5 percent of hot cuts experiencing outages on conversion, and with no more than 2 percent reporting trouble within 7 days of installation); *Texas Order*, 15 FCC Rcd at 18487-94, ¶¶ 262-274 (finding that BOC provides nondiscriminatory access to unbundled loops, providing carriers a meaningful opportunity to compete, by completing 90 percent of coordinated conversions involving fewer than 11 lines within 1 hour, with no more 5 percent of hot cuts experiencing outages on conversion, and with no more than 2 percent reporting trouble within 7 days of installation).

[49] WorldCom's proposed measurement, however, does not indicate what percentage of hot cut orders must be completed in its preferred window. To the extent WorldCom proposes a percentage higher than that the Commission has found to provide CLECs with a meaningful opportunity to compete, it has failed to provide any support for increasing that standard.

for the BOC to achieve" and should do so again.[50] Moreover, a CLEC that is actually using Verizon's hot cut processes has stated that, pursuant to the existing performance standards, "Verizon has scheduled, coordinated, and completed hot-cuts in a manner that offers Conversent a reasonable opportunity to compete." Conversent Comments at 2.

The CLECs' proposed performance standards are also tied to national wholesale performance intervals that are set without regard to intervals for comparable retail products. For example, both WorldCom and Covad propose a one-day interval for line sharing orders. *See* WorldCom Comments App. B at 54; Covad Comments at 25-26. Yet state regulators in Verizon's former Bell Atlantic states have required it to provision comparable retail orders in three days; neither commenter offers any reason why wholesale customers should be entitled to a shorter interval, nor does the Act permit the Commission to require ILECs to provide CLECs with superior service.

As a general matter, for the Commission to adopt WorldCom's proposed national wholesale provisioning intervals while complying with the Act's nondiscriminatory service standard, it would also have to preempt the retail intervals that some state commissions have established. Even if the Commission were inclined to do so, the 1996 Act's local competition provisions provide it with no authority to regulate an ILEC's provisioning intervals for intrastate retail products.[51] In any event, this is not the appropriate proceeding for the Commission to alter ILECs' substantive requirements to provide UNEs — performance measurements are designed

[50] *Texas Order*, 15 FCC Rcd at 18485, ¶ 258 (internal quotation marks omitted). Indeed, AT&T admits that its proposed standards are five times more stringent than the "90% on-time and <5% outage benchmark performance standards" that the Commission has found to satisfy the Act. AT&T Comments Sczepanski Decl. ¶ 10. AT&T points to nothing that has changed over the past two years that would justify such an increase in the level of performance required to provide CLECs a meaningful opportunity to compete.

[51] *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 380 (1999).

"to help determine whether incumbent LECs are in compliance with the[] duties and other requirements" imposed by the 1996 Act, NPRM ¶ 14, not to establish those requirements.[52]

Finally, because the Act requires nondiscriminatory service and does not establish objective service requirements, CLECs are incorrect in contending that "[t]he Commission should establish a presumption that a best practice from one ILEC is mandatory for all other ILECs subject to the performance rules." Allegiance Comments at 9. Instead, as Verizon explained (at 20-21), the Commission has previously recognized that different ILEC processes may be equally nondiscriminatory, such that uniform, national business rules and performance standards cannot be adopted.[53] The appropriate question, in determining parity, is not whether wholesale consumers in some other state are receiving superior performance, but whether the same level of service is provided to both wholesale and retail customers in a given state.

E. The Failure To Comply with a Performance Standard Cannot Give Rise to a Presumption of Noncompliance with the Act

The Commission has previously rejected CLECs' contentions that "failure to meet performance metrics is *per se* evidence of the ILEC's failure to comply with the requirements

[52] Similarly, this is not the appropriate proceeding in which to address AT&T Wireless's claims that national measurements should include UNEs ordered by CMRS carriers. The Commission is currently considering the scope of ILECs' unbundling obligations with respect to CMRS carriers. *See First Triennial Review* ¶¶ 12, 38, 61. Until the Commission resolves this legal issue, it should not require ILECs to report their performance in providing UNEs to which the Commission may find that CMRS carriers are not entitled. In any event, the UNE measurements that various states currently require Verizon to report include orders from CMRS carriers that have a valid CLEC ID.

[53] *See*, *e.g.*, *Texas Order*, 15 FCC Rcd at 18404-05, ¶ 109, 18429-30, ¶ 153 n.414, 18438-39, ¶ 171 n.461, 18530, ¶ 357; *cf.* Memorandum Opinion and Order, *Application of GTE Corp. and Bell Atlantic Corp. for Consent To Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application To Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd 14032, 14163, ¶ 284 (2000) ("*Bell Atlantic/GTE Merger Order*") (declining "to require region-wide uniformity across measurements between different states" and finding that the performance plan gives each "individual operating compan[y] incentives to treat competitors as [it] would Bell Atlantic's or GTE's own retail operations").

of" the Act. CompTel Comments at 12. Indeed, Cox's proposal (at 6-7) that failure to meet a performance standard "should be treated as conclusive evidence that the Bell company has not complied with the checklist requirements," while "meeting the performance standards, in and of itself, should not be considered proof that a Bell company has met the checklist requirements" would turn the Commission's past practice on its head.[54] The CLECs offer no reasons for the Commission to depart from its prior conclusion that, when an ILEC's reported performance does not meet the applicable performance standard, the determination of whether an ILEC's "performance meets the statutory requirements necessarily is a contextual decision based on the totality of the circumstances and information before the Commission" and cannot be resolved based simply on the reported performance data.[55] The Commission has stated that it will use performance "misses" to identify areas where further inquiry is warranted and will consider, among other things, whether the "data accurately depict the quality of the BOC's performance."[56] Indeed, as Verizon explained, the Commission has repeatedly concluded that "statistically significant differences" may "have little or no competitive significance in the marketplace."[57]

---

[54] *See*, *e.g.*, *Pennsylvania Order*, 16 FCC Rcd at 17513, App. C, ¶ 8 ("Thus, to the extent there is no statistically significant difference between a BOC's provision of service to competing carriers and its own retail customers, the Commission generally need not look any further. Likewise, if a BOC's provision of service to competing carriers satisfies the performance benchmark, the analysis is usually done.").

[55] *Id.*; *see also id.* at 17514, App. C, ¶ 10 ("performance measurements . . . cannot wholly replace the Commission's own judgment as to whether a BOC has complied with the competitive checklist").

[56] *Id.*

[57] *Id.* at 17513, App. C, ¶ 8; *see*, *e.g.*, *New York Order*, 15 FCC Rcd at 3976, ¶ 59, 4061, ¶ 202; *Texas Order*, 15 FCC Rcd at 18378, ¶ 58; *Kansas/Oklahoma Order*, 16 FCC Rcd at 6252-53, ¶ 32; *Massachusetts Order*, 16 FCC Rcd at 8995, ¶ 13; *Connecticut Order*, 16 FCC Rcd at 14153, ¶¶ 12-13; *Pennsylvania Order*, 16 FCC Rcd at 17513, App. C, ¶ 8; Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., et al., Pursuant to Section*

Thus, CLECs' claims that "liability for performance failures should be 'presumptive,'" Focal Comments at 31, completely ignore the Commission's past treatment of performance measurements. Indeed, notwithstanding CLECs' contentions that "[p]erformance results worse than the benchmark level should not be permitted," WorldCom Comments at 18, the Commission has expressly concluded that it "would be *unreasonable* to expect a particular performance metric to always show *ex post* equal or better performance for service to a [CLEC], compared to that provided to the incumbent LEC's customers."[58] Such a requirement, the Commission continued, "would demand that the incumbent LEC provide *ex ante superior service* to a [CLEC], in order to ensure that random variation does not cause performance to the [CLEC] to drop accidently below the level needed for a determination of parity."[59] These conclusions apply with even more force to the benchmark standards that WorldCom and other CLECs propose, which are substantially higher than that those the Commission has reviewed in its section 271 applications and that state commissions have recognized go beyond the requirements of the Act.

III. THE ENFORCEMENT SCHEMES PROPOSED BY THE CLECS ARE CONTRARY TO LAW AND TO SOUND POLICY

As with their proposed performance measurements and standards, the CLECs have proposed a wish list of enforcement mechanisms that have no basis in the Act. Indeed, despite the occasional perfunctory nod in the direction of the Act, most CLECs simply assert that the Commission should adopt self-effectuating enforcement schemes. Not only does the Act

---

271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri, CC Docket No. 01-194, FCC 01-338, ¶¶ 34, 104 (rel. Nov. 16, 2001) ("*Arkansas/Missouri Order*").

[58] *New York Order*, 15 FCC Rcd at 4182, App. B, ¶ 2 n.2 (emphasis added).

[59] *Id.* (emphasis added).

prohibit the Commission from granting the CLECs' wishes, but the damage levels that the CLECs propose are contrary to both sound policy and the Commission's past applications of the Act.

A. The Commission Is Prohibited from Adopting a Self-Effectuating Liquidated Damages Rule Resulting in Automatic Payments to CLECs

As Verizon and other ILECs explained in their opening comments, the Commission has no authority to impose a "self-effectuating liquidated damages rule" under which "failure to comply with [national performance] standards would result in automatic payments to competitors." NPRM ¶ 22. In particular, explicit provisions of the Communications Act, together with basic principles of due process, guarantee ILECs significant procedural rights before damages or penalties can be imposed against them. *See* Verizon Comments at 40-47; SBC Comments at 35-42; BellSouth Comments at 18-20, 22-24; Qwest Comments at 25-30. These procedural protections are wholly incompatible with a system of automatic liquidated damages or penalties; and the Commission cannot circumvent them by creating an alternative compensation or penalty scheme out of whole cloth. *See* Verizon Comments at 40-47; SBC Comments at 35-42; BellSouth Comments at 18-20, 22-24; Qwest Comments at 25-30. No CLEC or other commenter offers any argument that rebuts these conclusions.[60]

In many cases, CLECs proposing an automatic liquidated damages or penalty rule simply ignore these detailed procedural protections and, after a token citation to the Act (if any), assert that the Commission should adopt such a rule. *See*, *e.g.*, AT&T Comments at 32-33; XO Comments at 19-20; Cox Comments at 19; McLeodUSA Comments at 10-11; Mpower

[60] Indeed, Chairman Powell effectively has acknowledged that the Commission currently has no authority to impose liquidated damages (whether in an interconnection agreement or otherwise) by asking that Congress expressly grant such authority. *See* Letter from Chairman Michael Powell, FCC, to the Senate and House Commerce and Appropriations Committees (May 4, 2001), *at* http://www.fcc.gov/Bureaus/Common_Carrier/News_Releases/2001/nrcc0116.html.

