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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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

REPLY COMMENTS OF ALLEGIANCE TELECOM, INC.

Kevin M. Joseph
Mary C. Albert
ALLEGIANCE TELECOM, INC.
1919 M Street, N.W.
Suite 420
Washington, D.C. 20036
(202) 464-1800

Thomas Jones
Christi Shewman
Kelly N. McCollian
WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
(202) 328-8000

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REPLY COMMENTS OF ALLEGIANCE TELECOM, INC.

Allegiance Telecom, Inc. ("Allegiance"), by its attorneys, hereby submits these reply comments in response to the Notice of Proposed Rulemaking[1] in the above-referenced proceeding.

I. INTRODUCTION

It is clear from the comments that the Commission has a basic decision to make in this proceeding. On the one hand, competitive interests see this proceeding as an opportunity to improve the existing enforcement regime for wholesale service quality. There are certainly differences in the details of the competitive carriers' approach, but they generally support allowing the states to continue to enforce wholesale service quality rules while at the same time

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[1] *See Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, Notice of Proposed Rulemaking, FCC 01-331 (rel. Nov. 19, 2001) ("NPRM").

establishing federal rules that complement the state rules. Allegiance, for example, has argued that this is best accomplished by adopting federal rules designed to spread best practices in the provision of wholesale inputs needed for facilities-based competition and by improving federal enforcement.

On the other hand, the ILECs (especially SBC, Verizon, and BellSouth) view this proceeding as an opportunity to cripple the existing enforcement regime for wholesale service quality. They restate the tired argument that regulatory oversight of wholesale service quality is overly burdensome, citing unverifiable and doubtless inflated dollar figures for their compliance costs. The real answer, they claim, is to preempt the bothersome state performance rules that are the basis for Section 271 approvals and whose continued application the Commission has repeatedly relied on as justifying the conclusion that granting Section 271 applications is in the public interest. ILECs assert that the state rules should be replaced with a stripped down set of aggregated and unaudited federal requirements that, they assert, can be subject to virtually no enforcement.

Choosing between these two approaches should be easy. The ILECs unquestionably have the incentive to degrade the quality of their rivals' wholesale inputs. State regimes and the BOC merger conditions are helpful, but they have not, by themselves, changed the ILECs' incentives. SBC, Verizon, and others continue to pay millions of dollars in fines for repeated failures to comply with applicable performance standards. Former Commissioner Susan Ness put it quite plainly: such fines are "effectively a cost of doing business for the big companies."[2]

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[2] *See* Keith Epstein, *Cheating or Competing?*, Washtech.com (Feb. 1, 2002) <http://washtech.com/news/telecom/14977-1.html> ("*Cheating or Competing*?").

The Commission can diminish the ILECs' opportunities and incentives to engage in non-price discrimination by establishing performance measurements, standards, and reporting requirements (collectively "performance rules") designed to spread best practices and that apply in states where performance rules are inadequate. Moreover, such federal performance rules should form the basis for swift, severe, and certain federal enforcement. In adopting such a regime, the Commission should reject the numerous transparent ILEC arguments contained in the comments (and discussed below) designed to limit the effectiveness of national performance rules.

Finally, the Commission must also prevent the ILECs from using this proceeding as yet another means of raising their rivals' costs by causing performance rules to apply to CLECs. CLECs lack any incentive to degrade the quality of the services they provide. In fact, CLECs have the incentive to improve service quality because the level of a CLEC's service quality determines whether it succeeds in the marketplace. There is therefore no basis for applying performance rules to competitive carriers.

II. NATIONAL PERFORMANCE RULES AND PENALTIES MUST ALLOW STATES TO CONTINUE TO ENFORCE SERVICE QUALITY RULES WHILE SPREADING BEST PRACTICES AND INCREASING FEDERAL ENFORCEMENT.

As Allegiance and others explained in their comments, the states have made very significant progress in establishing and enforcing performance measurements, standards, and reporting requirements (collectively, "performance rules").[3] *See* Allegiance Comments at 7-8. The current state regimes are the product of "thousands of hours of meetings and discussions" among regulators, ILECs, and competitors as well as formal hearings and arbitrations. *See*

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[3] As used in these comments, the terms performance measurements, standards, benchmarks, and reporting requirements have the meanings attributed to them in the NPRM. *See* NPRM at n.2.

Qwest Comments at 6. These regulatory regimes are not perfect, most notably because they do not include high enough penalties to eliminate the ILECs' incentive to discriminate. But they are at least a sound framework for enforcement. Moreover, as Allegiance explained, the states have certain inherent comparative advantages over the Commission in developing performance rules and penalties. *See* Allegiance Comments at 8. These comparative advantages allow the states to respond more quickly than the Commission could to problems in the marketplace as they develop. States are very much the first line of defense for competition, and it would be a grave error to disarm them.

But this is exactly what several of the ILECs have asked the Commission to do. In different ways, Verizon, SBC, and BellSouth all urge the Commission to occupy the field of performance rules and (subject to some limited exceptions discussed below) replace *all* state rules and penalties with a core set of federal rules.[4] In so doing, the ILECs rely on inflated rhetoric regarding the burdens they bear in complying with state performance measurements that they claim include numerous reporting requirements of no competitive significance.[5] But these are issues that are best left to the states in the first instance. The states are constantly exposed to the details of interconnection and unbundling in their capacity as arbitrators and enforcers of interconnection agreements. Moreover, their more detailed Section 271 proceedings combined with the fact that they have oversight of one state only (rather than the entire country, as the Commission has), further confirm the states' comparative advantage in this area. The states are

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4 *See* Verizon Comments at 32-36; SBC Comments at 9-11; BellSouth Comments at 15-16.

5 There are many cases where state performance rules and penalties have been established in a comprehensive multi-state manner that limits the ILEC's compliance burden. Qwest, for example, explains that a regional oversight committee has developed apparently uniform performance rules for participating states in the Qwest region. *See* Qwest Comments at 5-10. *See also id.* at 18 ("for the most part the measurements described herein are standard across Qwest's territory").

fully capable therefore of establishing performance measurements and standards that are appropriately tailored to ensure ILEC compliance with the Act. Where the existing state regimes are too limited, the states can promptly fill holes, and where their performance rules include duplicative and unnecessary reporting requirements, they can and do eliminate unnecessary requirements. Indeed, at least Verizon has been forced to admit as much. *See* Verizon Comments at 33. In addition, Commission preemption of "state [performance assurance plan] efforts would be premature, have the potential to disrupt ... important negotiations, and create comity concerns between the Commission and the states." Qwest Comments at 4.

Central to the argument in favor of complete preemption is the assertion that any judgment made by the Commission that a particular performance measurement should not be adopted "necessarily represents a determination that the measure is not critical to competition, and therefore is superfluous." SBC Comments at 9. But it would be terrible policy to reach this conclusion. The ILECs have the incentive to constantly change the manner in which they resist competitive entry. The problem is particularly acute in situations where the nature of wholesale inputs changes, either because of changes to the underlying ILEC network or because the needs of CLECs change. But even absent such changed circumstances, ILECs have shown a willingness and ability to come up with new ways of preventing CLECs from obtaining old inputs. The problems that numerous commenters have discussed regarding Verizon's "no facilities" rejection of loop orders is a classic example of this behavior.[6] For the reasons described, the states are generally better informed as to the nature of these problems. The states must therefore be given the flexibility to respond with specific state performance rules and

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6 *See, e.g.*, Comments of Business Telecom, Cavalier, DSLnet, Network Telephone, and RCN at 17-20; Comments of Focal, Pac-West, and US LEC at 44-45; XO Communications Comments at 8.

penalties. In addition, the states have already established numerous performance assurance plans that the Commission has repeatedly recognized to be important protections against backsliding.[7] Given the obstacles associated with establishing a truly self-enforcing performance assurance plan at the federal level, it would be counterproductive to say the least to preempt state penalty plans.

