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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 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 Relief	)	

REPLY COMMENTS OF SPRINT CORPORATION

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February 12, 2002

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REPLY COMMENTS OF SPRINT CORPORATION

Sprint Corporation, on behalf of its incumbent LEC, competitive LEC, long distance, and wireless divisions, hereby respectfully submits its reply to comments filed in the above-captioned proceeding on January 22, 2002.

I. Introduction and Summary.

The Commission initiated this proceeding to determine whether it should adopt performance measurements for evaluating ILEC provisioning of UNEs and enforcement mechanisms for violation of same to "further a Commission goal of fostering facilities-based competition while promoting simultaneously competition, innovations, and deregulation."[1] Predictably, the commenting parties split along party lines. For the mostpart, the RBOCs

[1] NPRM at para. 5.

support the adoption of federal performance measurements, but only if they are mandatory and supplant any state-ordered measurements.[2] The RBOCs also argue that the Commission lacks the authority to adopt any self-effectuating enforcement mechanisms - be they forfeitures or damages. The requesting carriers, on the other hand, support federal performance measurements, but only if they serve as minimum guidelines that the states are free to build upon. By and large, the requesting carriers encourage the Commission to adopt self-effectuating enforcement mechanisms to either supplant state enforcement mechanisms, or to serve in addition to any state mechanisms. For the most part, the state commissions agree with the requesting carriers.

Sprint, as one of the only entities with significant incumbent local interests that provide UNEs and competitive local, long distance, and wireless interests that purchase UNEs, takes a different position. In its comments, Sprint agrees with the RBOCs and supports adoption of federal performance measurements that supplant any existing or future state-ordered measurements. With only a few minor changes, as noted in Sprint's Comments, Sprint supports the performance measurements proposed by the Commission.[3] On the other hand, Sprint agrees with most of the requesting carriers that, for the RBOCs, the Commission should adopt self-effectuating enforcement mechanisms, providing for swift, certain, and significant damages and forfeitures. These damages and forfeitures must be designed to make requesting carriers whole for the damages suffered through RBOC failure

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[2] The exception being Qwest, the one RBOC that also provides interstate interLATA telecommunications services on a wide-scale basis. Qwest does not oppose preemption on all grounds, but rather argues that preemption at this time would be premature. *See*, Comments of Qwest Communications International Inc. pp. 3-4. *See also*, Comments Comments of California at p. 5.

[3] Attachment A to Sprint's Comments is a completed model of each Performance Measurement proposed by Sprint with detail on geographic coverage, disaggregation levels, business rules, and exclusions. Except as specifically noted herein, Sprint stands by that submission.

to provide nondiscriminatory access to UNEs and to drive the RBOCs to compliance with their nondiscriminatory obligation. With regard to independent incumbents, Sprint demonstrated that self-effectuating enforcement mechanisms are not necessary. Rather, the Section 208 complaint process should fulfill the need for enforcement.

As set forth briefly below, the comments provide ample support for Sprint's position.

II. Federal Performance Measurements, Standards, and Enforcement Mechanisms Can and Should be Adopted and Should Supplant State Plans.

Several commenters argue, not so much that the Commission cannot supplant the states' efforts, but rather that it should not. These commenters make much of the fact that, in the *UNE Remand Order*[4], the Commission left the states free to impose additional UNE obligations upon the incumbents, beyond that required by the Commission.[5] Covad takes this argument so far as to argue that because of that Commission action, the Commission must allow the states to adopt performance measurements in addition to any adopted by the Commission:

> The fact that the states are free to develop and implement additional UNE requirements *ipso facto* means that the states must be left free to adopt additional performance metrics and standards as well. Were they not permitted to do so, states would [be] left without the power to enforce the very rules that the 1996 Act and the Commission's rules permit them to adopt independently.[6]

This emphasis on the Commission allowing the states to add UNEs is misplaced. Rather, the critical point, for the current debate, is that, in the *UNE Remand Order*, the

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[4] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, 15 FCC Rcd 3696 (1999) (*UNE Remand Order)* at para. 154.
[5] *See, generally,* Comments of McLeodUSA Telecommunications Services, Inc. at p. 8 and Comments of XO Communications Inc. at p. 17.
[6] Comments of Covad Communications Company at p. 28.