Comments at 10-12. Such unsupported assertions are no substitute for legal analysis, particularly where — as here — Congress has carefully delimited and significantly constrained the Commission's authority to impose damages and forfeitures. Other commenters offer a modicum of legal analysis and suggest that the Commission could impose an automatic liquidated damages or penalty rule pursuant to provisions of the Act that give the Commission general authority to promulgate regulations it determines are "necessary" to carry out the provisions of the Act. *See*, *e.g.*, ALTS Comments at 13 (citing 47 U.S.C. § 201(b)); Allegiance Comments at 39-44 (relying on 47 U.S.C. § 154(i)). However, it is well settled that the Commission may not rely on such general grants of authority to circumvent the more carefully crafted procedures and limitations — in sections 206-209, 403, and Title V of the Act — governing damages and forfeitures.[61]

The variety of additional CLEC proposals for automatic or streamlined penalty or damages provisions likewise fail, because they either attempt to evade the procedural protections set forth in the Act, affirmatively conflict with other provisions of the Act, or both. For example, at least one CLEC suggests that the Commission should impose performance remedies for violations of national standards, such as requiring ILECs to "dispatch a technician for loop trouble reports" for a month or to "create an electronic system for the initiation of trouble

[61] *See AT&T Co. v. FCC*, 487 F.2d 865, 872-74 (2d Cir. 1973) (holding that 47 U.S.C. § 154(i) and other general authority provisions in the Communications Act did not give Commission authority to require prior approval of rate changes, because the statute set forth precise procedures and limitations concerning rate revisions); *Southwestern Bell Tel. Co. v. FCC*, 168 F.3d 1344, 1350 (D.C. Cir. 1999) (stating that section 154(i) did not give Commission authority to circumvent rate-making procedures set forth in another part of the statute); *cf. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932) ("General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment."); *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) (per curiam) (holding that "it is a basic principle of statutory construction that a specific statute . . . controls over a general provision").

tickets." Mpower Comments at 11. But no provision of the Act gives the Commission general equitable authority to order specific performance as a remedy for a violation of the Act, nor does Mpower attempt to identify one.[62]

Other CLECs contend that the Commission should treat an ILEC's performance report as a notice of apparent liability ("NAL") under section 503 of the Act. *See* BTI Comments at 8-9; Focal Comments at 32. This, too, is contrary to the Act. Pursuant to section 503(b), the Commission must "issue" a notice of apparent liability and an ILEC's performance report obviously would not be issued by the Commission.[63] This requirement is no mere formality. Among other things, an NAL must state the "amount of such forfeiture penalty" to be assessed by the Commission, and in "determining the amount of such forfeiture penalty, the Commission . . . *shall* take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."[64] Thus, even if the Act permits the Commission to set forth basic forfeiture guidelines and amounts connected with particular violations,[65] it does not authorize the Commission to assess such a forfeiture without first considering the particular circumstances surrounding the violation of a given rule and the particular characteristics of the alleged violator. It would thus be flatly inconsistent with the Act — and an abdication of a required exercise of Commission judgment — for the Commission to transform an ILEC's performance report into an NAL.

---

[62] *Cf.* 47 U.S.C. § 206 (damages limited to the "*amount* of damages sustained in consequence of any . . . violation [of the Act]") (emphasis added); 47 U.S.C. § 503(b) (setting forth monetary forfeiture penalties).

[63] 47 U.S.C § 503(b)(4)(A).

[64] *Id.* § 503(b)(2)(D) (emphasis added).

[65] *See* 47 C.F.R. § 1.80, Guidelines for Assessing Forfeitures.

Nor do sections 206 through 208 of the Act authorize the Commission to establish a self-effectuating liquidated damages regime, as some commenters contend. *See* Sprint Comments at 10; Covad Comments at 32. To begin with, Congress has explicitly provided that the Commission may award damages *only* in response to complaints from private parties, and may *not* do so on its own motion, as would occur under an automatic damages regime.[66] Moreover, section 208, and the related provisions of the Act, set forth clear procedural requirements that are incompatible with a liquidated damages rule. Section 209, for example, requires a hearing before damages can be imposed. Nor can the Commission simply assume that violation of a performance standard has caused damage: instead, a CLEC must prove such damages in any particular proceeding.[67] In any event, any such presumed damages would necessarily be rebuttable on the facts of a specific case — again defeating any attempt to impose an automatic liquidated damages rule. *See* Verizon Comments at 46-47; SBC Comments at 35-38.

Finally, some CLECs suggest that the Commission "requir[e] that ILECs include liquidated damages, upon a CLEC's request, in interconnection agreements." BTI Comments at 9; *accord* Focal Comments at 23-24. However, courts have already found that the Act does not impose a duty on state commissions to include liquidated damages provisions in interconnection

[66] *See* 47 U.S.C. § 403.

[67] *See id.* § 206 (recovery under the Act limited to "damages *sustained* in consequences of [a] violation" of the Act, plus attorney's fees) (emphasis added); Memorandum Opinion and Order, *AT&T Co. v. Northwestern Bell Tel. Co.*, 5 FCC Rcd 143, 146, ¶ 27 (1990) (concluding that defendant had violated the Communications Act, and was liable to plaintiff "*to the extent it can establish that it was damaged thereby*") (emphasis added); Memorandum Opinion and Order, *Teledial America, Inc. v. Michigan Bell Tel. Co.*, 8 FCC Rcd 1151, 1154, ¶ 14 (1993) (carrier that violated the Act "liable for damages *to the extent a complainant/customer can establish that it was damaged* as a result of the violation") (emphasis added).

agreements.[68] Nor could the Commission properly mandate that interconnection agreements contain such provisions. *See* Ohio Comments at 6-8. And this is all the more true given its repeated conclusions that the fact that an ILEC has missed a performance benchmark does not necessarily mean that a CLEC has suffered competitive harm.[69] Imposing liquidated damages when CLECs have not suffered competitive harm would be contrary to basic principles of law, because they would make an ILEC's performance failure "more profitable to the [CLEC] than performance would be."[70] It would be similarly inappropriate for the Commission to "establish[] suggested guidelines for liquidated damages to govern negotiations between CLECs and ILECs," BTI Comments at 12, in light of state commissions' authority to reach cost-related determinations under the Act.[71] Finally, those CLECs seeking an automatic liquidated damages

[68] *See*, *e.g.*, *MCI Telecomms. Corp. v. U.S. West Communications*, 204 F.3d 1262, 1272 (9th Cir.), *cert. denied*, 531 U.S. 1001 (2000); *MCI Telecomms. Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1157, 1183 (D. Or. 1999); *MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.*, 40 F. Supp. 2d 416, 428 (E.D. Ky. 1999).

[69] *See*, *e.g.*, *New York Order*, 15 FCC Rcd at 3976, ¶ 59, 4061, ¶ 202; *Texas Order*, 15 FCC Rcd at 18378, ¶ 58; *Kansas/Oklahoma Order*, 16 FCC Rcd at 6252-53, ¶ 32; *Massachusetts Order*, 16 FCC Rcd at 8995, ¶ 13; *Connecticut Order*, 16 FCC Rcd at 14153, ¶¶ 12-13; *Pennsylvania Order*, 16 FCC Rcd at 17513, App. C, ¶ 8; *Arkansas/Missouri Order* ¶¶ 34, 104.

[70] *Red Sage Ltd. P'ship v. DESPA mbH*, 254 F.3d 1120, 1127 (D.C. Cir. 2001); *see also Kothe v. R.C. Taylor Trust*, 280 U.S. 224, 226 (1930) ("[A]greements to pay fixed sums plainly without reasonable relation to any probable damage which may follow a breach will not be enforced."); *Raffel v. Medallion Kitchens of Minn., Inc.*, 139 F.3d 1142, 1144-46 (7th Cir. 1998). Moreover, it is well settled that liquidated damages clauses are invalid if, in situations where damages from a particular breach may vary, they attempt to set a single measure of damages that does not vary with the gravity of the breach. *See*, *e.g.*, *Taylor Trust*, 280 U.S. 224; *Raffel*, 139 F.3d at 1146; *Davy v. Crawford*, 147 F.2d 574, 575 (D.C. Cir. 1945); 5 Corbin on Contracts § 1066 (1964). Given the likely nationwide variation in the possible damages (if any) resulting from the failure to meet a particular performance standard, a Commission-determined damages measure would likely be invalid.

[71] *See Iowa Utils. Bd.*, 525 U.S. at 384; *see also* Ohio Comments at 6-8.

rule have not established any record on which the Commission could determine the appropriate amount of damages for breach of its proposed national measurements.[72]

B. The CLECs' Proposed Penalty Levels Are Contrary to the Commission's Prior Orders and to Sound Public Policy

As Verizon explained (at 29-31), the Commission should not set the base forfeiture amount at $1.2 million as the CLECs, unsurprisingly, propose. *See* Adelphia Comments at 13; ALTS Comments at 8; BTI Comments at 5; Cox Comments at 19; Focal Comments at 27-29; TDS METROCOM Comments at 10.[73] Yet, if the Commission adopts only 12 national measurements and requires reporting at the state level only, a $1.2 million base forfeiture would mean that an ILEC would face an annual potential liability of $173 million in each and every state in which it operates. This is far in excess of the amount at risk under nearly every performance assurance plan that the Commission has reviewed in its section 271 orders, and which it has found "provide[] additional assurance that the local market will remain open after [the BOC] receives section 271 authorization."[74]

The CLECs, however, propose further that the Commission assess $1.2 million forfeitures for "violations of each metric (or each sub-metric, where sub-metrics are established) in each separate reporting period" and in each geographic reporting area. BTI Comments at 7. However, if the Commission set a base forfeiture of $1.2 million for only half of the

[72] *Cf.* 5 U.S.C. § 706(2)(A) (directing reviewing courts to "hold unlawful and set aside agency action, findings and conclusions found to be . . . arbitrary [or] capricious").

