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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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 AT&T CORP.

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REPLY COMMENTS OF AT&T CORP.

AT&T Corp. ("AT&T") hereby replies to the comments filed in response to the Notice of Proposed Rulemaking ("*Notice*") in the above-captioned proceeding.[1/]

INTRODUCTION AND SUMMARY

The Commission's *Notice* establishes two goals for this proceeding. First, it seeks improved enforcement capabilities to sanction incumbent local exchange carriers ("ILECs") that fail to comply with their statutory obligation to provide just, reasonable, and nondiscriminatory support for the unbundled network elements ("UNEs"), interconnection, and collocation functionalities they must provide to competitive local exchange carriers ("CLECs"). Second, it

1/ Notice of Proposed Rulemaking, CC Docket Nos. 01-318, 98-56, 98-147, 96-98, 98-141, 16 FCC Rcd. 20641 (2001).

seeks to develop those enforcement capabilities in a minimally regulatory manner. AT&T's proposal that the Commission develop a federal enforcement regime that relies on selected performance measurements from existing state performance plans is the most efficient and effective means to accomplish both of those objectives.

As a threshold matter, the comments demonstrate a strong consensus among state commissions and CLECs that the Commission should not, as some ILECs suggest, preempt the states' performance plans. The states and CLECs have invested significant time and resources to develop and implement performance plans that, for the most part, satisfactorily monitor the ILECs' provision of UNEs, interconnection, and collocation services to CLECs. Preemption of the state performance measures with federal measures of the sort proposed in the *Notice* -- especially if further limited as proposed by the ILECs -- would be affirmatively harmful to competition because it would reduce the ability to track the ILECs' performance and thereby increase their opportunities to avoid their statutory nondiscrimination obligations. This, in turn, would support the ILECs' ongoing attempts to hamper CLECs' ability to gain a competitive foothold in local telecommunications markets.

Thus, the Commission should not undo the work that has already been done in the states. To the extent, however, that the Commission decides to adopt a federal performance measurement plan that would preempt state plans, it should only do so if the federal measures are comprehensive and incorporate the "best of the best" provisions from the state plans. Otherwise, any federal measurement plan should serve simply as a guide to states that have not completed their work to develop performance measurement plans or to states that have less stringent performance metrics.

Tellingly, the ILECs' comments on this issue here represent a complete flip-flop from the position they took only a few years ago on this identical issue. Although they previously argued *against* adoption of a single, uniform federal performance plan, the ILECs now hope to force CLECs to redo at a federal level what has already been accomplished -- with great effort and expense -- in the states. The ILECs have two obvious objectives. First, such a course requires CLECs to waste their precious remaining resources on regulatory rather than competitive pursuits. Second, it gives the ILECs an opportunity to water down the requirements that the states have developed because the states generally did not heed their calls for weak performance measurements and standards. The Commission should reject this unwarranted effort and stay the course it initiated when it deferred to the states on the development of performance plans four years ago.

The state commissions and CLECs also generally agree with AT&T that the ILECs have treated existing state enforcement regimes as simply a cost of doing business and that such regimes have not been sufficient to deter the ILECs' anticompetitive behavior. Thus, all of the commenters (other than ILECs) agree with AT&T that more meaningful penalties are necessary to provide ILECs with the incentives they require to comply with their obligations under the Communications Act ("Act").

AT&T has proposed a mechanism that would enable the Commission to do so in a minimally regulatory manner. Specifically, AT&T recommends that the Commission adopt a rule requiring ILECs to satisfy state performance measures and standards (except for hot cuts standards, which require a more stringent federal standard); require ILECs to report their monthly state performance data for a limited set of CLEC-identified measures to the Commission; and identify (using statistical methodology where appropriate for parity measures)

the measures for which they have failed the applicable performance standards. This would provide the Commission with needed insight on the ILECs' performance on critical performance measures and create an evidentiary basis for federal enforcement activities when an ILEC fails to meet its statutory obligations. And critically, since the ILEC reports to the Commission would rely on excerpts of the data they already provide to the states, the ILECs should not incur any significant additional costs.

Finally, to keep ILEC performance consequences from merely being another cost of doing business, the Commission should exercise its enforcement authority by assessing significant federal penalties when an ILEC reports performance failures using a truncated notice of apparent liability ("NAL") process consistent with Section 503 of the Act. This is both appropriate and complies with all statutory notice requirements because the federal penalty would be based on undisputed evidence supplied by the ILEC itself.

AT&T's federal enforcement plan is the most efficient means to deter ILEC anticompetitive behavior and to ensure ILECs comply with the Act. Moreover, it is completely consistent with the Commission's goal of reduced regulation because it does not require the overlay of a federal performance measurement process on the existing state plans. Thus, it is the most effective way to achieve all of the Commission objectives identified in the *Notice*.