Moreover, as Verizon explains at length, it is not at all clear that the Commission has the authority to occupy the field of performance measurements. It is one thing for the Commission to rule that all ILECs must comply with certain defined best practice performance requirements, thus preempting any state rule that establishes a more lenient standard for a particular measurement. Preemption is clearly appropriate here, since a more lenient state standard could not be separated from the inconsistent federal rule.[8] But it is quite another thing to attempt to occupy the entire field of performance rules and penalties. As Verizon explains, there are numerous provisions of the 1996 Act that can be read to preserve state authority to adopt performance rules and penalties that do not directly conflict with federal requirements.[9] These provisions at least demonstrate that there is considerable doubt as to the extent of the Commission's authority in this area. This fact further supports the view that the costs of complete preemption of state performance rules and penalties outweigh any purported benefits.

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7 *See Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region InterLATA Services in Texas*, Memorandum Opinion and Order, 15 FCC Rcd 18354, ¶ 420 (2000) ("*Texas 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*, Memorandum Opinion and Order, 15 FCC Rcd 3953, ¶ 429 (1999) ("*New York Order*").

8 *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 376 n.4 (1986) (recognizing that, where it is "not possible to separate the interstate and the intrastate components of the asserted FCC regulation," FCC may preempt inconsistent state rules).

9 *See* Verizon Comments at 47-51 (discussing Sections 251(d)(3)(C), 261(c), 252(e)(3), 253(b), and 271).

Furthermore, it is both sound policy and consistent with the statutory framework that the Commission continue to rely on the states to establish performance rules and penalties for purposes of determining whether a BOC meets the requirements of Section 271. As SBC explains, it "would be unnecessarily disruptive to the section 271 process to alter the performance measurements used in the evaluation of a section 271 application during the midst of a state or federal section 271 proceeding." SBC Comments at 11. Preventing the states from establishing their own performance rules and penalties for purposes of Section 271 would also undermine the states' ability to fulfill their responsibility to determine whether a BOC has complied with the competitive checklist. *See* 47 U.S.C. § 271(d)(2)(B). As mentioned, ILEC anticompetitive behavior is likely to take different forms over time, and the nature of CLEC inputs is also likely to change. While a set of federal performance rules may adequately track all competitive problems that have been encountered as of the time the federal rules are established, new problems are likely to subsequently arise. States cannot adequately evaluate a BOC's compliance with the competitive checklist unless they have the freedom to introduce new performance measurements and penalties to ensure that such problems have been resolved as of the Section 271 filing for a particular state. In sum, as Verizon concedes, "the fact that section 271 requires the Commission to consult with states in making any determination of compliance with the competitive checklist suggests that states must have a degree of independence from the Commission's rules in determining whether ILECs are complying with the requirements of section 271 -- if they do not, the Commission could gain little from such consultation." Verizon Comments at 50-51.

But while the states must be allowed to continue their important and innovative work, there is a critical, and as yet unmet, need for federal performance measurements and standards.

As Allegiance explained in its comments, the Commission's performance rules should require the spread of best practices throughout the country in areas of wholesale activity most critical to facilities-based competition. *See* Allegiance Comments at 9. Those rules should apply in states that do not have performance rules applicable to a particular wholesale input and where existing state performance standards are more lenient than the federal standard.

The spread of best practices is even appropriate in situations where parity has sometimes been deemed an acceptable standard. As Allegiance explained in its comments, mean time to repair is one performance measurement to which the parity standard has been inappropriately applied. *See* Allegiance Comments at 21-22. For example, the New York Public Service Commission ("NYPSC") has adopted a parity standard for wholesale mean time to repair service. However, it has adopted a benchmark for ILEC retail repair service that serves as a boundary for the wholesale parity standard. For retail customers, the NYPSC requires 80 percent of out of service repairs to be completed within 24 hours and 80 percent of other service affecting repairs to be completed within 48 hours.[10] As a result, Verizon routinely sends 48 hour repair commitment times to CLECs for wholesale repair service. First, as described in Allegiance's comments, CLECs must perform repair functions before and after the actual ILEC-performed repair. Therefore, a parity standard does not truly ensure equality, since the CLEC customer that must wait longer for the repair to be completed. Second, this example demonstrates the need to spread best practices. The New York standard is so lenient, it provides CLECs with no predictability as to the timing of repairs that they can in turn convey to their customers. Allegiance does not know if Verizon will repair a facility in 48 hours or 30 hours. A more stringent time frame requirement would reduce this problem. Indeed, while the Ohio and

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[10] *See* N.Y. Comp. Codes R. & Regs. tit. 16, § 603.3(c)(1), (d)(1) (2001).

Illinois repair requirements are in many ways flawed (in part because they impose unnecessary service quality regulations on CLECs), they at least include shorter repair intervals for the ILEC.[11] Such shorter intervals should become baseline performance requirements in all states.

In addition, as many commenters point out, there is a very significant need to augment existing state enforcement mechanisms with federal enforcement. *See, e.g.,* AT&T Comments at 23-27; WorldCom Comments at 20-21. Such enforcement is simply not possible in the absence of established federal performance measurements and standards. Thus, for all states, ILECs should provide the Commission with performance reports. Where, as would usually be the case, state rules already require ILECs to report results in a performance measurement, the state report would be provided to the Commission (or possibly reformatted to make all federal reporting uniform). This approach is eminently practical. As Qwest points out, it is feasible for ILECs to submit to the Commission the reports required by each state in a uniform format required by the Commission. *See* Qwest Comments at 18. The Commission would then simply apply the federal standard to the state report to determine whether performance meets the requirements of federal law. Separate federal reporting requirements would only apply in the absence of existing state reporting requirements for a particular measurement. Finally, third-party experts should be employed to provide regular reports on ILEC wholesale activity as a whole. *See* Allegiance Comments at 32-36.

Thus, the Commission should not attempt to occupy the field in the area of performance rules. Instead, it should adopt an approach that offers the states flexibility to continue to make

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11 *See* 22 Ill. Comp. Stat. 5/13-712(e)(1); 83 Ill. Admin. Code Sec. 732.30(a) (requiring a carrier to credit the customer if it fails to repair an out-of-service condition for basic local exchange service within 24 hours); Ohio Admin. Code Sec. 4901:1-5-16 (requiring customer credits for local exchange service outages).

progress in establishing and refining performance rules and penalties while at the same time ensuring the spread of best practices and more effective federal enforcement.

III. THE COMMISSION SHOULD REJECT ILEC ATTEMPTS TO PLACE INAPPROPRIATE LIMITATIONS ON THE EFFECTIVENESS OF NATIONAL PERFORMANCE RULES.

The ILECs offer numerous purported bases for artificially limiting the scope of the performance rules to be adopted in this proceeding. As explained below, these arguments are simply attempts to undermine any possible national performance regime and should be rejected.

A. The ILECs' Proposed Methodologies For The Establishment Of National Performance Rules Should Be Rejected.

The ILECs propose several methodologies for developing performance rules that would only render those rules ineffective. For example, Verizon argues that the Commission should not adopt performance measurements that are correlated. *See* Verizon Comments at 14. Such comprehensive performance rules are not needed, it argues, because CLECs are fully capable of "seeking remedies before the Commission, state commissions, and the courts for any perceived disparities in [wholesale] performance." *Id.* at 15. In fact, many competitors are very reluctant to complain about ILEC wholesale performance for fear that ILEC retaliation will ultimately make them worse off.[12] Even those CLECs that seek remedies from the Commission have generally been unable to *obtain* them.[13] The reason of course is that, without federal performance measurements and standards, it is virtually impossible to determine which disparities in wholesale performance violate the law.

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[12] Indeed, competitors often will not even agree to be quoted in news articles describing ILEC anticompetitive practices because they fear ILEC retaliation. *See Cheating or Competing*?

[13] *See Ex Parte* Letter from Jason Oxman, Covad Communications Company, to Magalie Roman Salas, FCC, CC Docket No. 96-98, at 1-2 (Oct. 1, 2001) (explaining that Covad cannot successfully bring complaints for the ILECs' discriminatory conduct in the absence of performance measurements and standards).