[73] AT&T argues (at 26-33) that the Commission should adopt a penalty regime that supplements the remedy payments required under state performance assurance plans. However, the exact plan that AT&T proposes remains vague. For example, although AT&T states (at 30) that a "simple equation can . . . be used to calculate a specific basic penalty amount," it does not specify what that simple equation is.

[74] *Connecticut Order*, 16 FCC Rcd at 14181, ¶ 76; *see also Arkansas/Missouri Order* ¶ 129 n.409; *Massachusetts Order*, 16 FCC Rcd at 9121, ¶ 241; *Kansas/Oklahoma Order*, 16 FCC Rcd at 6378-79, ¶ 274.

approximately 5,800 measurements that the CLECs have proposed, each ILEC would face an annual potential liability of more than $40 billion; all large ILECs, cumulatively, would face an annual potential liability of approximately $2.5 trillion — or about 25 percent of the gross domestic product of the United States in 2000. These CLECs do not even attempt to justify potential liability of this magnitude.

In proposing such draconian penalty levels — which are light years beyond anything conceivably necessary to provide an incentive not to "backslide" — the CLECs utterly disregard the Commission's frequent rejection of the proposition that "liability under [a performance plan] must be sufficient, *standing alone*, to completely counterbalance" any incentive a LEC might have to discriminate.[75] Indeed, one CLEC expressly contends that, "in any month in which an ILEC misses the relevant standard, the presumption should be that the existing PAP (whether federal or state) has not adequately deterred ILEC anticompetitive behavior." Allegiance Comments at 31. Not only would such a presumption be inconsistent with the Commission's section 271 orders, but it would also 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. Instead, as Verizon proposed (at 29), any penalty amounts should be based on the competitive significance of a performance miss, so that an ILEC is required to pay less in penalties for a one-time, minor performance miss that affects few CLEC orders than for a persistent, major performance miss that affects a large number of CLEC orders.

[75] *New York Order*, 15 FCC Rcd at 4167, ¶ 435; *see also*, *e.g.*, *Pennsylvania Order*, 16 FCC Rcd at 17489, ¶ 130; *Massachusetts Order*, 16 FCC Rcd at 9121, ¶ 241.

IV. THE IMPLEMENTATION OF NATIONAL PERFORMANCE MEASUREMENTS

A. National Measurements Should Sunset No Later Than Two Years After Full Implementation

As Verizon explained (at 66-67), any national measurements should have a sunset date of two years after they are implemented. Two years provides ample time in which to assess the utility of the national measurements and whether there is any continued need for them. *See* NPRM ¶¶ 78-79. The CLECs, however, uniformly oppose any sunset date on the ground that competition might not have developed (at least, not to their satisfaction) by that point. *See*, *e.g.*, Focal Comments at 39; BTI Comments at 26-27; Sprint Comments at 20; XO Comments at 15. Indeed, AT&T expressly contends (at 38) that "deregulation is only a rational policy once competition has been fully established." These comments disregard the substantial degree of competition that has already developed, with CLECs currently serving more than 10 percent of the local exchange market and more than 20 percent of business customers. *See supra* Part I.

In addition, adopting a sunset date appropriately requires the parties seeking to prevent deregulation to demonstrate that there is still a rational, pro-competitive justification for the existence of national measurements, in order to maintain such measurements beyond the sunset date. This is fully consistent with the Act's and the Commission's emphasis on deregulation. As Chairman Powell has explained, deregulation is "not a reward to hold out to industry, after the government determines that there is enough competition to grant relief."[76] Instead, as Chairman

[76] *Federal Communications Commission Reform for the New Millennium: Hearing Before the Subcommittee on Telecommunications, Trade, and Consumer Protection of the House Committee on Commerce* (Oct. 26, 1999) (opening statement of Michael K. Powell, Commissioner, Federal Communications Commission) (emphasis omitted).

Powell also noted, the presumption should be "in favor of deregulation and an obligation to re-justify regulations that are retained, with the burden to do so resting with the Commission."[77]

B. CLECs Propose Excessive Audit Requirements that Would Dramatically Increase ILECs' Burdens Without Any Corresponding Benefits

As Verizon explained (at 64-65), the most effective way for the Commission to ensure valid and accurate performance reporting is to require LECs to provide other carriers with access to the data they use to calculate their performance results.[78] Any required audits — and Verizon does not concede that any are in fact necessary — should occur infrequently and should be used only to ensure that the business rules for performance measurements are being implemented and applied correctly. They should apply to both ILECs and CLECs, but should not involve costly and time-consuming order-by-order comparison of ILEC and CLEC records. Order-by-order data reconciliation is not a "minimally burdensome" undertaking, NPRM ¶ 74, and for that reason has not been part of state commissions' OSS tests.

CLECs, however, support wide-ranging audit requirements that would impose massive costs on ILECs with little potential benefit. WorldCom, for example, proposes that the Commission allow "*each*" of an ILECs "carrier customer[s] . . . to conduct one audit per

---

[77] *Id.*

[78] CLEC protestations that such a requirement is insufficient ring hollow. Some commenters, for example, plaintively assert that "CLECs simply do not have the resources to constantly monitor ILEC compliance with every provision of the Act." *E.g.*, Focal Comments at 38. If true, this supports the Commission's proposal to adopt only the most critical measurements, rather than the approximately 5,800 measurements the CLECs have proposed. However, a scant four pages later, they reverse course and energetically suggest that ILECs should be required to submit data underlying their performance reports because "the industry will be able to check the validity of the reports" against the underlying data, and will also be able to "customize reports to address differing needs," enabling "the industry [to] effectively evaluate the performance of ILECs." *Id*. at 42. If "the industry" is able to accomplish so much with this data, it is difficult to understand why providing access to such data should be such a poor method of ensuring the accuracy of ILEC performance reports.

calendar *quarter*." WorldCom Comments at 23 (emphases added). This quarterly audit proposal guarantees that there would *never* be a day on which an ILEC was not undergoing an audit — if not multiple audits, given that BOCs and other large ILECs normally have 50 to 100 "carrier customer[s]." In light of the intrusive and time-consuming nature of audits, this is a manifestly burdensome proposal and is directly antithetical to the objective of deregulating the telecommunications industry. WorldCom's concession (at 23) that CLECs "would pay for the audit unless the audit reveals inaccuracies in the incumbent LEC's report" is wholly illusory. In fact, this proposal guarantees that ILECs would be financially responsible for each and every one of these quarterly audits. As Verizon explained (at 63-64), although it strives for perfection, converting raw data into performance results is a tremendously complex process, and one that involves constantly changing requirements. Even if a carrier's systems and processes were virtually perfect, the vast amount of performance data that would be subject to an audit means that such audits would always uncover at least one "inaccuracy."

However, this considerable financial and administrative burden would be incurred with no real benefit. Performance results, because of their complexity, are necessarily susceptible to inadvertent error, but (contrary to CLEC contentions, *see*, *e.g.*, Covad Comments at 51-52) such errors normally do not materially affect reported data. Indeed, they are just as likely to *decrease* as increase the reported quality of an ILEC's wholesale performance, providing ILECs with sufficient incentive to identify and correct any such errors. *See* Verizon Comments at 64. The quarterly audit proposal is thus a paradigm case of a burdensome and intrusive regulation that achieves no concrete anti-discriminatory or pro-competitive purpose. In recognition of this, the

Commission has previously rejected CLECs' arguments, repeated here, that unaudited performance data are unreliable. *See* SBC Comments at 43.[79]

C. The Commission Should Employ Statistical Analysis To Ensure that Carriers Are Not Penalized for Disparities in Reported Performance Due to Random Variation

As the Commission recognizes, statistical analysis is essential to "reveal the likelihood that reported differences in an incumbent LEC's performance toward its retail customers and competitive carriers are due to underlying differences in behavior rather than random chance." NPRM ¶ 89. In the *New York Order*, the Commission found that the modified z-test and the t-test for measurements with large sample sizes and permutation testing for measurements with small sample sizes, using a 95-percent confidence level, are "reasonable tests for statistical significance."[80] Verizon supports the use of these tests for the national measurements, along with suitable statistical methods to ensure that the probability of Type I error — when an ILEC's performance is found to be statistically out of parity even though it actually provided parity service — is limited to 5 percent. *See* Verizon Comments at 73-75. Indeed, in what is fundamentally a parity process — that is, where an ILEC is doing the same type of work for the CLECs and for its retail operations — the Commission has recognized that it is reasonable to expect that parity means that the results are sometimes better for the CLECs and sometimes better for the ILEC's retail customers.[81] Other commenters similarly recognize that statistical analysis is required to ensure that ILECs are not penalized for random variations in performance. *See* SBC Comments at 47-61; Sprint Comments Exh. B.

---

[79] *See Texas Order*, 15 FCC Rcd at 18377-78, ¶ 57.

[80] *New York Order*, 15 FCC Rcd at 4185, App. B, ¶¶ 7-8 & n.17, 4186-87, App. B, ¶¶ 10-11, 4188-89, App. B, ¶ 13; *see also* NPRM ¶ 89 n.120.

[81] *See New York Order*, 15 FCC Rcd at 4182, App. B, ¶ 2 n.2.