I. THE COMMISSION SHOULD NOT PREEMPT THE STATES' PERFORMANCE PLANS.

State commissions have, for the most part, diligently assumed the responsibility that the Commission deferred to them in 1998,[2/] when it issued -- at the strong urging of ILECs[3/] -- proposed performance guidelines to assist the states in developing performance metrics.[4/] The results of the states' efforts are largely satisfactory and there is no reason to heed the ILECs' suggestion that the Commission suddenly reverse its course and undo their hard work by exercising federal preemption.

The states uniformly oppose the ILECs' new-found calls for the Commission to usurp their roles.[5/] The state commissions correctly explain that replacing their robust regimes with the

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2/ AT&T at 11-12; Allegiance at 7 ("[S]tate regulatory commissions have done a great deal of work and accumulated a vast amount of experience in developing and enforcing comprehensive performance rules."); TDS Metrocom, USLINK, and Madison River ("TDS") at 4 (State commissions have "devoted countless amounts of energy and resources to the establishment of state performance plans."); WorldCom at 2 ("When the FCC declined to adopt federal measurements and standards, the states, with the assistance of ILECs, CLECs and interested parties, stepped up and developed measurements and standards."); *Id.* ("Nearly every state in the country has either established performance measurements and standards, or is considering their adoption.").

3/ *See* Comments of BellSouth Corporation, RM-9101 (July 10, 1997) ("BellSouth OSS Comments"); Comments of Bell Atlantic Telephone Companies, CC Docket No. 98-56 (June 1, 1998) ("Bell Atlantic OSS Comments"); Comments of SBC Communications Inc., CC Docket No. 98-56 (June 1, 1998) ("SBC OSS Comments").

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

5/ California ("CA PUC") at 4; Colorado Office of Consumer Counsel ("CO OCC") at 2-3; Florida Public Service Commission ("FL PSC") at 2; Minnesota Department of Commerce ("MN DOC") at 2-3; New York State Department of Public Service ("NY DPS") at 2; Oklahoma Corporation Commission ("OK CC") at 3; Public Service Commission of the State of Missouri ("MO PSC") at 6; Public Utilities Commission of the State of Colorado ("CO PUC") at 2; Public Utilities Commission of Ohio ("OH PUC") at 5-6; Public Utility Commission of Texas ("TX PUC") at 2-3; Virginia State Corporation Commission Staff ("VA SCC") at 2.

limited measures the Commission references (or with the ILECs' even more bare-boned approaches) would result in a least-common-denominator approach to performance standards,[6/] would not guarantee that ILECs are complying with their statutory duty not to discriminate against CLECs,[7/] and would not capture several important areas of performance.[8/] Moreover, as the Colorado Public Utilities Commission aptly notes, "[f]ew, if any, state commissions will undertake the enormously time-consuming and resource-intensive process of developing measures and standards if the result may be preempted and the process redone using the national standards and measures."[9/]

Like the state commissions, the CLECs generally agree with AT&T[10/] that there is no reason to undermine their years of effort in helping to develop and implement state plans.[11/] Thus, to the extent the Commission adopts federal performance rules here, they should serve as a baseline -- a floor, not a ceiling -- of measures and standards for states that have not adopted performance plans[12/] or for states that have adopted plans but have metrics that are not as

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6/ FL PSC at 2; NY DPS at 2; TX PUC at 3.

7/ OH PUC at 11.

8/ TX PUC at 3.

9/ CO PUC at 9.

10/ AT&T at 12-14.

11/ Allegiance at 9; Association for Local Telecommunications Services ("ALTS") at 17; Business Telecom, Cavalier, DSLNet, Network Telephone, and RCN ("Business Telecom") at 3; Competitive Telecommunications Association ("CompTel") at 4-6; Cox at 3; McLeodUSA at 6-8; TDS at 4; WorldCom at 4-5; XO at 2, 17.

12/ For states with no performance plan in place, the Commission can (and should) withhold Section 271 approval for the applying Bell Operating Company ("BOC"), both because the BOC could not demonstrate present compliance with the competitive checklist and because there would be no reasonable assurances that the BOC would continue to comply with its statutory obligations after the application is granted. *See Application by SBC Communications Inc., 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

effective as the federal metrics in promoting competition.[13/] Most importantly, the CLECs generally agree that any federal plan adopted here should not prevent states from supporting the development of competition in their jurisdictions by adopting, implementing, and operating their own performance plans or from establishing measures and standards that are more detailed and more stringent than those in a federal plan.[14/]

The few CLECs and others that support preemption of state performance plans do so for two completely legitimate reasons -- to deter ILECs from ignoring state performance requirements[15/] and to develop uniformity in performance metrics across the states.[16/] AT&T supports both these goals, but it believes that a federal performance measurements and standards plan of the sort contemplated in the *Notice* is not absolutely essential to accomplish them. Although measures and standards are necessary components for deterring ILECs' anticompetitive behavior, the existing state performance plans are generally satisfactory and

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FCC Rcd. 18354, ¶ 420 (2000); *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).