Verizon also argues that disaggregated performance measurements are not needed because ILEC discrimination would be "easily detected" by regulators and "severely punished." Verizon Comments at 16-17. Discrimination is not "easily detected" or easily proven. As former FCC Chief Economist Joseph Farrell has described it, discriminatory behavior by an upstream monopolist is "hard to regulate away, because withdrawal of cooperation from rivals may be subtle, shifting, and temporary, but yet have real and permanent effects."[14] Discrimination is especially difficult to prove because the ILECs invariably control the information needed to determine whether a particular act is unreasonable. As Michael Katz, another former FCC Chief Economist, has explained (writing with Steven Salop), "the information needed to regulate ILEC behavior may be extremely difficult to obtain."[15] Professor Marius Schwartz has observed further that "the information available to outsiders, such as regulators and courts, about the [regulated] firm's capabilities and conduct is vastly inferior to the firm's. . . . To eliminate its informational disadvantage entirely, the regulator would have to become the firm."[16] Excessive aggregation hides discrimination and therefore does nothing to solve the problem of access to information.

Moreover, where the regulator does not have easy access to information, punishment is likely to be slow in coming and sporadic at best, and it will not outweigh the significant benefits an ILEC gains from discrimination. As former FCC Commissioner Susan Ness recently stated, "there are 50,000 ways of dragging one's feet when it comes time to really play the game and

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14 Joseph Farrell, *Creating Local Competition*, 49 Fed. Comm. L.J. 201, 207 (1996) ("Farrell").

15 Declaration of Michael L. Katz and Steven C. Salop, *Using a Big Footprint to Step on Competition: Exclusionary Behavior and the SBC-Ameritech Merger*, Petition to Deny of Sprint, CC Docket No. 98-141, Attachment B at 35 (Oct. 15, 1998) ("Katz & Salop").

16 Marius Schwartz, *The Economic Logic for Conditioning Bell Entry into Long Distance on the Prior Opening of Local Markets*, 18 Journal of Regulatory Economics 247, 267 (2000) ("Schwartz").

allow competition." *See Cheating or Competing*? Punishing this behavior on a case-by-case basis is very hard for the Commission. As Ness describes it, "[s]ometimes Verizon and the other Bells have been in violation of the rules . . . [b]ut by the time the rules get enforced the company [that is the victim of the illegal behavior] is out of business. And sometimes the rules are vague and don't address the issue. It can take forever to get a matter resolved at the FCC." *Id.* Moreover, CLEC participation in enforcement proceedings is very costly. In order to prove ILEC deficiencies, CLECs must divert attention from production and internal operational efficiencies to the tracking of performance measurements and the filing of complaints. Allegiance has found these endeavors to be extremely costly and to require hundreds of hours of manual tracking, expert testimony, and more.

Verizon asserts that it is "implausible" that it could engage without detection and punishment in discrimination that causes CLECs to lose customers. But CLECs can and do lose customers from ILEC behavior that goes unpunished. For example, as Allegiance explained in its comments, ILECs often fail to keep accurate records of which central office facilities used to connect CLEC collocated equipment to unbundled loops are actually being used by the CLEC. It has been Allegiance's experience that an ILEC will port Allegiance customers back to the ILEC without updating its internal database to indicate that the central office wiring used to serve the customer is no longer needed to serve the CLEC customer. This omission causes the ILEC's database to indicate that the facilities in question are used to serve the CLEC's customers when these customers are actually being served by the ILEC. When a CLEC seeks to reuse these facilities for a new customer, the ILEC rejects such requests based on the (incorrect) conclusion that there are inadequate facilities to serve the customer. Thus, an ILEC's failure to keep accurate records as to the use of central office wiring used by CLECs effectively places artificial limits on the number of customers a CLEC can serve out of that central office and adds unnecessary rejects and rework to the provisioning process. Yet this kind of behavior is not specifically prohibited by any federal or state law, and thus detection does not lead easily to punishment.

But the harm is even worse than the loss of customers. This kind of behavior also directly increases CLECs' costs, since while the ILEC's database indicates that central office wiring is still used by the CLEC, the ILEC continues to charge the CLEC for that facility.[17] Paying unnecessary fees of this sort prevents a CLEC from investing in its own facilities and entry in new markets. Furthermore, the larger the ILEC's service territory, the more it can capture the benefit of this form of anticompetitive behavior and the more likely it is to engage in it.[18] Here again, the CLEC's entry is restricted by ILEC behavior that, in the absence of appropriate performance rules, goes unpunished.

Moreover, ILEC attempts to prevent the adoption of meaningful performance standards have no more merit than their attempts to prevent the adoption of meaningful performance measurements. To begin with, SBC argues that the Commission should at most limit itself to establishing performance measurements and should not set performance standards at all. *See* SBC Comments at 32-35. But this proceeding would be essentially meaningless if the

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[17] SBC has implicitly admitted its responsibility for this problem in the Ameritech territory, but nonetheless has proposed a solution that would require CLECs to bear the expense of fixing it. *See* Ameritech Accessible Letter, (Ordering and Provisioning) Collocation Connecting Facility Assignment (CFA) Inventory Report - Illinois, Indiana, Michigan, Ohio, Wisconsin, CLECAM01-087 (Mar. 29, 2001).

[18] *See Applications of Ameritech Corp. and SBC Communications Inc. for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules,* Memorandum Opinion and Order, 14 FCC Rcd 14712, ¶ 60 (1999), *vacated on other grounds, Ass'n of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001) ("*SBC/Ameritech Order*"); *Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, 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*, Memorandum Opinion and Order, 15 FCC Rcd 14032, ¶ 96 (2000) ("*Bell Atlantic/GTE Order*").

Commission merely adopted performance measurements without associated standards. The Commission should soundly reject any proposal that would leave the Commission without the tools for certain, swift, and severe punishment of violations of the ILECs' statutory unbundling obligations.

Furthermore, the Commission should reject arguments that it cannot apply uniform best practice performance standards to all Tier I/Class A ILECs for wholesale inputs for which no retail analogue exists. *See* Verizon Comments at 20-27. The Commission has repeatedly concluded that relying on a comparative analysis of ILEC performance is a reasonable means of defining ILECs' obligations under the Act.[19] As the Commission has explained,

> [C]ourts, federal and state regulators, and competitors have consistently recognized comparative practices analysis as a crucial tool, and have employed such analyses, to set industry standards and policy, detect discriminatory behavior, and promote competition.

SBC/Ameritech Order ¶ 125. The Commission has further explained that, "because they face similar statutory obligations and market conditions, [major ILECs] remain uniquely valuable benchmarks for assessing each other's performance." *Bell Atlantic/GTE Order* ¶ 129. Moreover, federal courts have affirmed the use of benchmarking to detect discrimination.[20]

In fact, since the passage of the 1996 Act, the Commission has several times relied on comparative analysis to define the ILECs' obligations to meet the "just and reasonable"

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19 *See SBC/Ameritech Order* ¶¶ 101-85; *Bell Atlantic/GTE Order* ¶¶ 127-72.

20 *United States v. Western Elec. Co.*, 993 F.2d 1572, 1580 (D.C. Cir. 1993) ("federal and state regulators have in fact used such benchmarks in evaluating compliance with equal access requirements ... and in comparing installation and maintenance practices for customer premises equipment.") (citation omitted); *see also United States v. AT&T*, 1982-2 Trade Cas. (CCH) ¶ 64,980, 1982 WL 1893 at *2 n.8 (filed with D.C. Cir. Aug. 23, 1982) (using benchmarking to support decision to allow RBOCs to market CPE). In some circumstances, BOCs have even supported benchmarking as a means of decreasing regulation. *See SBC/Ameritech Order* ¶ 126 ("SBC further asserted that the seven RBOC benchmarks provide 'an effective deterrent against even subtle attempts to abuse any advantages that might arise from the ownership of local exchange telecommunications facilities.'") (citation omitted).

requirements of Section 251(c). For example, in defining an ILEC's collocation obligations, the Commission ruled that "the deployment by any [ILEC] of a collocation arrangement gives rise to a rebuttable presumption in favor of a [CLEC] seeking collocation in any [ILEC] premises that such an arrangement is technically feasible."[21] The Commission also used a "best practices" approach to the technical feasibility of subloop unbundling. In the *UNE Remand Order*, the Commission established a "rebuttable presumption that, once one state has determined that it is technically feasible to unbundle subloops at a designated point, it will be presumed that it is technically feasible for any [ILEC], in any other state, to unbundle the loop at the same point everywhere."[22] A "best practices" approach to the performance measurements and standards at issue in this proceeding is equally reasonable to assure ILEC compliance with their statutory obligations to provide wholesale inputs to competitors on "just and reasonable" terms and conditions.