Commission exercised its authority to preempt the states from removing any elements from the national list.[7] Section 251(d)(3)(C)[8] authorizes the Commission to preclude state regulation that would substantially prevent implementation of the requirements of section 251 and the purposes of Part II -- Development of Competitive Markets of Title II of the Communications Act. The Commission found that state removal of UNEs from the national list would prevent implementation of the requirements and purposes of the Act. The record in this proceeding provides ample evidence that the continued existence of individual state performance measurement plans will likewise thwart the purpose of the Act to foster facilities-based competition while promoting simultaneously competition, innovations, and deregulation.

SBC points out that, while the performance measurement plans it is subject to in Kansas, Oklahoma, Arkansas, and Missouri are substantially based on the Texas plan, in practice those plans have between 105 and 119 separate measurements and between 659 and 2,084 different sub-measurements.[9] This results in a difference of **1,425** sub-measurements just in one RBOC region.

The experience of BellSouth in just three of its nine in-region states demonstrates even more extreme divergences between the states:

> Further, each State that has ordered a plan, has ordered a different plan. The Florida and Georgia Commissions took a similar approach to the disaggregation of measures, yet their respective orders differ enough so that the Georgia plan has almost 200 submeasures more than the Florida plan. The Louisiana plan, although very similar to the Georgia plan in many respects, included the disaggregation of measurements into ten different geographic areas, which resulted in a plan with more than 10,000 submeasures. ... Moreover, even when State Commissions have ordered the

[7] *UNE Remand Order* at para. 154.
[8] 47 USC § 251(d)(3)(C).
[9] Comments of SBC Communications Inc. at p. 6.

> same measures and submeaures they have often ordered different standards, both retail analogs and benchmarks. To illustrate, benchmarks have been ordered by at least one of three Commissions mentioned above for forty-three different measurements. However, there are only thirteen measurements for which all three have ordered a benchmark (as opposed to a retail analog) and have also set the same benchmark.[10]

Of even more concern is BellSouth's note that, in the ongoing Tennessee performance plan proceeding, it appears the CLEC proposed plan has 93 measurements with **400,000** sub-measurements.[11]

Interestingly, WorldCom argues that preemption isn't needed because individual state plans are not over-burdening the RBOCs because, within region, the RBOCs are subject to substantially identical performance measurement plans.[12] Even if true, which based on the above appears questionable at best, WorldCom's argument falls wide of the mark for the independent incumbents that operate in more than one RBOC region. For example, Sprint's geographically dispersed incumbent local companies operate in all four RBOC regions.

These extremely divergent plans quickly bring to mind the Supreme Court's concern that a federal program administered by 50 independent state agencies is "surpassing strange."[13] If the current scenario for performance measurement plans designed to implement the nondiscriminatory provisioning of UNEs is not already "surpassing strange," it is evident that it soon will be unless the Commission acts to supplant existing and future individual state plans. This scenario cannot possibly foster competition or deregulation. It overburdens not only the incumbents, but also the requesting carriers, already struggling to compete, and the various regulators who enforce the statute.

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[10] Comments of BellSouth Corporation at pp. 12-13.
[11] *Id.*
[12] Comments of WorldCom, Inc. at p. 7. *See also,* Comments of the New York Department of Public Service at p. 2.
[13] AT&T Corp. v. Iowa Utils. Bd.., 119 S. Ct. 721, 730, n. 6 (1999).

The fact that different states have different conditions or different incumbents have different systems has no bearing on this issue. The question to be asked is, "Is SWBT providing UNEs to the requesting carriers on a nondiscriminatory basis with how it provides service to itself and its affiliates?" In other words, the obligation, and the measurement for compliance, is on an individual incumbent in a single state. It is not a matter of comparing what one incumbent does in one state with what another incumbent does in another state. It makes no difference that those two incumbents may have completely different legacy systems or different competitive environments. In each instance of measuring for compliance, there is one single, federal obligation.