13/ Allegiance at 9; ALTS at 17; CompTel at 6; Covad at 27-28; Cox at 3; McLeodUSA at 6; TDS at 4-5; WorldCom at 2; XO at 2.

14/ Allegiance at 9; Business Telecom at 3; CompTel at 6; Covad at 28; XO at 2. *See also* 47 C.F.R. § 51.317(b)(4) (providing states with the authority to impose additional unbundling requirements); *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, ¶¶ 18, 145, 155 (1999); 47 U.S.C. § 261(c) (authorizing states to impose requirements on intrastate telecommunications carriers, which are necessary to further local competition).

15/ Focal, Pac-West, and US LEC ("Focal") at 11 ("[t]he need for federal metrics to correct poor provisioning is dramatically highlighted by ILECs in some cases simply ignoring existing state metrics"); Adelphia at 3 (noting "fears that the ILECs will become increasingly more aggressive if the FCC does not impose some oversight over the process").

16/ Covad at 18; Dynegy, E.spire, ITC Deltacom, Metromedia Fiber, Nuvox, Talk America, and Z-Tel ("Dynegy") at 4; General Services Administration ("GSA") at 9.

largely uniform.[17/] They include measurements for pre-ordering, ordering, provisioning, maintenance and repair, and billing of ILEC services; they set standards based on parity (where appropriate) and benchmarks; they require performance to be measured and reported on a disaggregated basis; they give ILECs opportunities to exclude data in appropriate circumstances; and they provide for periodic reviews and audits.[18/] With one exception -- hot cut standards[19/] -- the state plans adequately measure and gauge ILECs' performance and their anticompetitive behavior.[20/]

17/ Uniformity of measures and standards at the federal level, an admirable goal, was sought by CLECs, opposed by ILECs, and ultimately rejected by the Commission in 1998. *See* Petition for Expedited Rulemaking by LCI International Telecom Corp. and Competitive Telecommunications Association, CC Docket No. 96-98 (May 30, 1997) (proposing comprehensive, detailed federal performance standards developed by the Local Competition Users Group ("LCUG"), which was comprised of LCI, MCI, Sprint, WorldCom, and AT&T); BellSouth OSS Comments (opposing a federal performance plan); Bell Atlantic OSS Comments (opposing a federal performance plan); SBC OSS Comments (opposing a federal performance plan); *OSS Notice* (declining to adopt a federal performance plan). As envisioned by S. 1364, a bill introduced by Senator Ernest Hollings, Chairman of the Senate Commerce, Science, and Transportation Commission, an ideal uniform federal plan should incorporate a comprehensive list of the "best of the best" measures from the state plans so that all competitors in all states benefit from the substantial progress already made. *See* AT&T at 5. In sharp contrast, the "blueprint" of uniform but limited metrics Verizon proposes in this proceeding is merely duplicative of a subset of the guidelines that the Commission already issued in 1998 and is entirely insufficient to measure ILEC performance comprehensively.

18/ Qwest at 6-8.

19/ *See* Declaration of John Sczepanski on Behalf of AT&T Corp., attached to AT&T's comments.

20/ Contrary to the comments of Conversent, AT&T has frequently suffered unacceptable outages in connection with hot cuts that limit its ability to compete with the ILECs on a facilities basis. *See* Conversent at 2. Accordingly, AT&T urges the Commission to address this critical problem by adopting national hot cut performance standards that are significantly more stringent -- 98% on time with a dial tone interruption rate of under 1% -- than the standards applied in most states. *See* AT&T at 36. WorldCom also seeks hot cut standards that are more stringent than what is included in most state performance plans. WorldCom at App. B, 55. *See also* ALTS at 14; CompTel at 10; McLeodUSA at 5; XO at 2, 11. Based on AT&T's experience, those standards too are inadequate.

Instead of developing a new set of measures and standards to supplant or overlay state plans, what is most needed at the federal level is prompt adoption of meaningful consequences for ILECs when they fail to comply with state measures and standards. AT&T's proposed federal enforcement-only plan is the most efficient -- and least regulatory -- means to develop an effective deterrent to keep ILECs from ignoring state performance requirements and continuing (or escalating) their anticompetitive behavior.

There is clearly no rational basis for the Commission to support the sudden about-face of the ILECs (other than Qwest)[21/] that seek to cast aside the states' diligent work on performance metrics and to supplant the state plans with cut-down requirements that are too weak to detect or deter anticompetitive behavior.[22/] Just three years ago the ILECs vigorously *opposed* adoption of a federal performance plan, citing the need to tailor performance plans to the unique aspects of their services and networks in each state.[23/] Some of these same ILECs continued, until very recently, to advocate strongly against national standards.[24/] Yet, now that the states have actually

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21/ Qwest at 3-4 ("[A]ny efforts by the Commission to preempt state PAP efforts would be premature, have the potential to disrupt these important negotiations, and create comity concerns between the Commission and the states."); *Id.* at 4 ("[T]he Commission should defer to the states"). It is possible that Qwest breaks ranks with the other ILECs because it also has a thriving interexchange business, and recognizes the value of effective performance plans for that aspect of its operations. Nonetheless, Qwest reverts to its ILEC roots in opposing Commission enforcement activity. Qwest at 24.