B. ILEC Attempts To Narrowly Define Specific Performance Measurements And Standards Should Be Rejected.

As to the specific performance measurements and standards proposed by Allegiance, those proposals are widely supported by the commenters. In several cases, however, the ILECs

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21 *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 4761, ¶ 45 (1999) ("We believe this 'best practices' approach will promote competition. Thus, for example, a [CLEC] seeking collocation from an [ILEC] in New York may, pursuant to this rule, request a collocation arrangement that is made available to competitors by a different [ILEC] in Texas, and the burden rests with the New York [ILEC] to prove that the Texas arrangement is not technically feasible."), *aff'd in part, vacated in part on other grounds, GTE Service Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000). The best practices presumption applies to the extent that collocation requirements were upheld in this appeal.

22 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, ¶ 227 (1999) ("*UNE Remand Order*") ("For example, Texas requires subloop unbundling at the remote terminal. If a [CLEC] seeks unbundled access to a subloop at the remote terminal from an [ILEC] in New York, the burden rests with the New York [ILEC] to prove that its own situation differs to such an extent that the Texas arrangement is not technically feasible. We believe that this 'best practices' approach insures the [ILECs] do not limit access to subloops based on unforeseeable technological and infrastructure developments.") (citations omitted).

have tried to argue that specific wholesale functionalities covered by the Allegiance proposal should not be subject to national performance rules. Those arguments are without merit.

1. Ordering Measurements

In its comments, Allegiance proposed four ordering measurements critical to facilities-based competition: (1) Percent On Time LSRC/FOC; (2) Serial Rejects on the Same Order; (3) Timely Jeopardy Notifications; and (4) FOC Interval After "No Facility" Jeopardy Notification. The record supports adoption of these measurements and the associated standards. First, an order notifier timeliness measurement was widely recognized by commenters as a key measurement.[23] However, Verizon's comments included two proposals related to this measurement that should be rejected. Verizon argues that this measurement should be combined with a reject notification timeliness measurement. To begin with, a reject notification measurement need not be adopted. But, even if such a measurement is adopted, it is important that the LSRC/FOC notification measurement be kept separate in order to ensure that the resulting data accurately reflects performance on only this measurement.[24]

In addition, Verizon proposes a 90 percent benchmark for LSRC/FOC timeliness. It is widely accepted that service at that level will not provide competitors a meaningful opportunity to compete. For example, the Texas Commission set a standard of 95 percent for its order confirmation timeliness measurement to ensure that competitors are afforded a meaningful opportunity to compete in Texas. *See Texas Order* ¶ 172. Even this standard is not fully

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[23] *See* Verizon Comments at 56; SBC Comments at 13-14; BellSouth Comments at 32-37; *see also* Qwest Comments at 19-20 (explaining that, although Qwest does not support federal measurements, this measurement is an important part of Qwest's state performance plans); *see also* WorldCom Comments at 42-44.

[24] *See, e.g.*, BellSouth Comments at 37 (explaining that BellSouth believes that separate measurements for FOC timeliness and rejects is the best means to determine whether an ILEC is providing nondiscriminatory service).

satisfactory. Accordingly, the Commission should adopt the more exacting standard -- 98 percent -- proposed by Allegiance.[25]

Moreover, CLECs experience high volumes of jeopardies after receiving order confirmations for loops because ILECs generally do not check the availability of facilities before confirming an order. *See* Allegiance Comments at 12-14. As a result, the CLEC inconveniences its customer by first informing the customer of the committed due date and then rescheduling the due date after the order is placed in jeopardy status. Therefore, the Commission should require that an LSRC/FOC not be deemed timely unless the ILEC has performed a pre-LSRC/FOC facilities check. As Allegiance described in its comments, Pacific Bell has implemented a process that, while not ideal, could serve as a best practice on which the Commission could base a facilities check requirement. Indeed, Verizon appears to support a pre-LSRC/FOC facilities check approach to this measurement. In its proposed Order Notifier Timeliness measurement, Verizon proposes intervals that vary depending on whether a facilities check is performed for the order. *See* Verizon Comments, Appendix A at A-5. For example, Verizon proposes an interval of 24 hours for UNE POTS orders with no facility check and 72 hours with a facility check. Although Verizon's proposed measurement implicitly supports the need for pre-LSRC/FOC facilities checks, its proposed intervals are insufficient. Allegiance's proposal of 48 hours for

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25 BellSouth argues that unsolicited FOCs, ILEC test orders, and disconnect service requests should not be exclusions from this measurement. *See* BellSouth Comments at 35. To the contrary, both ILEC test orders and disconnect service requests should be exclusions, because including these in the measurement would result in skewed data that could overstate the quality of the ILEC's service. Test orders may well show artificially high performance levels, since they are not conducted under the stress of normal commercial activity. Disconnects also would probably show artificially high performance levels since they require simpler wholesale functionalities than provisioning functionalities and include no manual labor. Allegiance agrees that unsolicited FOCs should not be excluded but the Commission should ensure that the interval for unsolicited FOCs is measured from the time that the LSR is submitted.

LSRC/FOCs with facilities checks both allows CLECs a meaningful opportunity to compete and is a reasonable benchmark for ILECs as demonstrated by Pacific Bell's practice.[26]

Second, Allegiance proposed a new measurement to address serial rejects on the same order. Although commenters generally did not address a similar measurement, Allegiance's experience demonstrates that this measurement is needed to avoid unnecessary delay in order processing that impedes the CLEC's opportunity to compete with the ILEC. As Allegiance discussed in its comments, both Qwest and Pacific Bell have adopted procedures that could be a starting point for establishing a best practice for this measurement. *See* Allegiance Comments at 15-16.

Third, Allegiance proposed a Timely Jeopardy Notifications measurement to measure the extent to which CLECs are notified in advance of missed installation appointments. *See id.* at 16-17; WorldCom Comments at 44-45. Several commenters argue that the Commission should not adopt the related, but nonetheless quite different, performance measurement suggested in the NPRM: percentage of total orders placed in jeopardy status. *See* NPRM ¶¶ 43-45. Whatever the merits of these arguments, the Commission should adopt a measurement tracking the timeliness of jeopardy notices. As several ILECs recognize, this measurement gauges ILEC performance on a critical function for facilities-based competitors. *See* Verizon Comments at 36; SBC Comments at 15-16. The Commission should, however, reject BellSouth's suggestion that jeopardies on the due date should be excluded from a jeopardy measurement. *See* BellSouth Comments at 42. This measurement must include jeopardies reported on the due date if it is to accurately measure an ILEC's performance. Taken to its logical extreme, the exclusion

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26 If the Commission decides not to require a facilities check, Allegiance proposes a 24-hour interval, which is again a reasonable expectation of ILEC performance based on the best practices of Pacific Bell. *See* Allegiance Comments at 14.

for jeopardies sent on the due date would create the perverse incentive to delay notification to the CLEC until the due date. Such delay would jeopardize the CLEC's relationship with its customer and violate the ILEC's obligation to provide just and reasonable service.

Fourth, the Commission should adopt a measurement of FOC Interval After "No Facility" Jeopardy Notification to allow a CLEC to determine whether it is receiving nondiscriminatory access to UNEs following a "no facility" jeopardy notification. The Timely Jeopardy Notifications and FOC Interval After "No Facility" Jeopardy Notification measurements are needed because "no facilities" jeopardies are far too common in practice. There is broad agreement among commenting parties that delays associated with "no facilities" situations have become an important obstacle to the growth of facilities-based competition.[27] Accordingly, the Commission should adopt these proposed measurements and the facilities check requirement discussed above to limit the ILECs' opportunities to discriminate in "no facilities" situations.

2. Provisioning Measurements

Allegiance's proposal included five provisioning measurements that measure the most critical provisioning functions for facilities-based competitors: (1) Installation Interval; (2) Timely Coordinated Hot Cut Conversions for UNE Loops; (3) Delay Days on Missed Installation Due Dates; (4) Orders Completed on Time; and (5) Quality of Conversion/Installation. Discriminatory access to the functions measured by these performance measurements denies competitors a meaningful opportunity to compete in the marketplace by causing irreparable harm to a CLEC's customer relationships and commercial reputation.