However, those few CLECs to comment on the issue oppose efforts to mitigate against Type I error. WorldCom, for example, opposes the use of parity standards, in part, to avoid statistical testing that might reveal that apparent performance disparities were due to random variation and did not reflect a violation of the Act's nondiscriminatory service requirement. *See* WorldCom Comments at 17. The "stare and compare" method WorldCom favors — in which an ILEC's performance is compared to the benchmark and performance even 0.01 points below the benchmark is considered a "miss" — would necessarily lead to ILECs paying performance penalties due to random variation, despite providing service that meets the statutory standard. Moreover, because WorldCom has proposed benchmarks for measurements for which there exists a comparable retail product, service, or function, an ILEC could well be required to pay penalties for missing the "aggressive" WorldCom benchmark even though it provided CLECs with *better* performance than for the comparable retail product, service, or function. AT&T expressly objects (at 27) to the use of methods to mitigate against Type I error, claiming that they allow "many ILEC deficiencies to go unpenalized." Yet, as AT&T recognizes (*id.*), when Type I error occurs, there is no ILEC deficiency or violation of the Act; therefore, there is no basis on which a penalty could be applied.[82] For this reason, in every section 271 application that the Commission has approved, the performance assurance plan has included at least one provision designed to mitigate against Type I error.

AT&T also argues (at 30 n.78) that the Commission should adopt some form of so-called "error balancing" to account for Type II error, which occurs when a statistical test shows that

[82] *See also* Focal Comments Selwyn/Lundquist Decl. ¶¶ 36, 43, 47 (recognizing that, when Type I error occurs, "the ILEC would be required to pay a penalty . . . when in fact it actually was in compliance with the parity requirement," but suggesting that the Commission should not be concerned by such penalties).

performance is in parity when, in reality, performance is out of parity.[83] However, as Verizon explained (at 76-77), both the Commission and AT&T have previously recognized that the 95-percent confidence level supported by Verizon and other commenters appropriately limits *both* Type I and Type II error.[84] Moreover, there is no evidence that Type II error has actual competitive consequences and, therefore, there is no need to engage in complicated efforts to address this purely statistical phenomenon. Indeed, when the absolute difference between an ILEC's performance for CLECs and for the retail comparison group is large — that is, when the CLEC is most likely to suffer competitive harm — the probability of Type II error is extremely small. Conversely, Type II error is most likely in precisely those situations in which the Commission has found that competitive harm is least likely.[85] Therefore, there is far less risk from Type II error than of Type I error.

---

[83] *See also* BellSouth Comments at 85; Focal Comments Selwyn/Lundquist Decl. ¶ 36.

[84] *See New York Order*, 15 FCC Rcd at 4190, App. B, ¶ 17; *see* AT&T Comments at 54 & Att. G ¶ 22, CC Docket No. 98-56 (FCC filed June 1, 1998).

[85] *See*, *e.g.*, *Connecticut Order*, 16 FCC Rcd at 14153, ¶ 12 ("Isolated cases of performance disparity, especially when the margin of disparity or the number of instances measured is small, will generally not result in a finding of checklist noncompliance.").

CONCLUSION

The Commission should adopt national performance measurements consistent with the proposals made and the principles outlined in Verizon's comments and reply comments.

Respectfully submitted,

Michael E. Glover
Karen Zacharia
Leslie V. Owsley
VERIZON
1515 North Courthouse Road
Suite 500
Arlington, VA 22201-2909
(703) 351-3158

Mark L. Evans
Scott H. Angstreich
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
Sumner Square
1615 M Street, N.W., Suite 400
Washington, DC 20036
(202) 326-7900

Counsel for the Verizon Telephone Companies

February 12, 2002

APPENDIX A

RESPONSE TO CLEC COMMENTS REGARDING VERIZON'S COMPLIANCE WITH THE 1996 ACT

A number of commenters make allegations, with varying degrees of specificity, regarding Verizon's compliance with the 1996 Act. As explained below, these allegations are without merit.

Allegiance claims (at 24) that, "in a recent upgrade, Verizon removed the 'Service Order View' capability in its [graphical user interface]," and "declined . . . to add this feature back into its new release or to provide an alternate functionality." Allegiance is wrong. Both "post-order" functions that Verizon makes available to CLECs — the ability to check the status of an order and to obtain a copy of the service order as it exists in Verizon's service order processor — are available through Verizon's Web GUI. Although they no longer appear under the "Pre-order" tab, because they are not pre-order functions, they are still available to CLECs under the "Search" tab.

AT&T notes that "ILECs have paid literally hundreds of millions of dollars in fines," citing, among other things, four specific Verizon payments, totaling $18 million over two years, and suggests that these fines demonstrate that Verizon's "performance in meeting [its] statutory obligations remains deficient." AT&T Comments at 23-24 & n.60. As AT&T well knows, this is a mischaracterization of these payments. Thirteen million dollars of this total relate to a single event in early 2000 when CLECs complained that Verizon's systems were not returning electronic status notifiers on a timely basis for UNE orders submitted through Verizon's EDI interface. As Verizon has explained on numerous occasions, contrary to CLECs claims that Verizon's systems "hemmorrhaged" and lost a "massive" number of orders,[1] in most cases Verizon received and processed the order, although the CLEC had not received one of the status

[1] Comments of AT&T Corp., at 19 n.10, CC Docket No. 01-347 (FCC filed Jan. 14, 2001).

notifiers. From November 1999 through January 2000, Verizon processed more than 750,000 local service requests for competitors in New York, and, as Attachment 1 shows, competition in New York increased steadily during this period and subsequently. For fewer than 2.5 percent of the local service requests, Verizon had no record of receiving the order and asked the CLEC to resubmit the order.[2] The remaining so-called "fines" were, in fact, voluntary payments that Verizon made pursuant to the Bell Atlantic/GTE merger conditions based on reported performance results for approximately 160 different measurements per state across the more than 30 jurisdictions in which Verizon operates. Like the state performance assurance plans, the merger conditions effectively require superior performance for Verizon to avoid making any voluntary payments. The amounts paid are a small fraction of the amount at risk in any given month under the merger conditions, indicating that Verizon's performance has been excellent.

Covad similarly claims (at 40 & n.51) that certain payments Verizon has made to the Commission "demonstrate[] a pattern of deceptive submissions of performance data to the Commission and competitive carriers." The two orders pertaining to Verizon that Covad cites, however, demonstrate nothing of the sort. As an initial matter, one of the investigations involved Verizon's long distance business, and thus had nothing whatsoever to do with Verizon's local exchange services. *See* Order, *Verizon Communications*, 15 FCC Rcd 20134 (2000). In any event, both orders Covad cites involved consent decrees terminating Enforcement Bureau investigations into *possible* violations of Commission rules. *See id.*; Order, *Verizon*

[2] WorldCom also states (at 20) that, in 1999, "Verizon experienced serious competitive problems with missing notifiers in New York." As explained above, competition continued to flourish in New York during this time frame. In any event, this occurred three years ago and the Commission has since twice rejected WorldCom's contentions that this issue has recurred. *See Pennsylvania Order*, 16 FCC Rcd at 17446-47, ¶ 44 n.172; *Massachusetts Order*, 16 FCC Rcd at 9035-36, ¶¶ 88-89.

Communications, Inc., 16 FCC Rcd 16270 (2001). In neither case did the Enforcement Bureau find any actual violation. Indeed, both consent decrees state *explicitly* that the Commission had *not* found Verizon liable for violating its rules, and note that Verizon denied any such violation. *See* Order, 15 FCC Rcd at 20140-41, ¶¶ 18, 20; Order, 16 FCC Rcd at 16275, ¶ 20.

Covad also asserts (at 22) that it "generally waits significantly longer than 6 days simply to receive a loop from a Bell company," and contrasts this interval with Verizon's advertisement in Massachusetts of a "'sign up to turn on' interval for [its] retail DSL service of only 6 days." However, the relevant data belies this assertion and indicates that, in the last quarter of 2001 (October through December), Verizon completed more than 97 percent of all CLEC DSL loop orders for pre-qualified loops within 6 days, and Verizon similarly exceeded the 95 percent benchmark for Covad's orders in particular. It is thus simply not true, at least with respect to Verizon, that Covad "generally" waits "significantly longer" than 6 days to receive a loop.

Finally, Covad states (at 43) that, "every month, Verizon files a petition with the New York PSC seeking various adjustments to the New York PAP for the prior three months of data, based on various exclusions that Verizon would like to make." In the more than two years in which the New York PAP has been in effect, Verizon has invoked the exceptions process only once, as a result of a work stoppage in 2000. (The New York PSC also suspended the operation of the PAP as a result of the events of September 11, 2001.) Verizon does not petition "every month" for "adjustments" to the PAP.[3]

[3] Covad might be referring to the monthly letters that the PAP requires Verizon to file with the New York PSC. However, those letters do not request adjustments or exceptions, but instead detail the amount of bill credits due, if any, in light of the PAP provision that provides for automatic adjustments in the payments due in one month based on the Verizon's performance in the following two months. *See New York Order*, 15 FCC Rcd at 4189, App. B, ¶ 14 n.41.

A number of commenters assert that, around May 10, 2001, Verizon implemented "new policies and practices" relating to its treatment of CLEC orders for high capacity UNE loops, and that these policies resulted in "an immediate and significant increase" in the percentage of CLEC orders for such loops rejected for "no facilities" reasons. BTI Comments at 17-18; *see* Focal Comments at 44-47; XO Comments at 7 n.10. These CLECs also contend that this allegedly new policy is "clearly discriminatory," because Verizon "generally will modify, reconfigure or augment the electronics" to provide facilities to fill service orders not priced at section 252(d) cost-based rates. BTI Comments at 18-19; *see also* Focal Comments at 44-50; XO Comments at 7 n.10.

These allegations are misleading or incorrect on a number of counts. First, contrary to these CLEC contentions, Verizon did not implement a new policy in May 2001. As Verizon explained to CLECs in a letter of July 24, 2001, attached as Exhibit 4 to the Focal Comments ("July 24 Letter"), its policy regarding construction of new DS1 and DS3 unbundled network elements — which is "clearly stated in Verizon's relevant state tariffs and the CLEC Handbook, and is reflected in the language of Verizon's various interconnection agreements" — has "remain[ed] unchanged." July 24 Letter at 1, 2.