22/ BellSouth at 2, 15; SBC at 2; Verizon at 32.

23/ *See* BellSouth OSS Comments at 14-19 (arguing that federal performance standards for UNEs are unnecessary, inappropriate, and superfluous); Bell Atlantic OSS Comments at 3 n.3 ("[A] single national set of performance measurements would not take into account the differences in underlying systems and would produce meaningless information."); SBC OSS Comments at 2 (requesting that the Commission respect prior agreements made at the state level and not "re-create the wheel," which would impose undue burden on ILECs).

24/ *See* Letter from Robert T. Blau, BellSouth, to Dorothy Attwood, Chief, Common Carrier Bureau, FCC, CC Docket 96-98 at 1 (Oct. 18, 2001) (requesting that state performance measures continue to apply and stating that "the Commission should not attempt to create a set of performance measures that would supplant or duplicate state measures"); Letter from Caryn

developed plans that require the incumbents to reveal their anticompetitive behavior, the ILECs have decided that they no longer like state-by-state performance plans[25/] and complain about a "lack of consistency" and belatedly argue that there is a need for "uniformity."[26/]

This is nothing but self-serving posturing. In reality, the ILEC comments make plain that they will continue to flip positions whenever it serves their business goals to protect their local monopolies. It clearly would have been lawful and administratively efficient for the Commission to develop a uniform federal performance plan in 1998, but the ILECs opposed federal action (and even authority) and argued that the states should take the lead. The Commission listened to them and ignored the CLECs' requests for uniformity, forcing them to incur the costs to litigate performance issues across the country. Now that most states have *operational* performance plans that were developed through extensive efforts, the ILECs contend

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Moir, SBC, to Magalie Roman Salas, Secretary, FCC, CC Docket 96-98 at 1 (Oct. 16, 2001) (recommending that a national model must "use existing state standards as models where possible, allowing SBC to use previous investment in reporting systems and processes where reasonable").

25/ BellSouth at 10-11 (complaining that state plans have taken "an expansive approach to the task of developing measurements. . . . [T]hese plans tilt too far in the direction of thoroughness, and . . . streamlining is necessary to restore an appropriate balance."); SBC at 7-8 (urging the adoption of national measurements to promote the market-opening objectives of the Act, to facilitate enforcement, and to eliminate unnecessary and burdensome regulatory requirements); Verizon at 32 ("[N]o meaningful 'harmoniz[ing]' or 'streamlin[ing]' can occur unless the adoption of national measurements presages the elimination of the current 'regulatory patchwork' of state and federal requirements.").

26/ BellSouth at 14 ("The lack of consistency in the performance measurement plans adopted thus far by State Commissions is regrettable."); *Id.* at 15 ("[U]niformity of measures is a paramount goal."); Verizon at 35 ("Preemption of the existing state performance reporting regimes . . . is likely to be necessary to stem the 'proliferation of differing state requirements [that] impose increasingly divergent and costly requirements on carriers.'" *quoting Notice* ¶ 4).

Although the ILECs claim that state plans differ from one to another, this is exactly what the ILECs originally sought in the 1998 *OSS Notice* -- state plans that contained measures and standards tailored to the unique aspects of the ILECs' services and networks in each state. Despite their complaints that the state plans differ significantly, this is not true; the state plans are largely uniform. AT&T at 19; BellSouth at 11-13.

that the Commission should start the process all over again. The state plans took months and, in some cases, years to develop. There is no need to repeat such work to develop a federal plan that would at best duplicate what the states have already done, and at worst result in the adoption of a regime that caters to the ILECs' desire for a limited and watered down set of performance measures and standards.

No matter what course the Commission takes here, it is indisputable that an effective performance plan must have strong metrics that detect all discriminatory treatment by ILECs[27/] and strong remedies and incentives to deter the ILECs from continuing their anticompetitive behavior. AT&T continues to believe that state measures and standards are generally sufficient to detect ILECs' poor performance and that the most important missing element is a federal enforcement plan that can effectively deter ILEC anticompetitive behavior. However, if the Commission should decide to preempt state performance plans,[28/] any plan that it adopts should build on the states' work, using a comprehensive "best of the best" approach that covers all areas of ILEC performance. In such case, AT&T generally supports the development of a federal plan based on WorldCom's proposed measures, definitions, and levels of disaggregation.[29/]

27/ Verizon proposes that a measurement plan should be limited to services and facilities for which CLECs have significant volumes and ILECs have a history of discrimination. *See* Verizon at 9-11. This proposal inappropriately limits the Commission's focus by ignoring future competitive activities and fails to consider the possibility that ILECs may provide discriminatory treatment in the future in situations where they did not do so in the past. Importantly, it is only the CLECs that can identify the measures that are most important to assess whether the market is truly open to competition.