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[27] *See, e.g.,* Comments of Dynegy Global Communications, e.spire, ITC^Deltacom, KMC, Metromedia Fiber Network Services, Nuvox, Talk America and Z-Tel at 9.

First, an installation interval is necessary to ensure that ILECs are providing nondiscriminatory access to unbundled loops. *See* WorldCom Comments at 47-48. Even SBC appears to agree that establishing such an interval is appropriate. *See* SBC Comments at 18.

Second, there is no more important measurement than the Timely Coordinated Hot Cut Conversions for UNE Loops measurement. *See* WorldCom Comments at 48-49. Although some commenters include hot cuts in their proposed Percentage On Time Performance measurement, that measurement does not adequately track nondiscriminatory performance of hot cut conversions. *See* Verizon Comments, Appendix A at A-12. Coordinated conversions must not only be completed on the committed due date, but within a reasonable window of time on the due date. As Allegiance explained, the length of the cutover window should be adjusted to the number of loops in an order to minimize the time the customer is without dialtone. Customers, especially business customers, will not tolerate significant service outages during the cutover process. Allegiance's proposed Timely Coordinated Hot Cut Conversions for UNE Loops measurement captures this aspect of order timeliness.

Third, while commenter reaction to the Delay Days on Missed Installation Due Dates measurement was mixed, opponents of the measurement offer little of substance in support of their opposition. On the one hand, SBC supports such a measurement.[28] On the other hand, Verizon opposes the measurement, arguing that it is not needed because it is highly correlated with the Percentage on Time measurement. *See* Verizon Comments at 57. This argument is easily rejected. To be sure, the two measurements are related insofar as they both concern missed due dates. But the two measurements track completely different and independently

[28] *See* SBC Comments at 20-21. SBC argues that this measurement should include only new connect, change orders, and transfer orders. It is not clear what SBC means by these terms. In any event, this measurement should include all conventional wholesale functions, including hot cut conversions.

significant aspects of missed due dates. The Percentage on Time measurement tracks how often an ILEC meets the due date commitment. Delay Days on Missed Installation Due Dates tracks the degree of delay and helps detect discrimination in the ILEC's treatment of orders on which the due date has been missed. Both measurements are needed to provide a complete picture of ILEC performance.

Fourth, commenters widely agree that timely order completion by the committed due date is a critical measurement.[29] The Orders Completed on Time measurement should therefore be adopted. However, SBC argues that "customer not ready" ("CNR") situations should be excluded from this measurement. This approach allows ILEC gamesmanship by claiming a CNR exclusion when in fact the CLEC's customer was available at the appointed time. Thus, in adopting this measurement, the Commission should require that the ILEC follow established procedures to notify the CLEC of a CNR situation and to allow the CLEC a reasonable period of time to verify and to correct the problem. *See* WorldCom Comments, Appendix B at 27.

Fifth, there is broad agreement that a measurement of installation quality based on troubles reported on a facility following completion of an order should be included in any set of core performance measurements.[30] As proposed by Allegiance, this measurement should include both new stand-alone loop installations and conversions of loops already in service. However, the Commission should reduce the time period in which troubles are measured from 30 days, as discussed in the NPRM, to seven days. *See* NPRM ¶ 55. The seven-day period

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[29] *See* Verizon Comments at 57; SBC Comments at 17; BellSouth Comments at 54; *see also* Qwest Comments at 21-22 (explaining that, although Qwest does not support federal measurements, this measurement is included in Qwest's state performance plans); WorldCom Comments at 48.

[30] *See* Verizon Comments at 57; SBC Comments at 21; BellSouth Comments at 50.

allows sufficient time to determine whether the conversion or installation was completed properly while eliminating unnecessary ILEC information gathering and reporting.[31]

3. Maintenance & Repair Measurements

Commenters expressed broad support for the proposed maintenance and repair measurements supported by Allegiance: (1) Mean Time to Repair; and (2) Repeat Trouble Report Rate.[32] However, certain ILECs propose modifications to these measurements that would reduce their effectiveness. For example, SBC and BellSouth recommend that the Commission adopt a Mean Time to Repair measurement in which the end of the interval period is triggered when the service is restored rather than when the CLEC is notified of the restored service. *See* SBC Comments at 27-28; BellSouth Comments at 64. The Commission should reject this approach and require that the end point for the time measurement be 30 minutes after notification to the CLEC of the repair. CLECs need a period of time beyond notification to verify that the repair has been completed successfully. Indeed, Allegiance is currently working with several ILECs to ensure that Allegiance has the capability to check on repairs that have been completed.

Likewise, SBC proposes a 10-day measurement period for the Repeat Trouble Report Rate measurement for POTS UNEs. *See* SBC Comments at 27. A 30-day period, as proposed by Allegiance, would yield a more accurate view of the quality of the initial repair and is supported by other ILECs, including Verizon and BellSouth. *See* Verizon Comments, Appendix

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[31] The Commission should reject SBC's proposal that states be allowed to determine the time period for measurement of installation quality. *See* SBC Comments at 21. Federal enforcement will continue to be ineffective in the absence of consistent federal quality measurements. Furthermore, the Commission should reject BellSouth's argument that the measurement period be limited to five days. Five days is not enough time to be certain that service problems related to installation/conversion are captured. *See* BellSouth Comments at 51.

[32] *See* Verizon Comments at 58; SBC Comments at 26-28; BellSouth Comments at 62-66; *see also* Qwest Comments at 23-24 (explaining that, although Qwest does not support federal measurements, these measurements are included in Qwest's state performance plans).

A at A-28; BellSouth Comments at 62. Accordingly, the Commission should adopt Allegiance's maintenance and repair measurements. *See* WorldCom Comments at 52, 54.

4. OSS Measurements

Allegiance proposed two measurements to determine whether CLECs have nondiscriminatory access to ILEC electronic interfaces: (1) OSS Availability; and (2) Software Problem Resolution. *See* WorldCom Comments at 32-33, 37-38. As the Commission recognized in the NPRM, "an interface that provides responses in a prompt timeframe is necessary for competing carriers to market their services and serve their customers as efficiently and at the same level of quality as the incumbent LEC serves its own customers." NPRM ¶ 35. CLECs are only able to provide that level of quality if OSS is available on a nondiscriminatory basis and if problems encountered with software upgrades are promptly resolved.

In its comments, Verizon expresses support for an OSS Availability measurement that resembles the one supported by Allegiance except that Verizon disputes the need for disaggregation by interface type. *See* Verizon Comments at 55 & Appendix A at A-4. Yet, disaggregation by interface allows carriers to isolate problems with individual interfaces where aggregated performance data may not reveal a problem. This is particularly important because certain critical functions are available only through one interface. For example, CLECs are currently only able to access customer service records through graphical user interfaces in most (possibly all) regions. An aggregated measurement could hide discriminatory performance for this function, putting the CLEC at a competitive disadvantage.

Verizon proposes region-wide OSS Availability reporting to the extent that ILECs use region-wide OSS. *See id.* The Commission should likewise reject this proposal. State-by-state reporting is critical to ensure that ILECs do not mask poor performance in particular states and is a more practical approach given Allegiance's proposal based on state-by-state application of performance rules and penalties. Moreover, this should not be burdensome for ILECs that already report to state commissions on a state basis even though in some cases they have implemented region-wide OSS.

C. ILEC Arguments Against Mandatory, Annual Audits Are Baseless.

The Commission should require independent audits of all ILEC data filed under the performance rules adopted in this proceeding. As the Commission recognizes, "the reliability of all data gathered and stored in connection with national performance measurements" is critical. NPRM ¶ 73. It must be "valid, accurate, and reproducible." *Id.* The Commission has routinely used independent audits as "an efficient and cost-effective mechanism for providing reasonable assurances" of compliance with Commission orders. *SBC/Ameritech Order* ¶ 412; *see also Bell Atlantic/GTE Order* ¶ 336. In conjunction with other regulatory tools, independent audits would help the Commission deter and detect discrimination. *See SBC/Ameritech Order* ¶ 474. As BellSouth acknowledges, audits are necessary to "ensure that both regulators and interested parties can trust the accuracy and validity of the incumbent LEC-generated and reported data." BellSouth Comments at 69.