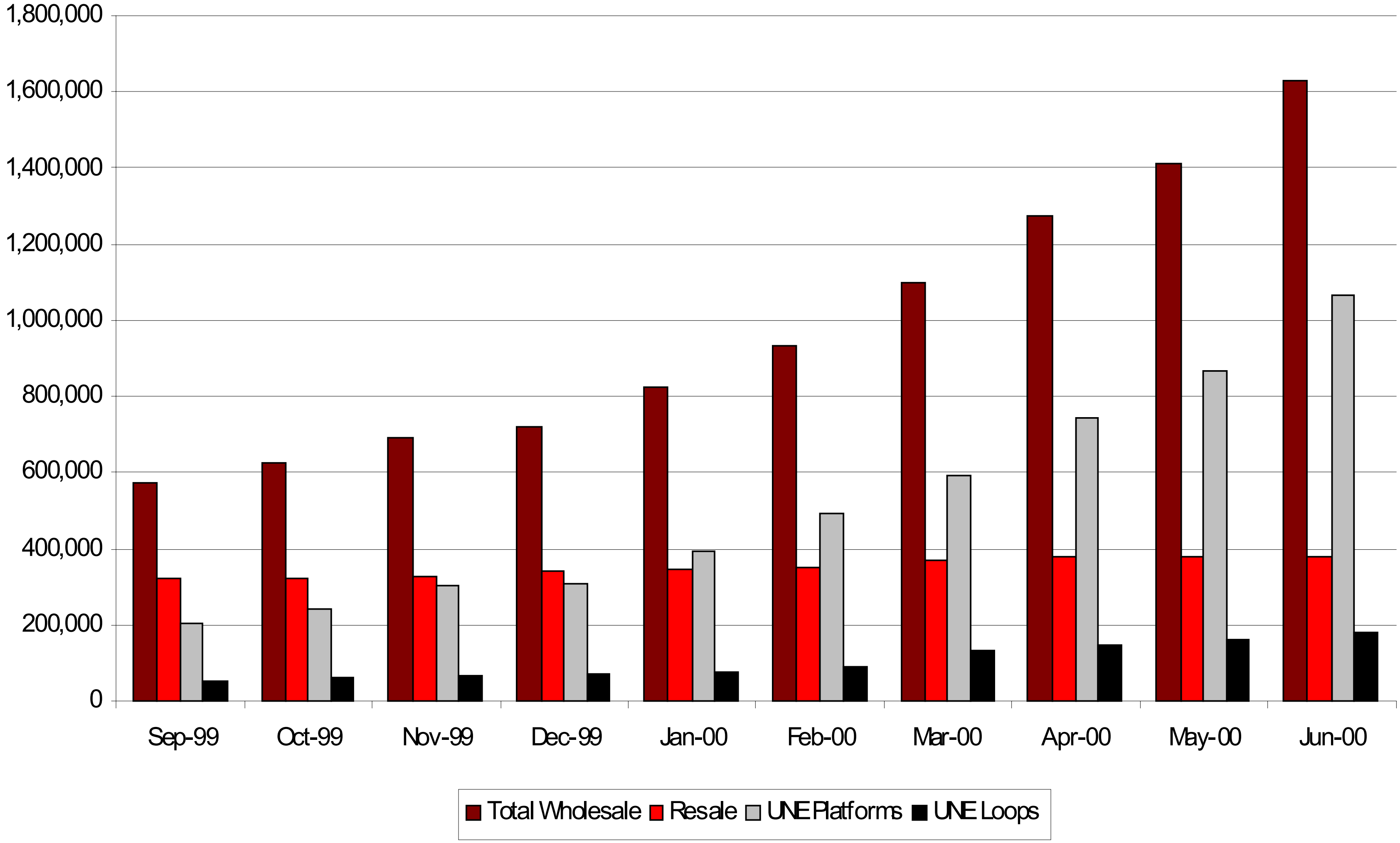
Second, Verizon's policy in fact goes well beyond the requirements of the Act. As Verizon has explained to CLECs, "although Verizon has no legal obligation to add DS1/DS3 electronics to available wire or fiber facilities to fill a CLEC order for an unbundled DS1/DS3 network element, Verizon's practice is to fill CLEC orders for unbundled DS1/DS3 network elements as long as the central office common equipment and equipment at end user's location necessary to create a DS1/DS3 facility can be accessed." July 24 Letter at 1. Thus, in these circumstances, Verizon will install the appropriate high capacity card in spare slots or ports of the equipment; perform cross connection work between the common equipment and the wire or fiber facility connecting the central office and the customer premises; correct conditions on existing copper facility that could affect transmission characteristics; and terminate the high capacity loop in the appropriate network interface device at the customer premises — none of which it is required to do under the Commission's current rules.[4]

Finally, the Commission has already considered the *precise* claims the CLECs make here, *see Pennsylvania Order*, 16 FCC Rcd at 17469-70, ¶ 91, and stated that it "disagree[s] with commenters that Verizon's policies and practices concerning the provisioning of high capacity loops . . . expressly violate the Commission's unbundling rules," *id.* at 17470, ¶ 92.

[4] Verizon has also provided the same information to the Commission on numerous occasions. *See* Reply Declaration of Paul A. Lacouture and Virginia P. Ruesterholz ¶¶ 35-37, CC Docket No. 01-138 (FCC filed Aug. 6, 2001); Declaration of Paul A. Lacouture and Virginia P. Ruesterholz ¶¶ 108-110, CC Docket No. 01-347 (FCC filed Dec. 20, 2001); Reply Declaration of Paul A. Lacouture and Virginia P. Ruesterholz ¶¶ 22-23, CC Docket No. 01-347 (FCC filed Feb. 1, 2002); *see also Ex Parte* Letter from W. Scott Randolph, Verizon, to Magalie Roman Salas, FCC, CC Docket No. 01-138 (Aug. 24, 2001).

New York Wholesale Volumes In-Service

Attachment 1



APPENDIX B

COMMENTS ON WORLDCOM'S PROPOSED NATIONAL PERFORMANCE MEASUREMENTS

Verizon provides the following comments on the performance measurements proposed by WorldCom and supported by a number of CLEC commenters. These comments highlight the most egregious aspects of those proposed measurements, but do not provide a complete catalog of their defects.

1. Percent System Availability

This measurement is similar to Verizon's proposed OSS Interface Availability measurement. *See* Verizon Comments at A-3. However, there is no need for this measurement to be disaggregated by interface type, as WorldCom proposes. Not only is there no plausible argument that an ILEC would mask discriminatory performance on one interface with superior performance on other interfaces, but given the performance benchmark proposed for this measurement, it would be virtually impossible to do so.

In addition, this measurement should not be disaggregated by state, as WorldCom proposes. Instead, it should be reported by interface geography. As Verizon explained, ILECs often use the same interfaces and underlying OSS for multiple states. In those circumstances, an outage to such an interface will affect multiple states. It would be duplicative for national performance measurements to penalize an ILEC more than once for the exact same outage, merely because the ILEC has elected (or been required) to standardize its OSS platforms across multiple states.

WorldCom's proposal to prevent ILECs from scheduling downtime for major system releases during eighteen hours of the day, seven days per week, would unreasonably limit the ability of ILECs to upgrade the systems. Moreover, under Verizon's proposed measurement, such outages would be excluded from the measurement only if CLECs are provided with advance notification pursuant to the change management process. Finally, WorldCom's measurement does not recognize that, when an underlying OSS is out of service, the specific transactions performed by that OSS are equally unavailable to the CLEC and ILEC representatives.

Furthermore, WorldCom's proposed business rules fail to specify how CLECs are to report interface outages. In contrast, Verizon's proposed measurement specifies that CLECs must report outages to the designated system trouble reporting center. Verizon's proposed measurement further specifies that outages that Verizon cannot confirm in its systems will be excluded from the measurement, as will outages that are not reported to the correct center.

Any interface outages outside of prime time hours should not be included in the measurement. As WorldCom implicitly admits (at 33), such outages are competitively less significant than outages during prime time hours. Therefore, outages during prime time and non-prime time hours should not be weighted equally, as they are under WorldCom's proposal.

2. (a) Query Response Timeliness
(b) Percent Ordering/Pre-Ordering System Error/Timeouts

Part (a) of this measurement corresponds to the Commission's proposed OSS Pre-Order Interface Response Timeliness measurement, although it also includes maintenance and repair query response timeliness. As Verizon explained, however, the OSS interface availability measurement is both more comprehensive, because it also captures the ability of CLECs to enter ordering transactions, and more competitively significant, because the availability of an ILEC's OSS interfaces is a prerequisite to the successful completion of any electronic transaction. *See* Verizon Comments at A-2.

Under WorldCom's proposed measurement, ILECs would be required to report their performance on every query type provided, with no distinction made between more and less competitively significant types. WorldCom would therefore require ILECs to report their performance for at least 17 different transactions. In contrast, Verizon's proposed business rules focus on the five most competitively significant pre-ordering transactions.

WorldCom's proposal to disaggregate this measurement further by requiring separate reporting for each interface would multiply the number of measurements reported and require ILECs to report at least 50 and as many as 100 different query response timeliness measurements. In contrast, Verizon's proposed measurement focuses on the EDI interface, which WorldCom has previously claimed is the most competitively significant interface. *See*, *e.g.*, Comments of WorldCom at 39, CC Docket No. 00-176 (FCC filed Oct. 16, 2000) ("EDI is the interface of choice for CLECs attempting to provide service at commercial volumes.").

For the reasons explained above, this measurement should be reported by interface geography and not by state, as WorldCom proposes.

WorldCom's proposed general standard for this measurement of 95 percent within parity plus 2 seconds would require ILECs to provide CLECs with superior service, rather than nondiscriminatory service as required under the Act. Verizon is unaware of any state commission having set a "parity plus X seconds" standard that allowed only two seconds for the necessary translations and security requirements to provide responses to CLEC queries. For example, the New York Guidelines currently provide parity plus 4 seconds for the EDI and CORBA interfaces and parity plus 7 seconds for the Web GUI interface, and the New York PSC has explained that the standards it set go beyond the requirements of the Act. Similarly, the manual loop qualification standard of 95 percent within 24 hours is substantially more stringent than the standard established in New York, which is 95 percent within 48 hours.