28/ Federal preemption, however, cannot and should not prevent states from acting under state laws that are designed to promote competition.

29/ WorldCom at 10, App. B. This is consistent with S. 1364, a bill that would require the Commission to adopt rigorous federal performance standards using such an approach. *See supra* n.17.

Finally, except for the ILECs, the commenters all agree with AT&T[30/] that now is not the time for the Commission to consider sunsetting a federal plan it has not yet adopted.[31/] In a competitive market, self-imposed performance monitoring is necessary to prevent loss of customers and market share,[32/] and performance monitoring becomes a routine aspect of conducting business. In all events, performance monitoring imposed by regulation[33/] -- and necessary to ensure statutory compliance by carriers that wield monopoly power over essential competitive inputs -- should not sunset until there is full and effective competition.

II. MEANINGFUL AND VIRTUALLY AUTOMATIC FEDERAL PENALTIES ARE NECESSARY TO INDUCE ILECS TO COMPLY WITH THEIR OBLIGATIONS UNDER THE 1996 ACT.

A. Penalties Assessed Under State Performance Plans Have Not Proven Strong Enough To Deter ILEC Anticompetitive Behavior.

In the past few years, ILECs have paid hundreds of millions of dollars in fines under various performance plans because their performance for CLECs was so deficient.[34/] Yet,

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30/ AT&T at 40-41.

31/ Allegiance at 38; Business Telecom at 26-27; CA PUC at 10; Dynegy at 28; Focal at 38; MPower at 15-16; OK CC at 5; OH PUC at 17; Sprint at 6; XO at 14-15.

32/ AT&T at 39.

33/ In addition, virtually all commenters agree that performance monitoring requirements should not apply to CLECs. Rather, they correctly note that a performance plan is only necessary for Tier 1 (*i.e.*, Class A) local exchange carriers, which control the bottleneck facilities to which CLECs require access to serve their end user customers. *See* AT&T at 37; XO at 25; GSA at 9.

34/ AT&T at 23. In fact, the Voices for Choices Coalition recently announced that in the six years since the 1996 Telecommunications Act was signed into law the four Bell Operating Companies have been "assessed $1.84 billion in fines [for poor service, anti-consumer practices, and failure to live up to their promises -- among other reasons], [yet] they brought in more than $851 billion in revenues. So the fines represented only about two-tenths of a percent of total revenue during that period." "Telcom Act Anniversary Announcement: 'Voices' Coalition Unveils Database of Bell Company Sanctions," http://voiceforchoices.com/1091/wrapper.jsp?PID+1091-25&CID=1091-020702A (Feb. 7, 2002) ("*Voices for Choices2/7/02 Statement*").

numerous commenters correctly point out that these fines obviously are not sufficient because ILECs continue to provide CLECs with unacceptable service.

The CLECs and state commissions generally support AT&T's showing that larger penalties are needed to deter the ILECs' anticompetitive behavior.[35/] Moreover, McLeodUSA is clearly correct that "[a]ny error must be on the side of remedies being too large rather than too small. If ILECs perceive that the cost of noncompliance is only marginally higher or equal to the cost of compliance, then ILECs will choose noncompliance."[36/] Similarly, CompTel explains, "[t]he fact that the ILECs are repeatedly incurring fines and forfeitures for noncompliance is highly indicative of the fact that the ILECs view these penalties as an acceptable cost of doing business -- as a cost of maintaining their monopoly market share."[37/] In fact, the Minnesota Department of Commerce has obtained statements from an ILEC's employees acknowledging that the company "was willing to pay certain levels of penalties rather than strive for a performance level that met its . . . service quality obligations."[38/] Given the ILECs' enormous

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35/ AT&T at 23-27. Many CLECs and state commissions assert that the Commission should assess forfeiture amounts up to the maximum amount permitted under federal statute for failure to meet standards. *E.g.*, ALTS at 8; Business Telecom at 5-7; CA PUC at 7.

36/ McLeodUSA at 10.

37/ CompTel at 11; Business Telecom at 5-6 (ILECs must not be able to absorb penalties as a cost of doing business); CA PUC at 7 ("penalties should not be so low such that ILECs are willing to violate the standards as a cost of doing business"); MN DOC at 3 ("[p]enalties and remedies . . . must be high enough so that Regional Bell Operating Companies cannot simply absorb penalties as a cost of doing business"); TDS at 3 (there must be "meaningful economic consequences" for an ILEC's failure to meet standards so that penalties do "not simply become a cost of doing business for the ILEC"); WorldCom at 20-21 (penalties must be sufficiently large so that "failure to comply with the performance metrics is not regarded as a simple cost of doing business"); *Voices for Choices 2/7/02 Statement* (quoting Merrill Lynch analyst Ken Hoexter that "as long as the cost of violating merger agreements is below the cost of allowing competitors to enter the market, it continues to be cheaper . . . to pay the government for violating certain performance targets versus completely opening up the local markets to competitors").