The Commission should reject Verizon's argument that only one initial audit should be required if that audit does not reveal significant inaccuracies.[33] This approach would eliminate any means of detecting problems with the ILEC's data (whether intentional or inadvertent) provided in subsequent years.

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[33] *See* Verizon Comments at 65; *see also* SBC Comments at 42-44 (arguing that audits are not necessary).

Moreover, Verizon's recent efforts to evade the audit requirements of Section 272(d) demonstrate the need for verifiable and open audit procedures for performance reporting.[34] Even when ILECs are subject to audit requirements, they attempt to obscure the results so that the audits are of minimal use to the Commission and competitors. Therefore, the Commission should impose a regular independent audit requirement and ensure that the audits are rigorously executed.

The Commission should scrutinize the audit results to ensure compliance with the performance rules. Penalties should be imposed for inadvertent errors in data reporting, because both Commission and CLEC resources would be wasted in analyzing inaccurate data submitted carelessly. Swift and severe punishment should also of course be imposed for any intentional misreporting discovered in an audit. Without this degree of oversight, the performance rules could be manipulated to disguise unjust, unreasonable, and discriminatory behavior and to undermine the federal enforcement regime.

Finally, ILECs should be required to bear the costs of these audits, contrary to SBC's position that ILECs should only pay for an audit if it shows that measurement results were "not substantially correct." *See* SBC Comments at 44. Indeed, ILECs are required to pay for audits to ensure their compliance with the requirements of Section 272. *See* 47 U.S.C. § 272(d)(1). That requirement reflects a Congressional recognition that it is appropriate to require ILECs to bear the costs of audits designed to ensure the integrity of the competitive process. An ILEC's

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[34] *Accounting Safeguards Under the Telecommunications Act of 1996: Section 272(d) Biennial Audit Procedures*, Memorandum Opinion and Order, FCC 02-1 (rel. Jan. 10, 2002) ("Verizon's request for confidential treatment reads the public comment process on the audit results out of the statute."); *see also SBC Communications, Inc. Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 1140, ¶ 6 (Enforcement Bureau 2000) ("The auditor's report, along with the underlying data in SBC's monthly filings, revealed numerous instances of SBC's failure to comply with the requirements of the Carrier-to-Carrier Performance Plan through the submission of inaccurate performance data."), *forfeiture imposed*, Order of Forfeiture, 16 FCC Rcd 5535 (Enforcement Bureau 2001), *aff'd*, Order on Review, 16 FCC Rcd 12306 (2001).

compliance with its statutory unbundling obligations should be neither a burden on competitors nor on taxpayers, and therefore the obligation to pay for audits is equally reasonable in the case of national performance measurements.

D. National Performance Rules Should Only Sunset For A Particular UNE When An ILEC's Unbundling Obligation Is Eliminated.

The ILECs generally assert that the national performance rules should sunset as soon as possible, but in all events when an individual measurement or the plan in general has been fully implemented.[35] These arguments are easily rejected since, at least for UNEs, the only logical sunset trigger is the removal of an ILEC's unbundling obligations under Section 251(d)(2).

The sole basis offered by the ILECs for sunseting performance rules prior to the elimination of the underlying legal obligation to unbundle is the assertion that performance rules are no longer needed once an ILEC has demonstrated it can consistently provide the input in accordance with the relevant standard. *See* Verizon Comments at 11. But this rationale is weak. As the Commission has found, one of the most important purposes of adopted performance rules is to prevent ILEC backsliding. *See Texas Order* ¶ 420; *New York Order* ¶ 429. After an ILEC has received Section 271 approval, its incentives to discriminate against CLECs remain a very serious concern. As Katz and Salop explain,

> Unless the Commission interprets the Section 271 standard as requiring that a Bell company face very substantial actual local exchange competition before being allowed to offer in-region interLATA services, a Bell company's meeting this standard will not imply that the company has a non-dominant market position. In all likelihood, CLECs and [providers of combined local and long distance service] will remain dependent on the ILEC for the UNEs they need to compete long after Section 271 approval has been granted. . . . All of the problems of detection and

35 *See* Verizon Comments at 67 (no later than two years after a carrier fully implements the national performance measurements); BellSouth Comments at 73-74 (sunset should be one to three years after implementation).

enforcement discussed above will arise whether or not Section 271 approval has been granted.

Katz & Salop at 36. Given the problems of detection and enforcement (as explained above), there is every reason to rely on performance rules long after an ILEC has purportedly proved in a Section 271 proceeding or elsewhere that it has met the statutory standard. Not only is it possible that the ILEC will simply stop performing as well as it used to, but it will also have the incentive to find new ways of degrading a competitor's access to inputs.[36]

It would only be appropriate for the Commission to eliminate the application of performance rules to a particular network element when the Commission decides that the element no longer meets the "necessary" and "impair" standards in Section 251(d)(2). Under the Commission's construction of the "impairment" test (which applies to the inputs at issue in this proceeding), an ILEC must provide a network element as a UNE until it can be demonstrated that a CLEC will not be "materially impaired" in its ability to provide the telecommunications services it wishes to provide. *See UNE Remand Order* ¶ 51. The regulations designed to limit an ILEC's ability to exploit its incentive and opportunity to raise rivals' costs by raising price are eliminated only after an ILEC demonstrates that it can meet this standard for a particular UNE. It is therefore logical that regulations designed to limit an ILEC's ability to engage in non-price discrimination would similarly sunset only when the Section 251(d)(2) standard has been met.

IV. PERFORMANCE RULES SHOULD APPLY ONLY TO TIER I/CLASS A ILECS.

Blithely ignoring the glaring irony of urging regulators to adopt completely unnecessary performance requirements, several ILECs shamelessly assert that CLECs should be required to comply with performance rules just like ILECs. The adoption of performance rules for

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[36] Professor Marius Schwartz has concluded that a BOC's incentive to engage in non-price discrimination may actually increase after receiving Section 271 approval. *See* Schwartz at n.38.

competitors would be contrary to Commission precedent, the terms of Section 251, and sound policy.

As Allegiance explained in its comments, the Commission has already squarely rejected the argument that performance rules should apply to new entrants. *See* Allegiance Comments at 37-38. New entrants do not have the incentive to degrade the quality of service provided to customers, since customers that receive such poor service will switch from the CLEC to another carrier. Congress of course recognized this fact when it established Section 251. Under Section 251, only the ILECs are required to provide the inputs that are subject to the performance rules and penalties at issue in this proceeding. *See* 47 U.S.C. § 251(c). As the Commission has found, it must be proven that a LEC meets the specific legal standard for classification as an ILEC in Section 251(h)(2), before the requirements of Section 251(c) can apply to a LEC.[37] Performance rules adopted in this proceeding should therefore not apply to CLECs.

The policy underlying this approach should be beyond dispute. As the Commission repeatedly observes in the NPRM in this proceeding, the NPRM regarding special access performance reporting, and in still other contexts, the imposition of unnecessary performance rules should be avoided.[38] Unnecessary reporting and performance requirements impose costs, as the ILECs have been quick to point out in this proceeding. While those costs are justified in the case of ILECs, there is simply no justification for them in the case of competitors. Nor is

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[37] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, ¶ 1248 (1996) ("*Local Competition Order*").

[38] *See, eg.*, NPRM ¶ 77; *Performance Measurements and Standards for Interstate Special Access Services*, Notice of Proposed Rulemaking, FCC 01-339, ¶ 18 (rel. Nov. 19, 2001); *2000 Biennial Regulatory Review -- Telecommunications Service Quality Reporting Requirements*, Notice of Proposed Rulemaking, 15 FCC Rcd 22113, ¶ 10 (2000) ("We are aware that any new reporting requirements must be carefully designed to balance our objectives of ensuring that carriers maintain a high level of service quality with the need to minimize burdens imposed on carriers.").

there any basis for the suggestion that CLECs should be required to bear such costs as a means of leveling the competitive playing field between ILECs and competitors. As Professor Farrell has described it (in an analogous context), when designing rules to establish a level playing field for competition,

> [i]t's important that the playing field should be leveled upwards, not downwards. Like most economists, I am uncomfortable with rules that forbid a firm from exploiting efficiencies just because its rivals cannot do likewise. Such handicapping, or leveling without regard for up or down, may make for a good game, but the game is only a metaphor. When firms are hamstrung, even in order to equalize them with other firms, consumers are liable to lose out.