WorldCom's proposed requirement that ILECs begin reporting performance for any new query within six weeks of implementation is also unreasonable. It normally requires up to 90 days after a new functionality is implemented to complete the necessary work to measure and report performance for that functionality.

Part (b) of this measurement, which measures the percentage of CLEC submitted queries that time out or that receive system error messages does not correspond to any measurement the Commission has proposed, and there is no reason for the Commission to adopt such a measurement, which is duplicative of the interface availability measurement.

3. (a) Percent Change Management Notices/Documentation Sent On-Time
(b) Average Delay Days

These two measurements do not correspond to any measurement the Commission has proposed, and there is no reason for the Commission to adopt such measurements. In the context of section 271 applications, the Commission has required BOCs to demonstrate a "pattern of compliance with its documented change management processes and procedures" and, in SWBT's Kansas/Oklahoma application, found that SWBT's having sent "over half of the change announcements" late does "not suggest that SWBT is failing to follow the change process." *Kansas/Oklahoma Order*, 16 FCC Rcd at 6319-20, ¶ 169; *see Texas Order*, 15 FCC Rcd at 18418-19, ¶ 131.

WorldCom's proposed standards for this measurement go well beyond that required to provide CLECs a meaningful opportunity to compete. For example, the comparable measurement in the New York Guidelines requires Verizon to provide 95 percent of change management notices on time, as compared to 98 percent under WorldCom's measurement. The New York guidelines set an 8-day standard for delay days, while WorldCom proposes a standard of an average of no more than 5 days. The New York PSC has explained that the standards it set go beyond the requirements of the Act. WorldCom's benchmarks are even higher and, therefore, are clearly beyond the statutory requirements.

For the same reasons discussed above with respect to the OSS interface measurements, it the Commission were to adopt this measurement, it should be reported by change management process geography and not by state, as WorldCom proposes.

Finally, there is no reason to require reporting of both percentage on time and average delay day measurements, as such measurements are highly correlated. First, an ILEC must send a change management notice late before there can be any delay days. Second, the competitive significance of the average number of delay days is highly dependent on the number of notices that are sent late. For example, if an ILEC sends all of its notices on time except for one, which is sent 10 days late, there is no basis for concluding that this one delay was competitively significant. *See* Verizon Comments at A-16 to A-17.

4. (a) Percent Software Error Correction in X Days
(b) Average Delay Hours/Days

These two measurements do not correspond to any measurement the Commission has proposed, and there is no reason for the Commission to adopt such measurements.

In any event, WorldCom admits (at 38) that its proposed benchmarks for this measurement are more stringent than those in place for comparable measurements in the New York and Texas Guidelines. Beyond its assertion that the benchmarks in those states are too long, WorldCom offers no reason why its preferred benchmark is compelled by the 1996 Act's requirement that ILECs provide CLECs with a meaningful opportunity to compete.

For the reasons explained above, if the Commission were to adopt this measurement, it should be reported by software geography and not by state, as WorldCom proposes, and there would be no reason to require reporting of both percent on time and average delay day measurements, as they are highly correlated.

5. CLEC Center Responses in X Days

This measurement does not correspond to any measurement the Commission has proposed, and there is no reason for the Commission to adopt such a measurement. Indeed, WorldCom admits that this measurement "is not one that has been implemented in *any* state." WorldCom Comments at 39 (emphasis added).

Performance under WorldCom's newly invented measurement would be highly affected by CLEC competence. Whether an ILEC's response to a CLEC question will be "adequate to enable [the] CLEC to place [a] stalled order" depends in large part on the level of that CLEC's abilities. *See id.* App. B at 11. Indeed, CLEC obduracy could cause an ILEC to miss this measurement, especially given the unreasonably high benchmarks WorldCom has proposed. The Commission should not adopt a measurement under which a carrier's reported performance is within the control of its competitors.

6. Percent Order Accuracy

This measurement does not correspond to any measurement the Commission has proposed, and there is no reason for the Commission to adopt such a measurement. Because any service impacting errors will result in provisioning problems, the competitive significance of service order accuracy is better captured in the missed appointment and installation quality measurements. *See Texas Order*, 15 FCC Rcd at 18445, ¶ 182. The order accuracy measurement is inherently flawed in any event, as it attributes the same significance to service-impacting and non-service-impacting errors, and the same significance to an order with five errors as to one with a single error. WorldCom's proposed measurement also treats as errors instances in which an ILEC corrected an inaccuracy in a CLEC's order to the CLEC's benefit — for example, correcting the zip code.

If such a measurement were to be adopted, there is no need for the level of disaggregation proposed by WorldCom, which would require ILECs to report five separate order accuracy measurements. Furthermore, the benchmark WorldCom has proposed — 98 percent without error — goes well beyond that required to provide CLECs a meaningful opportunity to compete. The comparable measurement in the New York Guidelines has a 95-percent benchmark, and the New York PSC has explained that the standards it set go beyond the requirements of the Act. In addition, WorldCom's proposed measurement attributes the same competitive significance to all fields on a CLEC order, while the New York measurement is limited to a select list of key fields.

For the reasons explained above, if the Commission were to adopt this measurement, it should be reported by manual processing geography and not by state, as WorldCom proposes.

7. Percent Flow Through

This measurement does not correspond to any measurement the Commission has proposed, and there is no reason for the Commission to adopt such a measurement. Indeed, the Commission has found that flow-through rates "are not so much an end in themselves" and are relevant "not as a conclusive measure of nondiscriminatory access to ordering functions, but as one indicium among many." *Massachusetts Order*, 16 FCC Rcd at 9030, ¶ 77 (internal quotation marks omitted). Moreover, with respect to WorldCom's proposed designed flow through measurement, the Commission has previously held that, "[c]ontrary to the claims of some commenters," including WorldCom, "we do not specifically require Verizon to provide data on its achieved flow-through rate." *Pennsylvania Order*, 16 FCC Rcd at 17449, ¶ 48 & nn.182-183.

In addition, the Commission has repeatedly recognized that both total and designed flow through rates are highly dependent on CLECs' ability to submit valid orders. In numerous section 271 applications, Verizon and SBC have demonstrated that even though all CLECs use the same OSS, some CLECs attain much higher flow-through rates than others. *See supra* pp.15-16. In light of this evidence, the Commission has held that "it would not be appropriate to attribute this wide range of results entirely to" the BOC because "a BOC is not accountable for orders that fail to flow-through due to competing carrier-caused errors." *Connecticut Order*, 16 FCC Rcd at 14172, ¶ 56.

Finally, the benchmarks that WorldCom has proposed go well beyond that required to provide CLECs a meaningful opportunity to compete and ignore the reality that flow through is heavily influenced by CLEC capabilities. For example, while WorldCom has proposed a 97-percent benchmark for its designed flow through measurement, the New York PSC adopted a benchmark of 95 percent, and the New York PSC has explained that the standards it set go beyond the requirements of the Act. Moreover, unlike WorldCom's proposal, the New York measurement excludes orders that do not flow through as a result of CLEC errors, making WorldCom's measurement particularly unreasonable.

8. Percent On-Time LSRC/FOC

9. Percent On-Time Reject Notices

These measurements correspond to the Commission's proposed Order Notifier Timeliness measurement. However, as Verizon explained, there is no need for separate measurements for the return of order confirmation notifiers and rejects. *See* Verizon Comments at A-6.

WorldCom's proposed benchmarks for these measurements are, by its own admission (at 43), "aggressive" and go beyond what the Act requires. For example, the New York Guidelines, require 95 percent of "fully mechanized" (or flow through) confirmations and rejects to be returned within 2 hours, while WorldCom has proposed a 95 percent within 1 hour benchmark. Likewise, the New York Guidelines allow an additional 48 hours for orders requiring a facility check, while WorldCom proposes to require ILECs to conduct "at a minimum . . . an electronic facilities check" "in internal databases" before returning an order confirmation notice and provides no additional time. WorldCom Comments App. B at 17.

WorldCom's proposed "electronic facilities check" requirement is yet another instance in which it is attempting to use the development of performance measurements as a means of changing ILECs' OSS. Such requests are properly submitted through the established change management process. Verizon's systems currently cannot provide an "electronic facilities check" before returning an order confirmation notice. Indeed, for Verizon's retail and wholesale customers, facilities assignment takes place well after the point at which order confirmation occurs. Finally, requiring Verizon to conduct such checks for all CLEC orders would provide CLECs with superior service, contrary to the requirements of the Act.

WorldCom's proposed measurement also does not exclude time during which the service order processor is off-line for nightly batch processing in calculating the return of confirmation or reject notices for flow through orders. However, when the processor is off-line, neither retail nor CLEC orders can be worked. Accordingly, such time should be excluded.

Finally, there is no reason to disaggregate this measurement into five separate order confirmation measurements and three reject measurements. A single measurement of the overall percentage on time is sufficient to assess the timeliness with which ILECs respond to CLEC orders.

10. Percent Jeopardy Notices

This measurement corresponds to the Commission's proposed Percentage of Jeopardies measurement. However, as Verizon explained, national performance measurements should not include such a measurement, because it is not "relatively easily measured," is not "particularly critical to carriers' ability to compete effectively," and would "increase overall regulatory burdens on carriers." NPRM ¶ 27. In addition, Verizon does not normally notify retail customers in advance that a due date will be missed. The Act does not require that Verizon provide better service to CLECs. Indeed, the Commission has never relied on a jeopardy return performance measurement in any of its section 271 orders. *See*, *e.g.*, *Kansas/Oklahoma Order*, 16 FCC Rcd at 6307, ¶ 148 n.412.