38/ MN DOC at 3-4.

size, revenues, and market power, erring on the side of larger consequences is the only way to provide them with the incentives necessary to reform their behavior. And, in any event, setting larger consequences by itself causes no harm to the ILECs, because if they comply with their statutory duties, they face no liability at all.

In short, "[t]he ILECs will devote adequate resources to complying with performance rules once compliance is made a priority for them, and compliance will become a priority when the fines for noncompliance are so swift, certain, and steep that they are an unacceptable cost of doing business for the ILECs."[39/] The unanimous request from CLECs and state commissions is clear and powerful: the Commission must wield its authority and assess significantly greater penalties than the states have imposed in order to enforce the ILECs' obligations under the Act.

B. The Commission Has Legal Authority To Impose Penalties For ILECs' Failure To Comply with State Performance Requirements.

The Commission clearly has the legal authority to implement the federal enforcement plan AT&T recommends.[40/] As a threshold matter, except for hot cut benchmark performance

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39/ CompTel at 11.

40/ AT&T at 28-33. The federal plan that AT&T proposes involves forfeitures to the U.S. Treasury because of the damage an ILEC's unjust, unreasonable, and discriminatory conduct causes to the competitive market as a whole, based on its aggregate performance for all CLECs on a particular performance submeasure. Payments to the U.S. Treasury could be offset by any forfeiture payments for the same activities the ILEC has made to a state public fund pursuant to a state's performance plan.

AT&T supports the enforcement proposal proposed by the Joint Competitive Industry Group ("JCIG") (a group of competitive telecommunications carriers, trade associations, and the eCommerce & Telecommunications Users Group) in its letter to Commission Chairman Michael K. Powell on February 12, 2002. The JCIG enforcement plan addresses ILECs' poor performance to their special access customers by proposing remedies payments by ILECs to their special access customers; forfeiture payments by ILECs to the U.S. Treasury; and generally penalties that are sufficient to deter anticompetitive behavior, that increase for repeated performance failures, and that are more sever for critical performance measures. AT&T's federal enforcement-only plan for UNEs, interconnection, and collocation services is fully consistent with the JCIG proposal for special access services.

standards,[41/] the Commission should adopt a rule requiring ILECs to comply with the states' performance plans as adopted and implemented. Based on that rule, the Commission should then establish federal penalties for ILECs' failure to comply with a limited set of the measures that CLECs identify as the most important to support effective competition.[42/]

Under AT&T's plan, each ILEC would be required to provide to the Commission the same data that it reports to the state commissions under each state's performance plan for the identified measures. For measures for which parity is the standard, these data should be statistically analyzed at the submeasure level,[43/] using a z-test governed by a balancing critical value that accounts for random error (*i.e.*, a balanced z-test).[44/] In contrast, there is no need to

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41/ *See supra* n.20. The need for more stringent federal benchmark performance standards for hot cuts is explained in AT&T's Comments and the accompanying declaration of John Sczepanski. *See* AT&T at 33-36. In sum, AT&T demonstrates that facilities-based competition cannot be successful in the absence of such standards, which are necessary to support customer demands for quality service.

42/ These measures would address areas commonly measured in all state plans, although the precise measurement name and definition might vary in minor aspects from state to state.

43/ Measures must be reported and analyzed at disaggregated submeasure levels (*e.g.*, service types and geographic areas) so that apples are compared to apples, not oranges. AT&T at 20-21 ("requiring data disaggregation . . . assure[s] proper detection of ILEC performance failures, minimize[s] ILEC opportunities to manipulate performance results, and provide[s] regulators with the necessary information to attach appropriate consequences to failures"); WorldCom at 27 ("if reporting is not disaggregated sufficiently, ILECs will be able to manipulate their performance reports by grouping together different types of products and orders in various geographic areas" and "like-to-like comparisons are important to ensure that CLEC activity is not being compared to ILEC retail services that are not analogous"). Even the Commission recognized in the *Notice* that disaggregation is necessary to detect ILEC discrimination. *See Notice*, ¶¶ 33, 47. Accordingly, Verizon's claim that disaggregation is not necessary to reveal discrimination is, quite simply, incorrect. *See* Verizon at 15-16.