Farrell at 212. Indeed, imposing reporting requirements on CLECs would only serve to increase the already high entry barriers for local competitive entry.

The numerous arguments presented by the ILECs in favor of imposing performance rules on CLECs are utterly meritless. First, Verizon argues that requiring CLECs to report on their own performance is necessary to reduce CLECs' incentives "to argue for every conceivable performance measurement." Verizon Comments at 17. This suggestion is absurd. CLECs incur very significant costs in participating in regulatory proceedings (such as this one). Indeed at the state level, performance measurement proceedings generally include numerous written submissions, participation in lengthy workshops, and even participation in regulatory hearings (and sometimes subsequent rounds of reconsideration and appeals). It would be simply irrational for a CLEC (especially in the current environment, in which CLECs are under tremendous pressure to cut costs and demonstrate profitability) to incur the expense of participating in proceedings such as these for the purpose of seeking performance rules that would have little or no effect on a CLEC's ability to compete. But even if a CLEC were to seek an unnecessary performance measurement, regulators are more than capable of rejecting such requests.

Second, ILECs argue that requiring CLECs to report would reduce disputes regarding the accuracy of ILEC data. *See* Verizon Comments at 17-18. It is hard to see why this would be so. If more carriers retain detailed records regarding ILEC wholesale performance, it would seem that more disputes would arise among carriers where disparities in their reporting exist.

In fact, the only appropriate way to reduce disputes as to the accuracy of ILEC reporting is to require regular audits and to impose heavy forfeitures on ILECs that demonstrate a pattern of failing to report accurate data. Such an approach costs far less in absolute terms than requiring all competitors to incur what the ILECs describe as the extraordinary expense of establishing the capability to track and report performance. Moreover, rules that ensure accurate ILEC data would obviate the need for cooperative reconciliation of reported data. Participating in data reconciliation is extremely burdensome for ILECs and CLECs. It is an extremely inefficient means of tracking ILEC performance.

Third, Verizon argues that CLEC reporting can assist the Commission in determining whether different treatment of ILEC retail customers and CLECs is competitively significant. *See* Verizon Comments at 18-19. The only example Verizon can dream up in support of this proposition is the suggestion that CLECs should be required to report on the percentage of CLEC order cancellations that take place after the due date has been missed. *See* Verizon Comments at 19. Such reporting is unnecessary, however. It is reasonable for the Commission to conclude, as it has, that where an ILEC fails to provision UNEs by the due date, competitors will be harmed. *See New York Order* ¶ 283. Where the ILEC misses due dates, the customer understandably attributes this failure to the CLEC, thus harming the CLEC's reputation. That harm can be very real, even where the customer in question does not cancel the particular order that is delayed. For example, it is not uncommon for customers to purchase a small volume of service from a new entrant to test its reliability. Even if the customer decides not to cancel a delayed service order, poor performance in the initial order can lead the customer to decide not to purchase additional service (in the same or a different geographic location) from the CLEC. Moreover, poor provisioning performance can also harm the CLEC's reputation and make it more difficult to market to other customers.

Fourth, SBC argues that the Commission should apply any order processing performance measurements it may establish (for example, FOC timeliness) to CLECs, a requirement that it thinks is necessary "to promote an equally competitive environment." *See* SBC Comments at 30.[39] The purported purpose of reporting on this kind of activity is to ensure that conversions from CLECs-to-CLECs and from CLECs-to-ILECs are smooth and efficient. But SBC makes no attempt to show that CLECs have the incentive to perform poorly in this context. In fact, it is only where one firm controls the vast majority of customers that it has a strong incentive to withhold cooperation in converting customers to a competitor. Regulators therefore only need to measure the ILECs' behavior. Furthermore, the burden that such unnecessary requirements would impose on CLECs in the form of increased entry barriers and lower margins far outweighs any benefits that may come from disciplining outlier behavior.

Finally, Verizon argues that CLECs should be required to report performance that may affect ILEC performance. *See* Verizon Comments at 19. For example, Verizon states that CLECs sometimes incorrectly report the location of a trouble on the ILEC network. Where the ILEC determines that there is no trouble at the location in question, the initial trouble ticket is

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[39] In a related argument, Verizon asserts that CLEC-to-CLEC conversions present the need for CLEC performance rules. *See* Verizon Comments at 20. This argument clearly shows that Verizon's sole purpose in urging the application of performance rules to competitors is to raise their costs, since the carriers actually affected by CLEC-to-CLEC conversions have not even suggested that performance rules should apply in this context. Until CLECs actually argue that such regulation is needed, the Commission need not consider the matter.

closed. If the CLEC then submits a new trouble ticket that correctly identifies the location of the trouble on the ILEC's network and the ILEC fixes the problem in a timely fashion, the two reports nonetheless can appear to be an example of repeat troubles. *Id.* But as Verizon itself suggests, the way to address this issue is simply to establish an exclusion for this kind of repeat reporting. This is exactly what the New York PSC has done. *See id.* n.29. It hardly makes sense to force CLECs to create systems for performance reporting to address a matter that can be taken care of with the simple addition of an exclusion to established ILEC reporting requirements (in this case, the repeat troubles performance measurement).

V. THE COMMISSION HAS BROAD DISCRETION TO ADOPT THE INCENTIVE AND PENALTY MECHANISMS PROPOSED BY ALLEGIANCE.

The ILECs generally concede that the Commission has the authority to establish performance measurements, standards, and reporting requirements for the purpose of determining whether ILECs comply with the requirements of Section 251(c). *See* Verizon Comments at 41. They argue strenuously, however, that the Commission lacks the authority to adopt self-enforcing penalties, either in the form of damage payments to CLECs or forfeitures to the U.S. Treasury. *See* SBC Comments at 35-42; Verizon Comments at 42-47. Verizon also argues that, as a policy matter, penalties should be limited. These arguments are generally unpersuasive.

As an initial matter, Verizon and SBC argue that, since the national performance rules would take effect as part of an interconnection agreements, the states must have the initial authority to enforce the rules. *See* Verizon Comments at 42-43; SBC Comments at 36 n.72. But there is no basis for concluding that the rules can only take effect if included in interconnection agreements. The Commission may rely on its rulemaking authority in Section 201(b) to establish rules designed to implement the requirements of Section 251. *See AT&T. Corp. v. Iowa*

Utils. Bd., 525 U.S. 366, 377-78 (1999). Nothing in the language of the Act indicates that the requirements of Section 251 must (as the ILECs contend) be included in interconnection agreements to have binding effect. *See* Verizon Comments at 42. If this were so, the Commission's rules mandating such things as implementation of number portability, network disclosure, and dialing parity would have no effect except as part of an interconnection agreement. But those rules were (and must be, given the practical realities of implementing these requirements) designed to be binding regardless of whether carriers have entered into an interconnection agreement.[40] Indeed, the only basis the ILECs can point to in support of their argument is the fact that LECs can negotiate agreements that do not comply with the requirements of Section 251. *See* Verizon Comments at 42. But this just means that a CLEC may decide in an interconnection agreement to give up rights that existed and were fully enforceable prior to the consummation of an interconnection agreement.[41]

Even if national performance rules were included in interconnection agreements, the Commission may still enforce those provisions. The Commission and several (though not all)

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[40] *See Telephone Number Portability*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352, ¶ 74 (1996) ("*Telephone Number Portability Order*") (requiring carriers to implement number portability by a date certain with no requirement of an interconnection agreement); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Area Code Relief Plan for Dallas and Houston, Ordered by the Public Utility Commission of Texas; Administration of the North American Numbering Plan; Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech-Illinois*, Second Report and Order and Memorandum Opinion and Order, 11 FCC Rcd 19392, ¶ 228 (1996) ("*Second Local Competition Order*") ("At least one commenter argues that, because incumbent LECs and competing service providers have a common interest in ensuring that their networks function together properly ... any fixed timetables for [network] disclosure should be negotiated between carriers as part of individual interconnection agreements. We disagree."); *id.* ¶ 67 ("[A] LEC is required to permit telephone exchange service customers within a defined local calling area to dial the same number of digits to make a local telephone call, notwithstanding the identity of a customer's or the called party's local telephone service provider.").