Moreover, WorldCom has proposed not 1, but more than 1,000 jeopardy measurements. WorldCom's proposed measurement is disaggregated by as many as 24 product types, which in turn are disaggregated by method of provisioning (dispatch and no dispatch) and geographic region within states. In addition, WorldCom proposes four separate jeopardy measurements: percentage of advance notice of missed due date and notice less than 24 hours, 24 to 48 hours, and more than 48 hours prior to the due date. The New York Guidelines currently contain *no* jeopardy measurements — it is inconceivable that more than 1,000 such measurements are required in order to ensure that CLECs have a meaningful opportunity to compete. Moreover, Verizon is not aware of any state commission having set a benchmark of 98 percent advanced notice of missed due dates. In order to meet such an unreasonably high standard, an ILEC would effectively have to issue a jeopardy on every order, just in case the order was missed.

11. Percent On Time Completion Notices

This measurement corresponds to the Commission's proposed Order Completion Notifier Timeliness measurement. However, as Verizon explained, there is no need, as WorldCom proposes, to adopt measurements for both provisioning and billing completion notifiers. *See* Verizon Comments at A-7 to A-8. Such measurements would be duplicative because a billing completion notifer also provides CLECs with notice that provisioning has been completed. *See* *Pennsylvania Order*, 16 FCC Rcd at 17446, ¶ 43 (billing completion notifiers "inform competitors that *all provisioning and billing activities* necessary to migrate an end user from one carrier to another *are complete* and thus the competitor can begin to bill the customer for service") (emphases added).

WorldCom again admits that it has set "aggressive" benchmarks for these measurements. *See* WorldCom Comments at 46. Indeed, the proposed standards of 95 percent within 6 system hours for provisioning completion notifiers and 95 percent within 24 system hours for billing completion notifiers are significantly more stringent than those the New York PSC recently adopted at the behest of the CLECs, and fail to reflect the actual operation of Verizon's systems. The New York measurements are set at 95 percent within 1 business day for provisioning completion notifiers and 95 percent within 2 business days for billing completion notifiers. The New York standards go beyond the requirements of the Act; WorldCom's proposals deviate even further from the statutory standard.

Moreover, as Verizon explained, CLECs' orders are due for completion on a particular day, not at a particular time. For this reason, Verizon batch processes service order completions, rather than doing so in real time. Thus, hours are the wrong units for such a measurement. *See* Verizon Comments at A-9. Requiring Verizon to measure this in hours would, in effect, require Verizon to alter the way in which it processes retail and wholesale orders.

12. Percent Timely Loss Notifications

This measurement does not correspond to any measurement the Commission has proposed, and there is no reason for the Commission to adopt such a measurement. WorldCom admits that this measurement "is new to most ILECs." WorldCom Comments App. B at 24. Moreover, WorldCom's proposed measurement would require ILECs to develop systems that would provide line loss notifications "through an electronic notifier." *Id.* The Commission has never before held that the Act requires electronic line loss notification. In fact, the Commission has previously found that CLECs' claims, including WorldCom's, of inaccurate line loss reports are overstated. *See Pennsylvania Order*, 16 FCC Rcd at 17452, ¶ 52; *Massachusetts Order*, 16 FCC Rcd at 9045, ¶ 100; *Texas Order*, 15 FCC Rcd at 18452, ¶ 193.

13. Average Completion Interval (with dispersion around average)

This measurement does not correspond to any measurement the Commission has proposed, and there is no reason for the Commission to adopt such a measurement. As Verizon explained, the New York Public Service Commission ("PSC") recently eliminated all of the average completed interval measurements it had previously adopted, based on a consensus proposal of the New York Carrier Working Group, which includes WorldCom and other CLECs that support its proposed measurements. WorldCom notably does not mention the recent action of the New York PSC. Furthermore, Verizon is unaware of any state commission that has required reporting of dispersion around average for this measurement.

Moreover, the Commission has recognized that average completion interval measurements are inherently flawed and "are not an accurate indicator of [a carrier's] performance," because they are skewed by factors outside of an ILECs' control. *Massachusetts Order*, 16 FCC Rcd at 9038, ¶ 92; *see New York Order*, 15 FCC Rcd at 4061-65, ¶¶ 202-209, 4101-03, ¶¶ 285-288.

There is no justification whatsoever for the level of disaggregation WorldCom has proposed for this measurement. WorldCom's proposed measurement is disaggregated by as many as 26 product types, which in turn are disaggregated by method of provisioning (dispatch and no dispatch) and geographic region within states. In addition, WorldCom proposes nine separate reporting requirements: the average interval and eight different distributions (1, 3, 5, and more than 10 hours longer than the standard interval and 1, 3, 5, and more than 10 hours shorter than the standard interval). In sum, there would be as many as 2,340 reporting requirements for this one measurement.

WorldCom's average completion interval measurement is also tied to its proposed national provisioning intervals. As Verizon explained, these intervals are set without regard to the intervals for comparable retail products and therefore are incompatible with the requirements of the Act. *See supra* page 31. To the extent the Commission adopts this measurement, parity with an analogous retail product is the appropriate standard, unless (as in the case of hot cut orders) no such retail product exists. In any event, this is not the appropriate proceeding for the Commission to alter the scope of ILECs' requirements to provide UNEs — performance measurements are designed "to help determine whether incumbent LECs are in compliance with the[] duties and other requirements" imposed by the 1996 Act, NPRM ¶ 14, not to establish those requirements.

Finally, as Verizon explained (at 60-61), if the Commission were to adopt such a measurement, it should reject WorldCom's proposal that customer not ready situations be excluded from this and other measurements only if they are verified by the CLEC. Verification is not an efficient business practice, and such a rule would provide CLECs with the incentive to withhold or to refuse verification, thereby likely making the ILEC's reported performance worse and potentially subjecting the ILEC to penalties. However, because CLECs are responsible for arranging access, if the Commission establishes such a requirement, the Commission must establish limits on the amount of time an ILEC service technician is required to wait for the CLEC both to answer its hotline and to provide verification of the customer not ready or no access situation.

14. Percent Orders Completed On Time

This measurement corresponds to the Commission's proposed Percentage On Time Performance measurement. As Verizon explained, this is the inverse of the Commission's proposed Missed Appointments measurement.

As with other measurements WorldCom has proposed, this measurement is exhaustively disaggregated. WorldCom's proposed measurement is disaggregated by as many as 26 product types, which in turn are disaggregated by method of provisioning (dispatch and no dispatch) and geographic region within states. In addition, WorldCom proposes two separate reporting requirements: the percent completed on time and the percentage of facility misses. In sum, there would be as many as 520 reporting requirements for this one measurement.

For the reasons explained above, verification should not be required before customer not ready situations are excluded from this measurement. In addition, the Commission should reject WorldCom's proposal to use a benchmark for this measurement, based on its preferred national intervals for these products. Instead, parity with an analogous retail product is the appropriate standard, unless (as in the case of hot cut orders) no such retail product exists. Finally, as explained above, there is no reason to adopt a measurement of facility misses. *See supra* pages 18-19.

15. Percent Timely Coordinated Conversions

This measurement also corresponds to the Commission's proposed Percentage On Time Performance measurement. Although Verizon included this measurement as a disaggregation of its proposed on time performance / missed appointment measurement, Verizon is indifferent to whether this is listed as a separate measurement as the burdens of reporting this measurement are the same in either case.

WorldCom's proposed standard, however, should be rejected. WorldCom argues for a 90-minute interval for orders of 10 to 25 lines — rather than the two hour interval for orders of 10 to 49 lines that the New York PSC has approved — simply because this would be most convenient for it. WorldCom Comments at 49 ("most of its cuts fall into this volume category"). In addition, WorldCom's proposed measurement does not indicate the percentage of hot cut orders that must be completed in its preferred window. To the extent WorldCom proposes a percentage higher than that the Commission has found to provide CLECs with a meaningful opportunity to compete, it has failed to provide any support for increasing that standard. *See*, *e.g.*, *New York Order*, 15 FCC Rcd at 4105-11, ¶¶ 292-303, 4114-15, ¶ 309; *Texas Order*, 15 FCC Rcd at 18487-94, ¶¶ 262-274. Indeed, the Commission has previously rejected CLECs' attempts to require a hot cut standard of "the fewest number of outages and best on-time performance that it is technically feasible and commercially reasonable for the BOC to achieve" and should do so again. *Texas Order*, 15 FCC Rcd at 18485-86, ¶ 258 (internal quotation marks omitted).

16. (a) Average ILEC Caused Provisioning Outage Duration
(b) Percent ILEC Caused Provisioning Outages

These two measurements do not correspond to any measurement the Commission has proposed, and there is no reason for the Commission to adopt such measurements. Moreover, WorldCom's proposed standard of no more than 1 percent of conversions experiencing an outage is substantially higher than what the Commission has previously found sufficient to satisfy the requirements of the Act. *See*, *e.g.*, *New York Order*, 15 FCC Rcd at 4115, ¶ 309 ("fewer than five percent of hot cuts resulted in service outages . . . sufficient to establish compliance with the competitive checklist"). The Commission also has not previously considered average provisioning outage duration, and WorldCom provides no reason why it should now deem this one of the most essential measurements.

17. Percentage of Orders Held – 5, 15, 30 days

This measurement corresponds to the Commission's proposed Open Orders in Hold Status measurement. This measurement is inherently duplicative, as orders open for 30 days will necessarily be held open for 5 and for 15 days. This measurement is also duplicative of the missed appointment and average delay days measurements, as WorldCom admits. *See* WorldCom Comments App. B at 34 (open orders measurement "work[s] in tandem" with other measurements); Verizon Comments at 14, 57. Furthermore, Verizon is unaware of any state commission having adopted 5- or 15-day reporting requirements for an open orders in hold status measurement. In any event, the Commission has expressly declined to rely on an open orders in hold status measurement in the context of section 271 applications. *See Connecticut Order*, 16 FCC Rcd at 14155-56, ¶ 19. WorldCom has "offered no persuasive reason" why this is now an essential measurement. *Id.*

Moreover, if the Commission adopts such a measurement, the appropriate standard is parity with the percentage of open orders for comparable retail products that are in hold status. Indeed, WorldCom admits (at 51) that "it is critical to see retail performance to determine if discrimination is occurring." But it cannot be the case that an ILEC must meet WorldCom's proposed benchmark when retail performance for comparable products is worse than the benchmark and must meet the parity standard when retail performance is better than the benchmark. As explained above, the 1996 does not establish objective service requirements and CLECs are entitled to nondiscriminatory service, not superior service.