III. Independent Incumbent LECs and Competitive LECs Must be Treated Differently than the RBOCs.

Verizon argues that all LECs, including competitive LECs, should track and report on the adopted performance measurements.[14] BellSouth goes further and suggests the performance measurements should be applicable to any carrier having a network that could be made available to provide local service.[15] Obviously, these carriers grossly overstate the case. Only incumbent LECs have an obligation to provide UNEs and an obligation to do so on a nondiscriminatory basis. The CLECs have no such obligation at all and where there is no obligation to be measured, it will certainly not "foster competition" to impose measurements upon entrants already struggling to compete against the monopoly RBOCs in the newly competitive local telecommunications markets.[16]

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[14] Commments of Verizon Telephone Companies at p. 17.
[15] Comments of BellSouth Corporation at p. 55.
[16] While the Act has been in place since February 1996, the degree of competition in the local markets today is so small as to still suggest that the marketplace for local telecommunications service is still "newly competitive."

Further, as Sprint argued in its comments, there are good reasons to treat the independent incumbent LECs different from the RBOCs in the application of the performance measurements, enforcement mechanisms, reporting requirements, and auditing provisions.[17] Several commenting parties also support some distinction between different groups of incumbent LECs, but miss the mark on how to distinguish between them.

Several commenters, notably the California Commission and BellSouth, acknowledge that it may be appropriate to adopt different requirements, or no requirements, for rural ILECs.[18] Sprint agrees that this is a major step in the right direction. However, Sprint believes that such a standard does not fully provide the necessary relief for independent ILECs. As Sprint noted in its comments, all of Sprint's incumbent LECs, except for Nevada, meet the statutory definition of "rural."[19] However, to date, none of the Sprint incumbents have sought to shelter themselves from competition by seeking to invoke the Section 251(f) exemptions. Notwithstanding that the exemption has not been invoked, UNE activity, as noted in Sprint's Comments, has been non-existent in some of Sprint's incumbent regions and minimal in most of the rest.[20] Sprint expects that its experience is not remarkable, but is fairly representative of the degree of competition in independent LEC regions across the county. Accordingly, while it is appropriate to treat rural ILECs differently, the Commission should go one step further and draw the distinction between the RBOCs and the

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[17] Perhaps the most persuasive argument, and one for which nothing on the record contradicts, is the very limited degree of competition through UNEs in the independent territories. *See,* Sprint's Comments at pp. 9-10.
[18] *See,* 47 USC § 153(37) and Comments of California at p. 6, Comments of BellSouth at pp. 24-25.
[19] Sprint Comments at p. 9.
[20] *Id.*

independent ILECs. To limit the distinction to simply rural ILECs will subject many incumbents to a solution for which there is no demonstrated problem.

AT&T suggests that it may be appropriate to distinguish between Class A (or Tier 1) and Class B incumbents.[21] The old Class A - Class B distinctions are quickly becoming out-dated as the Commission increasingly distinguishes between small and mid-sized carriers on the one hand, and large carriers -- the RBOCs -- on the other.[22]

In the *ARMIS Reductions Report and Order*[23] the Commission reduced ARMIS filing requirements for mid-sized carriers in recognition that the RBOCs have a much greater transactional volume of nonregulated services than small and mid-sized carriers, creating more risk of cost shifting and harm to consumers and competitors from cross-subsidization. The Commission defined mid-sized as a carrier whose operating revenue equals or exceeds the indexed revenue threshold [the $117 million distinction between Class A and B], and whose revenues when aggregated with the revenues of any LEC that it controls, is controlled by, or which it is under common control is less than $7 billion. The effect was that the RBOCs were the only large LECs, with all independents being either small or mid-sized. This mid-sized classification was used again this past November to further reduce accounting

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[21] Comments AT&T Corp. at p. 37. Class A incumbents are those with less than $117 million (the current threshold) in annual revenues from regulated operations. *See also,* Comments of Focal Communications Corporation, Pac-West Telecom, Inc., and US LEC Corp. supporting distinguishing between Class A and B incumbents.