44/ This test is a simplified version of the computation proposed in the Louisiana Statistician's Report. *See Second Application by BellSouth Corp. et. al., for Provision of In-Region, InterLATA Services in Louisiana*, Brief in Support of Second Application by BellSouth, CC Docket No. 98-121 (filed July 9, 1998). While AT&T and BellSouth agreed on the statistical methodology to be used to determine whether the ILEC's performance passed or failed a particular measurement standard, they disagreed on the methodology for calculating amounts to be paid for performance failures. Specifically, AT&T objects to penalty calculations that would

test for random error when using benchmark standards. Benchmarks already account for random variation because they rarely require perfect service. In these cases, a bright line test is sufficient; any failure to meet the benchmark represents failure. Once the data are analyzed, except for hot cut performance (which should be compared to the federal benchmark standards), the results should be compared against each state's standards from the state's performance plan to determine whether the ILEC passes or fails the state's standards.

If the ILEC fails the state standards for one or more measures, then the Commission should begin the procedure to assess federal forfeitures, pursuant to its authority under Section 503(b) of the Act.[45/] Immediately after receiving an ILEC monthly report showing that the ILEC did not meet one or more performance standards, the Commission should issue an NAL,

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be made on a per-transaction basis for a particular submeasure because counting such transactions injects subjectivity into the penalty process and tends to underestimate the extent and impact of the failure, particularly for small data samples.

[45/] Section 503(b) provides that any person "who is determined by the Commission, in accordance with paragraph (3) or (4) . . . to have willfully or repeatedly failed to comply with the . . . Act or of any rule, regulation, or order issued by the Commission . . . shall be liable to the United States for a forfeiture penalty." A violation is "willful" if the relevant act was not an inadvertent error but was consciously or deliberately committed or omitted, "irrespective of any intent to violate any provision of [the] Act or any rule or regulation of the Commission." *MAPA Broadcasting, L.L.C. WSLA(AM) Slidell, Louisiana*, Forfeiture Order, DA 01-2922, ¶ 8 (rel. Dec. 19, 2001) (citing 47 U.S.C. § 312(f)(1) ("*MAPA Forfeiture Order*"). In other words, "willful means that the licensee knew he was doing the act in question, regardless of whether there was an intent to violate the law." *Application for Review of Southern California Broadcasting Company License, Radio Station KIEV(AM) Glendale, California*, 6 FCC Rcd. 4387, ¶ 5 (1991) (*quoting* H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) ("*Southern California Application*"). A violation is repeated if, among other things, it happened on more than one occasion or continued over more than one day. *See Southern California Application*, ¶ 5; *SBC Communications, Inc. Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture and Order, 16 FCC Rcd. 19091, 19111, ¶ 55 n.67 (2001). Because federal forfeitures would be based on an ILEC's aggregate performance for all CLECs on a particular submeasure, they would, by definition, be applied to "repeated" behavior.

pursuant to Section 503(b)(4) for each such ILEC failure.[46/] In addition, since monthly reports will not be submitted for some time after the reporting month,[47/] the Commission should require ILECs to submit any requests for waiver or exceptions simultaneously with the monthly report, providing a detailed explanation as to why an NAL should not automatically issue.[48/] The Commission should accept only a very narrow range of excuses in such cases, *i.e.*, the occurrence of force majeure type events (*e.g.*, emergency, catastrophe, natural disaster, and severe storm), for benchmark measures.[49/]

Because the Commission's determination of liability would be based solely on the ILECs' own reported data -- which are presumed to be accurate[50/] -- and because the ILECs would be offering any excuses for violating the state standards at the same time they submit their reports, the due process concerns raised by some ILECs are adequately addressed. Nevertheless, it would be reasonable for the Commission to give ILECs 15 days to provide a full response to

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46/ To facilitate this process, the Commission should develop a standardized form NAL for use in addressing ILECs' performance failures.

47/ Monthly reports are always submitted to the states some time after the close of the month being reported. Reports to the Commission would be excerpts from those reports and should be submitted on the same date they are due to the state commission.

48/ Because the ILEC would be submitting waiver requests with its reports some time after the offending conduct occurred, the ILEC should be fully aware of any facts that might justify its failed performance at that time. In addition, if a state plan requires the ILEC to submit a waiver request, the ILEC should submit the same waiver request to the Commission.

49/ Force majeure excuses generally should not be permitted for measures for which the standard is parity, because the event would presumably have affected the ILECs' retail and wholesale operations similarly. In addition, many state plans already include force majeure exclusions, so there would be no reason for the Commission to consider such ILEC excuses as to standards that already take force majeure events into account. But, for benchmark standards as to which the state does not already take into account force majeure events, it would not be unreasonable for the federal enforcement-only plan to incorporate a mechanism to consider them.

50/ ILECs' data are considered correct when filed with the Commission. 47 U.S.C. § 412; *see also Notice*, n.112.

the NAL, including all factual evidence they rely upon to avoid liability.[51/] Affected CLECs should thereafter have another 15 days in which to comment on the ILECs' excuses and proposed exclusions. After receipt of any such information, in order to assure that the ILEC faces swift consequences for its performance failures, the Commission should follow up with an order that rules on the NAL within 30 days of the date specified for CLEC filings. This process would alleviate any legitimate ILEC concern about notice and opportunity to be heard before the imposition of forfeitures.