For the reasons described above, the levels of product and geographic disaggregation WorldCom proposes for this measurement are excessive. In addition, there is no reason to identify separately orders held for facilities.

18. Troubles Within 30 days of Install/Order Activity

This measurement corresponds to the Commission's proposed Installation Quality measurement. WorldCom again proposes an excessive level of disaggregation, which would result in the reporting of as many as 250 different installation quality measurements. Moreover, for reasons explained above, the appropriate standard for this measurement is parity with the comparable retail product, where such products exist. Even for products with no retail analog, such as hot cut loops, WorldCom's proposed standard of 1.5 percent is more stringent than the 2 percent standard within 7 days of installation that the New York PSC adopted for hot cut loops, and that the Commission has found is sufficient to allow a CLEC a meaningful opportunity to compete. Similarly, the Commission has found that a 6 percent trouble report rate within the first 30 days after installation of xDSL loops satisfies the requirements of the Act. *See Kansas/Oklahoma Order*, 16 FCC Rcd at 6332-33, ¶ 191.

Finally, the Commission should reject WorldCom's proposal to include trouble reports where no trouble is found in the ILEC's network. *See* WorldCom Comments at 53. WorldCom provides no legitimate reason why CLECs' failure or inability to investigate troubles before reporting them to ILECs should be counted as part of the ILECs' reported performance. *See* Verizon Comments at 19-20, 61. Although WorldCom contends that CLECs have "an incentive against false reporting," WorldCom Comments at 53, it neither denies that false reporting occurs nor disputes that some CLECs are less able than others to diagnose problems correctly. Even if it might be "burdensome and costly" for CLECs to reconcile such exclusions, *id.*, it is far more burdensome and costly for an ILEC to be required to pay penalties as a result of trouble reports where there is no trouble in the ILEC's network.

19. Mean Time to Restore

This measurement corresponds to the Commission's proposed Time to Restore measurement. However, the proposed percent out of service greater than 24 hours measurement does not correspond to any measurement the Commission proposed, and there is no reason for the Commission to adopt such a measurement. As explained above, there is no reason to require reporting of both average and percentage measurements, as such measurements are highly correlated.

WorldCom again proposes an excessive level of disaggregation, which would result in the reporting of more than 500 different mean time to restore measurements. Moreover, for reasons explained above, the only appropriate standard for this measurement is parity with the comparable retail product, where such products exist.

For the same reasons that verification should not be required for customer not ready situations to be excluded, use of the stop clock should not be contingent on the CLEC providing written confirmation that the customer premises is not available for access on weekends. In addition, as explained above, reports where no trouble is found in the ILEC's network should not be included in this measurement.

20. Trouble Report Rate

This measurement corresponds to the Commission's proposed Trouble Report Rate measurement. As with WorldCom's other proposed maintenance and repair measurements, this measurement is excessively disaggregated, improperly uses an overly stringent benchmark where a parity standard is available, and includes trouble reports where no trouble is found in the ILEC's network.

In addition, the trouble report rate includes troubles that are also covered in the installation quality and repeat trouble report rate measurements. This leads to double counting of those reports and potentially subjects the ILEC to duplicative penalties for the same trouble reports. Moreover, as the Commission has recognized, the installation quality and repeat trouble report measurements are more important gauges of an ILEC's performance than the total trouble report. *See New York Order*, 15 FCC Rcd at 4073-74, ¶ 222 & n.711; *Massachusetts Order*, 16 FCC Rcd at 9067, ¶ 143; *OSS Notice*, 13 FCC Rcd at 12854, ¶ 83.

21. Percent Repeat Trouble Report Rate

This measurement corresponds to the Commission's proposed Repeat Trouble Report Rate measurement. As with WorldCom's other proposed maintenance and repair measurements, this measurement is excessively disaggregated, improperly uses an overly stringent benchmark where a parity standard is available, and includes trouble reports where no trouble is found in the ILEC's network.

22. Percent of Customer Troubles Resolved Within Estimated Time

This measurement does not correspond to any measurement the Commission has proposed, and there is no reason for the Commission to adopt such a measurement. As with WorldCom's other proposed maintenance and repair measurements, this measurement is excessively disaggregated and improperly uses an overly stringent benchmark where a parity standard is available. Accordingly, even if the Commission were to adopt such a measurement, it should reject WorldCom's proposal.

23. Percent Trunk Blockage

This measurement does not correspond to any measurement the Commission has proposed, and there is no reason for the Commission to adopt such a measurement. Moreover, WorldCom's proposal, as it admits (at 55), would fundamentally change the way trunk blockage is measured in the industry for both retail and wholesale trunks. First, ILECs would incur substantial costs to change from monitoring a consistent busy hour to monitoring every hour of the day, as WorldCom's proposal apparently contemplates. Second, this would also require fundamental changes in network engineering and design. Currently, there is a considerable body of trunk engineering design theory and mathematics that is based on the average time used to calculate the quantity of trunks needed based on the consistent busy hour. No such body of theory or mathematics exists for WorldCom's proposed methodology. Finally, WorldCom's proposed standard — 99 percent of trunks not exceeding the blocking design threshold (0.5 percent, 1 percent, or 2 percent) more than 4 times per month — is substantially more stringent than the standard that the New York PSC has adopted — no trunk exceeding the service threshold (for a trunk with a 0.5 percent design threshold, the service threshold is 2 percent) during the busy hour for three consecutive months. As noted above, the New York PSC has explained that the standards it adopted go beyond the requirements of the Act.

24. Percent Timely Collocation Response

25. (a) Percent Collocation/Augment Appointments Met
(b) Average Collocation/Augment Interval

These three measurements do not correspond to any measurement the Commission has proposed, and there is no reason for the Commission to adopt such measurements. In any event, there is no reason for three collocation measurements, let alone the 30 measurements that result from the disaggregation WorldCom has proposed. As with other WorldCom measurements, the proposed standards clearly exceed the requirements of the Act. Indeed, for measurement 25(a), WorldCom has proposed a benchmark of 100 percent. Finally, although the Commission expressly declined to adopt national provisioning intervals for virtual collocation and collocation augments, WorldCom's proposed measurement would impose such average intervals. *See* Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 17806, 17824, ¶ 32, 17826-27, ¶ 37 (2000). Moreover, the 90 calendar day physical collocation interval WorldCom proposes does not necessarily correspond to the intervals to which ILECs are actually subject in various states.

26. NXX/LRN Loaded by LERG Effective Date

This measurement does not correspond to any measurement the Commission has proposed, and there is no reason for the Commission to adopt such a measurement. In any event, WorldCom has proposed a standard of 100 percent for this measurement, even though the 1996 Act does not require perfect service. In addition, contrary to WorldCom's claim (at 58) that the "ILECs that have this metric also have adopted the 100% standard," a parity standard applies to the NXX Update measurement in New Jersey. Accordingly, if the Commission were to adopt this measurement, a parity standard should apply. Finally, given the relatively low volume of such updates, reporting should be no more frequent than quarterly, in order to ensure statistically valid samples.

27. Timeliness of Daily Usage Feed

This measurement does not correspond to any measurement the Commission has proposed, and there is no reason for the Commission to adopt such a measurement. In any event, WorldCom's proposed standard clearly goes beyond the requirements of the Act. The comparable New York measurement requires 95 percent of daily usage files to be transmitted within four business days, and the New York PSC has explained that the standards it set go beyond the requirements of the Act. WorldCom's proposed standard of 98 percent within 3 calendar days clearly requires superior service.

28. Timeliness of Carrier Invoice

This measurement is similar to Verizon's proposed Timeliness of Carrier Bill measurement. *See* Verizon Comments at A-32. However, there is no need to disaggregate this measurement by bill medium, as WorldCom proposes. Indeed, WorldCom's proposed business rules only consider a bill to be timely if it is sent in the proper format and medium. Therefore, this measurement should only apply to the CLEC's chosen format and medium for its bill of record, as Verizon proposed. In addition, WorldCom's proposed standard is equal to that in the New York Guidelines, and the New York PSC has explained that the standards it set go beyond the requirements of the Act. Verizon's proposed standard of 95 percent within 10 days is sufficient to provide CLECs with a meaningful opportunity to compete. *Cf. Texas Order*, 15 FCC Rcd at 18462-63, ¶ 212 n.390.

29. (a) Billing Error Correction Requests Acknowledged in X Hours
(b) Billing Errors Corrected in X Days

These two measurements do not correspond to any measurement the Commission has proposed, and there is no reason for the Commission to adopt such measurements. Similar measurements have only recently been adopted in a few of Verizon's states, although the Verizon measurement addresses billing claims that are resolved. These measurements are currently undergoing a six-month trial in other states, as a result of the collaborative efforts of the New York Carrier Working Group. Accordingly, it is premature to adopt such measurements nationwide. WorldCom also fails to recognize that CLECs frequently wait months before submitting a claim. Because of the volume of data handled by the billing systems, older data may have been archived and may need to be retrieved, adding to the time necessary to investigate a claim.

In any event, WorldCom's proposed standards go well beyond the requirements of the Act and are substantially more stringent than the measurements that were developed in the New York Carrier Working Group, of which WorldCom is a participant. Those measurements set a standard for 95 percent of CLEC billing claims acknowledged within two business days and a standard of 95 percent of billing claims resolved within 28 calendar days after acknowledgement. In contrast, WorldCom proposes a standard of 98 percent of CLEC billing claims acknowledged within 24 hours and correction of 95 percent of errors by the next carrier bill, which could be due as early as the following day and, therefore, could not provide the necessary time for the resolution of the CLEC's claim and the implementation of any corrections. In addition, WorldCom's proposed measurement fails to recognize that CLECs can submit claims for billing adjustments in error and, therefore, that resolution of a billing claim need not result in any correction or retransmission of the CLEC's bill.