[22] It must be noted that there is a big difference between the RBOCs, as they existed at the time Class A and B were conceived, and the RBOCs of today. Following the flurry of mergers, what really exists today are mega-RBOCs that dwarf the mid-sized carriers in size and scope and that further suggests the appropriate dividing line is between the RBOCs on the one hand and the non-RBOCs on the other.

[23] *In the matters of 1990 biennial Regulatory Review - Review of ARMIS Reporting Requirements,; Petition for Forbearance of the Independent Telephone and Telecommunications Alliance,* CC Docket No. 98-117; Report and Order in CC Dcoket No. 98-117, Fifth Memorandum Opinions and Order in AAD File No. 98-43, FCC 99-107, released June 30, 1999.

and reporting requirements on the mid-sized carriers as opposed to those imposed on the RBOCs.[24]

The issue at hand is similar. To date, the degree of UNE activity in the independent territories is not near as great as in the RBOC territories. There has been nothing placed on this record, regarding significant orders from independents or allegations of discrimination. While many parties speak in this proceeding in terms of all ILECs, it is clear in reading the comments that the focus has been and is on the RBOCs. The Commission should memorialize this recognition - at least at this time - and not impose unnecessary regulatory burdens on the independent ILECs beyond those minimal measures put forth by Sprint.[25]

IV. Specific Enforcement Mechanisms for the RBOCs are Necessary.

Sprint argued for swift and certain self-effectuating damages and forfeitures for RBOC misses of the federal performance measurements. The RBOCs argue, however, that the Commission cannot adopt self-effectuating damages because of various statutory and due process requirements and limitations.[26]

Sprint still believes that the record in this proceeding will be sufficient to meet any procedural concerns raised by the RBOCs. However, if the Commission does not agree that it can adopt self-effectuating damages and forfeitures, then it must act to at least streamline current processes.

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[24] *In the Matter of 2000 Biennial Regulatory Review - Comprehensive Review of the Accounting Requirements and ARMIS Reporting Requirements for Incumbent Local exchange Carriers: Phase 2,* Report and Order in CC Docket Nos. 00-199, 97-212, and 80-286, FCC 01-305, released November 5, 2001.
[25] Under Sprint's proposal, the non-RBOC ILECs will still track and keep data on the Performance Measurements and thus the FCC will have the information readily available to determine when, if ever, it is necessary to treat the independent ILECs similar to the RBOCs.
[26] *See, generally;* Comments of BellSouth Corporation pp 18-20 and Comments of Qwest Communications International Inc. at pp. 25-30.

Claims for damages could be filed by carriers pursuant to Section 208[27], and the Commission could subject such claims to its current Rocket Docket procedures, without the current required negotiation stage.[28] After the conclusion of the record in the instant proceeding, any failures by an RBOC to meet an adopted performance measurement should be prima facie proof of a Section 251(c)(3) violation and there will be no need for settlement negotiations.

Likewise, the Commission should investigate streamlining its forfeiture procedures, consistent with any statutory or due process requirements it deems necessary. If the federal performance measurements are to be effective, they must provide for swift, certain penalties -- something that the current environment is clearly not providing.[29]

While AT&T agrees with Sprint that existing federal penalty or forfeiture mechanisms have proven insufficient to drive RBOC compliance with the Act's Section 251(c)(3) obligations, AT&T's proposed solution is seriously flawed. AT&T suggests that existing state Tier 1 damages to carriers and Tier 2 penalties to the state be maintained in tact. What AT&T proposes is to add new federal penalties, on top of existing state penalties, for failures to comply with state performance plans -- in essence, penalizing the ILEC multiple times for the same offense.[30] Contending that the caps in existing state plans create forfeiture amounts that are nothing more than a cost of doing business, AT&T suggests that a procedural cap of 40% of ARMIS local revenues is the only cap necessary.[31]

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[27] 47 USC § 208.
[28] The Commission Accelerated Docket rules are set forth in 1.730 of the Commission's Rules, 47 CFR § 1.730.
[29] *See* Sprint's Comments at n. 13.
[30] *See generally,* Comments of AT&T Corp. at pp. 28-33.
[31] In addition to complaining about caps, AT&T complains that the inappropriate use of so-called K tables allows ILECs, in many instances, to exclude certain failed tests and thereby avoid

Such a proposal is of questionable legality, is akin to double jeopardy, and will overburden not only the ILECs, but also state and federal regulators. While existing penalties have not been sufficient, 40% of local revenue is patently excessive and poses a risk to the future economic viability of the ILEC.