ILECs potentially must be subject to the maximum statutory penalty[52/] for non-compliance with each submeasure[53/] for each month in each state where the ILEC provided service that failed to meet the state standards. The amount of the forfeiture in any specific case

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51/ The number of days that an ILEC has to respond to an NAL for poor performance should be expressly addressed by the Commission as a modification to Section 1.80 of its Rules. 47 C.F.R. § 1.80. Notably, although the rule states the time allotted for response to an NAL is "usually" 30 days, the rule does not provide a specific minimum period for such response.

52/ The current statutory maximum is $1.2 million, but this figure is the subject of Congressional legislation -- H.R. 1765 -- seeking to raise the forfeiture amount that the Commission can impose because it is recognized that the current level of forfeitures is not deterring ILECs' anticompetitive behavior. *See also* Letter from Michael K. Powell, Chairman, FCC, to Leaders of the Senate and House Commerce and Appropriations Committees (May 4, 2001) (stating that the forfeiture amount under 47 U.S.C. § 503(b)(2)(B) "is insufficient to punish and to deter violations in many instances" and urging Congress to "consider increasing the forfeiture amount to at least $10 million in order to enhance the deterrent effect of Commission fines"); FCC Chairman Michael K. Powell, Remarks at the Association for Local Telecommunications Services, at 3 (Nov. 30, 2001) (noting that the fines the Commission can impose are in many cases paltry and that such penalties can be absorbed as a cost of doing business).

53/ The disaggregated number of submeasures reported in each state should be correlated with the amount of the statutory maximum penalty to be able to reach a procedural cap -- 40% of the ILEC's local net revenues -- of each ILEC in each state. One way to achieve this result is to disaggregate the measures upon which ILECs report by ILEC operating region. Such disaggregation is reasonable because the ILECs themselves typically measure, track, and manage their own performance in such manner. *See* AT&T Comments, CC Docket No. 98-56, RM-9101 at 34-36 (June 1, 1998).

should also be adjusted to reflect the magnitude of the violation and the duration of the poor performance.

There is no question that the Commission has the requisite jurisdiction to establish such a federal remedy plan. As numerous commenters note, the Commission has general authority to adopt remedies for violations of its rules under Sections 201, 202, and 4(i) of the Act.[54/] Indeed, the ILECs recognize that the Commission has explicit authority to impose forfeitures using an NAL process under Section 503,[55/] and the process AT&T proposes follows the requirements of that section to the letter. The Commission also has broad discretion under Section 4(i) to employ a reasonable remedy scheme although that scheme may not have been the only conceivable one.[56/] In addition, the Commission previously addressed its authority to enforce the ILECs' market-opening responsibilities required by Sections 251 and 252 of the Act in the *Local Competition Order* in which it found that, under appropriate circumstances, it "could institute an inquiry on its own motion, 47 U.S.C. § 403, initiate a forfeiture proceeding, 47 U.S.C. § 503(b), initiate a cease-and-desist proceeding, 47 U.S.C. § 312(b), or in extreme cases, consider initiating a revocation proceeding for violators with radio licenses, 47 U.S.C. § 312(a), or referring violations to the Department of Justice for possible criminal prosecution under 47 U.S.C. § 501, 502 & 503(a)."[57/]

54/ Allegiance at 39; Covad at 10-11; Cox at 21; Dynegy at 14; XO at 17-18.

55/ Verizon at 44, Qwest at 29-30, SBC at 38-39, BellSouth at 18-19.

56/ *See AT&T v. FCC*, 836 F.2d 1386, 1392 (D.C. Cir. 1988).

57/ *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, CC Docket Nos. 96-98, 95-185, 11 FCC Rcd. 15499, ¶ 129 (1996) (intervening history omitted), *aff'd AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

Finally, AT&T supports the requests of commenters that the Commission also clearly state its intention to apply -- as additional enforcement tools -- non-monetary remedies to rectify ILEC performance deficiencies.[58/] These should include, at a minimum, (i) the imposition of affirmative injunctive relief requiring improved performance within a specific timeframe, (ii) the implementation of process changes designed to improve performance, and (iii) the suspension or revocation of a Bell Operating Company's Section 271 authority. All of these remedies may in fact be required to provide the ILECs with the incentives they need to overcome their natural (and obvious) inclination to discriminate against competitors who are forced to rely on the ILECs' provision of UNEs, interconnection trunks, and collocation.

58/ *E.g.*, MPower at 11-12.

CONCLUSION

For the foregoing reasons, the Commission should not preempt the states' performance plans with a federal performance plan, but should assess meaningful, federal penalties to enforce the state plans.

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