[41] Section 252(a) allows LECs to enter into binding interconnection agreements "without regard to the standards set forth in subsections (b) and (c) of section 251." 47 U.S.C. § 252(a). The fact that Section 251(b) (which includes resale, number portability, and dialing parity obligations) is referenced in the provision demonstrates that Congress could not have intended Section 251 obligations to become binding only in interconnection agreements.

courts of appeals that have addressed the matter have held that a state has the authority to enforce an interconnection agreement.[42] But neither a Commission order nor any currently binding court decision holds that the states have exclusive authority to enforce interconnection agreements. On the contrary, in the *Local Competition Order*, the Commission ruled that it has the authority to hear Section 208 complaints and to initiate forfeiture proceedings under Section 503(b) regarding ILEC failure to comply with an interconnection agreement. *See Local Competition Order* ¶¶ 124-129. Since the Eighth Circuit's subsequent decision vacating this part of the order was overturned by the Supreme Court,[43] it is the law of the land. In fact, when the Commission revisited this issue recently, it specifically stated that its recognition that states have the authority to enforce interconnection agreements "should not be construed to imply that our authority to interpret and enforce interconnection agreements is confined to the context of section 252(e)(5) of the Act [which applies where a state fails to act under Section 252]. Indeed, the Commission has held to the contrary."[44] It may well be that there are circumstances in which it would be appropriate for the Commission to refer disputes regarding a particular aspect of an arbitrated interconnection agreement to a state for resolution. But where the matter concerns a straightforward application of a federal requirement with which all ILECs must comply, there is nothing to be gained from such a referral. In fact, the only way to ensure that an ILEC has an

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[42] *See Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 15 FCC Rcd 11277, ¶ 6 (2000) ("*Starpower*"); *Southwestern Bell Tel. Co. v. Brooks Fiber Communications*, 235 F.3d 493, 496-97 (10th Cir. 2000); *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 946 (8th Cir. 2000); *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 338 (7th Cir. 2000); *Southwestern Bell Tel. Co. v. Public Util. Comm'n,*, 208 F.3d 475, 479-80 (5th Cir. 2000). *But see BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Services., Inc.*, 2002 WL 27099 (11th Cir. 2002).

[43] *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 804 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom., AT&T. Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 386 (1999).

[44] *Starpower* n.16 (citing *Local Competition Order* ¶¶ 124-129). The Commission has also recognized CLECs' Section 208 complaint rights for violations of the number portability and network change notification rules. *See Telephone Number Portability Order* ¶ 139; *Second Local Competition Order* ¶ 248.

adequate incentive to comply with performance requirements is to establish federal enforcement mechanisms in addition to state mechanisms that may apply.

The ILECs next argue that the Commission does not have the authority to implement self-enforcing penalties for failure to comply with national performance rules. *See* Verizon Comments at 43-47; SBC Comments at 36-42. To begin with, these arguments in no way affect the Commission's authority to require that ILECs waive charges for Section 251 inputs where service levels fall below predetermined thresholds. As Allegiance explained in its comments, the Commission can require that charges for inputs be waived pursuant to its authority to ensure that inputs are provided on just, reasonable, and nondiscriminatory terms and conditions. Such requirements should not be viewed as damages but rather as part of an incentive plan to ensure ILEC compliance with Commission service quality rules. *See* Allegiance Comments at 42-43.

Nor should there be any dispute that the Commission has the authority to establish guidelines describing the levels of ILEC performance that trigger the issuance of a notice of apparent liability ("NAL") seeking a forfeiture. Nothing in Section 503 prevents the adoption of such streamlining regulations, since ILECs would have the opportunity to respond to the NAL, and their due process rights would therefore be fully satisfied. Indeed, the ILECs do not even address such an approach in their comments.

The ILECs also argue that damages cannot be awarded pursuant to Section 206 for failure to comply with performance requirements unless the competitive carrier files a complaint under Section 208 and the Commission conducts a full hearing before an administrative law judge. *See* SBC Comments at 37-38; Verizon Comments at 46-47. Given the commonality of the issues regarding damages that would follow from poor ILEC service, it would seem at the very least that the Commission could again establish detailed guidelines for compensatory and even consequential damages that would be available to a CLEC that has received service performance below a defined threshold.

Finally, Verizon presents several arguments designed to limit the effectiveness of a federal enforcement regime. First, Verizon points out that waivers, penalty payments to CLECs, and forfeitures should not apply where an ILEC's performance falls only slightly (*e.g.*, one percent) below the parity level in one month. *See* Verizon Comments at 27. But it does not follow from this, as Verizon contends (at 27-28), that presumptions as to competitive harm cannot be established when an ILEC's performance falls below a certain level. For example, it can safely be presumed that a difference in performance quality of five percent or more in a particular month for a particular performance measurement results in a competitively significant difference in treatment. Larger differentials or differentials of five percent for more than one month can similarly be assumed to result in even greater competitive harm. Such differentials can also be the basis for a presumption that the applicable performance assurance plan does not, by itself, adequately deter anticompetitive behavior, thus warranting the initiation of forfeiture proceedings.

In order to ensure that ILECs' due process rights are not violated, the Commission should establish an exceptions process for the imposition of waivers, penalties, and forfeitures. But as the Commission has recognized, such exceptions processes must be narrowly tailored to ensure that the ILEC is not able to bring the regime to a standstill by repeatedly seeking exceptions. *See New York Order* ¶ 441. For example, if performance measurements are properly designed, there should be no need to give ILECs the opportunity to demonstrate that they missed a performance standard due to CLEC behavior,[45] since CLEC-caused misses should be excluded from performance reporting. Moreover, ILECs should not be relieved of liability where there has been a "clustering" of data, such as (to use Verizon's example) where a single cable cut results in multiple lines losing service for more than 24 hours. *See* Verizon Comments at 28. ILECs are under a legal obligation to provide each line provisioned to a CLEC on just, reasonable, and nondiscriminatory terms and conditions. That a violation of this requirement is the result of a single or multiple acts makes no difference under the standard in the Act, and it certainly makes no difference to CLEC customers served by the multiple lines affected by a single act. Indeed, the only reasonable basis for an exception should be that the ILEC failed to meet the standard due to certain events beyond its control (*e.g.*, acts of God).

The Commission should also reject Verizon's suggestion that high penalties should only apply in large states. *See* Verizon Comments at 30-31. The Commission has approved of smaller performance penalty plans for states in which ILECs have less revenue in the Section 271 process because that process requires examination of a BOC's incentives to engage in anticompetitive behavior in only the state for which the BOC has sought approval. When each state is viewed in isolation in this manner, the Commission's approach has been reasonable enough. But this proceeding must focus on ILEC incentives throughout their territories. The big footprint theory demonstrates that a larger ILEC has a greater incentive to engage in anticompetitive behavior because it can capture a greater portion of the benefits of such anticompetitive behavior. Under this theory, exclusionary behavior in Connecticut helps SBC in California. Given that the benefits of anticompetitive behavior are greater for a large ILEC, the penalties for such behavior also should be higher for larger ILECs than for smaller ILECs. This

[45] *See* Verizon Comments at 28.

is so regardless of the size of the state in the ILEC's territory in which it decides to engage in non-price discrimination.

VI. CONCLUSION

For the reasons described herein, the Commission should adopt performance measurements, standards, reporting requirements, and penalties in accordance with the proposal described herein and in the Allegiance comments in this proceeding.

Respectfully submitted,

Thomas Jones
Christi Shewman
Kelly N. McCollian
WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
(202) 328-8000

ATTORNEYS FOR
ALLEGIANCE TELECOM, INC.

Kevin M. Joseph
Mary C. Albert
ALLEGIANCE TELECOM, INC.
1919 M Street, N.W.
Suite 420
Washington, D.C. 20036
(202) 464-1800

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