V. Specific Performance Measurement and Standards Proposals.

BellSouth argues that service requests, identified by the ILEC as Projects, should be excluded from the FOC Timeliness and Reject Interval Performance Measurements.[32] Often, when an ILEC receives an order for a large volume of a single UNE, it designates the order as a Project and negotiates timelines. As Sprint understands it, the concern is one of workforce management, and Sprint acknowledges that that is a legitimate concern. The ILEC should not be expected to staff up and have idle workforce on the off-chance that a requesting carrier will submit a large volume order.

However, if the requesting carrier can provide a reasonably accurate, written forecast six months in advance of the order, there should be no reason why the RBOC can't plan adequately and meet the performance measurements. Accordingly, if the Commission adopts BellSouth's proposed exclusion for "projects", Sprint proposes an exception to that exclusion for large volume orders where the requesting carrier provides a reasonably accurate (+/- 20%) written forecast six months in advance. Large volume orders should be defined as (a) more than 5 orders of a single UNE, per day, per RBOC central office; or, if greater (b) an

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penalties. What AT&T fails to note is that such methods, designed to mitigate the risks associated with Type I errors (unavoidable errors of incorrectly deciding non-compliance) inherent in statistical testing, are necessary to construct a proper plan. Whether the K table approach is the correct method or not, without a provision for mitigating the risks associated with Type I errors, the ILEC would be placed in a position to pay penalties even for compliant service.

[32] Comments of BellSouth at p. 34.

order that is 50% greater than the carrier's daily run rate of orders for that UNE at the central office over the 180 day period immediately prior to the order in question.

WorldCom argues that the standard should never be parity, but rather fixed benchmarks. WorldCom's position cannot be reconciled with the clear language of the Act. The Act requires that parity be used whenever there is a retail analogue.

For example WorldCom's proposed measurement for Mean Time to Restore[33] applies for maintenance for high capacity unbundled loops, e.g., DS1, DS3, or Ocn., WorldCom suggests a benchmark standard. Sprint believes, however, that UNE loop standards for installation, repair, and maintenance should be parity with the ILEC private line or the equivalent special access channel termination. For example, an unbundled DS1 loop is effectively the same as a DS1 private line circuit or DS1 special access channel termination and therefore should have a parity standard for any measurements related to installation, repair, and maintenance.

Sprint agrees with AT&T Wireless Services[34] that Commercial Mobile Radio Service ("CMRS") carriers be full participants in the performance plan adopted. Accordingly, the performance measurements and standards and the enforcement mechanisms intended to ensure nondiscriminatory access to UNEs should apply when CMRS carriers obtain UNEs, just as they do when a wireline carrier obtains UNEs.

VI. CONCLUSION

The record demonstrates that the Commission can, and must, adopt federal performance measurements that supplant those of the states. As for the RBOCs, swift and

[33] Comments of WorldCom, Inc. Appendix B, p. 52.
[34] Comments of AT&T Wireless Services at p. 32.

certain enforcement mechanisms must be in place, if not self-effectuating, then at least streamlined from today's damages and forfeiture procedures. The record also demonstrates that independent ILECs must be treated differently than the RBOCs and accorded different treatment with regard to the application of performance measurements and any enforcement mechanisms.

Respectfully submitted,

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February 12, 2002

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **REPLY COMMENTS OF SPRINT CORPORATION** was sent by United States first-class mail, postage prepaid, on this 12th day of February 2002 to the parties on the attached list.

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