DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

FEB 12 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Performance Measurements and Standards for Interstate Special Access Services	)	CC Docket No. 01-321
	)	
Petition of U S West, Inc., for a Declaratory Ruling Preempting State Commission Proceedings to Regulate U S West's Provision of Federally Tariffed Interstate Services	)	CC Docket No. 00-51
	)	
Petition of Association for Local Telecommunications Services for Declaratory Ruling	)	CC Docket Nos. 98-147, 96-98, 98-141
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended	)	CC Docket No. 96-149
	)	
2000 Biennial Regulatory Review - Telecommunications Service Quality Reporting Requirements	)	CC Docket No. 00-229
	)	
AT&T Corp. Petition to Establish Performance Standards, Reporting Requirements, and Self-Executing Remedies Needed to Ensure Compliance by ILECs with Their Statutory Obligations Regarding Special Access Services	)	RM 10329

REPLY COMMENTS OF AT&T CORP.

James L. Casserly
Sara F. Leibman
Robin E. Tuttle
Angela F. Collins
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

Mark C. Rosenblum
Lawrence J. Lafaro
Richard H. Rubin
James W. Grudus
Deborah S. Waldbaum
AT&T Corp.
Room 1134L2
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-4243

Attorneys for AT&T Corp.

February 12, 2002

No. of Copies rec'd 0+4
List A B C D E

TABLE OF CONTENTS

Page

INTRODUCTION AND SUMMARY 2

I. THERE IS OVERWHELMING EVIDENCE THAT SPECIAL ACCESS PERFORMANCE MEASUREMENTS AND STANDARDS ARE NECESSARY 3

A. The Comments Demonstrate that the ILECs Retain a High Degree of Market Power in the Provision of Special Access Services. 4

1. The Existence of Pricing Flexibility or Competitor Collocations Does Not Equate to Special Access Competition 4

2. The ILEC "Evidence" of Competition Is Unreliable. 7

B. Adoption of Federal Performance Measures, Standards, and Reporting Requirements Will Help Deter ILECs From Abusing Their Market Power 10

1. The ILECs Have Both the Means and Motivation To Discriminate Against Competitors. 11

2. Performance Measures and Standards Will Correct, Not Distort, the Marketplace. 14

3. The Adoption of Performance Measures and Standards Will Not Be Burdensome on ILECs. 20

4. The Comments Do Not Support the Notion that Nondominant Carriers Should be Subject to Performance Measures, Standards, and Reporting Requirements. 22

5. There is No Evidence to Support the Adoption of an Automatic Sunset Date. 23

II. THE COMMISSION HAS THE AUTHORITY AND OBLIGATION TO ADOPT A NATIONAL PERFORMANCE PLAN. 24

A. The Commission's Jurisdiction To Adopt Performance Measurements, Standards, and Reporting Requirements Is Clear. 24

B. The Commission Should Adopt a Virtually Automatic Remedy Procedure Both To Compensate Injured Carriers and To Deter Anticompetitive Behavior. 28

1. The Commission's Enforcement Regime Should Permit Competitors To Recover Carrier-Specific Damages. 31

2. The Commission's Enforcement Regime Should Include Payments to the U.S. Treasury Via a Streamlined, Virtually Automatic Process. 37

CONCLUSION 43

RECEIVED
FEB 1 8 2002
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Performance Measurements and Standards for Interstate Special Access Services	)	CC Docket No. 01-321
	)	
Petition of U S West, Inc., for a Declaratory Ruling Preempting State Commission Proceedings to Regulate U S West's Provision of Federally Tariffed Interstate Services	)	CC Docket No. 00-51
	)	
Petition of Association for Local Telecommunications Services for Declaratory Ruling	)	CC Docket Nos. 98-147, 96-98, 98-141
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended	)	CC Docket No. 96-149
	)	
2000 Biennial Regulatory Review - Telecommunications Service Quality Reporting Requirements	)	CC Docket No. 00-229
	)	
AT&T Corp. Petition to Establish Performance Standards, Reporting Requirements, and Self-Executing Remedies Needed to Ensure Compliance by ILECs with Their Statutory Obligations Regarding Special Access Services	)	RM 10329

REPLY COMMENTS OF AT&T CORP.

AT&T Corp. ("AT&T") hereby submits its reply comments on the above-captioned Notice of Proposed Rulemaking ("*Notice*").[1/] As the vast majority of comments advocate, AT&T urges the Commission to take prompt action to adopt performance measurements,

---

1/ *See Performance Measurements and Standards for Interstate Special Access Services*, CC Docket No. 01-321, FCC 01-339 (rel. Nov. 19, 2001) ("*Notice*").

performance standards, reporting requirements, and a meaningful enforcement mechanism for special access services provided by incumbent local exchange carriers ("ILECs").

INTRODUCTION AND SUMMARY

The comments provide unquestionable evidence that the ILECs retain monopoly power over the interstate special access market and that they do not provide special access services to carriers or end users in a just, reasonable, and nondiscriminatory manner. Despite the ILECs oft-repeated claim that the special access market is competitive and that competitors have no need for special access services, the record here offers a sharply contrasting view -- both competitive local exchange carriers ("CLECs") and interexchange carriers ("IXCs") remain dependent on ILEC interstate special access services to provide both local telecommunications and interexchange services.

Except for the ILECs, the commenters unanimously call on the Commission to adopt federal performance measures, performance standards, reporting requirements, and a meaningful enforcement mechanism. In this regard, AT&T supports the adoption of the Joint Competitive Industry Group Proposal on ILEC Performance Measurements and Standards for Special Access Service ("JCIG Proposal"). The adoption of the JCIG Proposal is urgently needed to help prevent the ILECs from continuing to abuse their market power by providing commercially unacceptable services to their competitors.

The ILECs' argument that the Commission should rely on market forces to guarantee their compliance with the Communications Act ("Act") is conclusively rebutted by the comments, which uniformly demonstrate that competitors lack the bargaining power needed to compel the ILECs to incorporate adequate performance standards and remedies in their tariffs and carrier-to-carrier contracts. Moreover, the data currently provided to special access purchasers pursuant to contract or tariff provisions do not provide either competitors or the

Commission with the transparency needed to determine whether the ILECs actually are fulfilling their statutory duties. Adoption of the proposed JCIG performance standards is crucial to offset these deficiencies in the marketplace.

The comments make clear that the Commission has the authority -- and the obligation -- to adopt a national interstate special access performance plan, which includes strong, effective remedies. And critically, performance measures and standards are virtually useless unless they are accompanied by a meaningful enforcement regime that both compensates injured carriers and deters future ILEC performance failures. Accordingly, AT&T supports the principles set forth in the Joint Competitive Industry Group's Feburary 12, 2002 Proposal on the Essential Elements of a Special Access Enforcement Plan ("JCIG Remedies Proposal"). Moreover, as numerous commenters recognize, the Commission's special access enforcement regime should be as self-executing as possible. A streamlined enforcement scheme with limited procedural time frames and substantial penalties for non-compliance is the most effective way to ensure that ILECs do not continue to provide competitors -- and thus their end user customers -- with unjust, unreasonable, and discriminatory service.

I. THERE IS OVERWHELMING EVIDENCE THAT SPECIAL ACCESS PERFORMANCE MEASUREMENTS AND STANDARDS ARE NECESSARY.

Above all, the record in this proceeding supports AT&T's demonstration -- and the Commission's prior finding -- that the special access market is not competitive and, more importantly, that the ILECs retain and exert their power in this market to disadvantage competitors.[2/] Now, more than ever, a comprehensive federal performance plan is necessary to

---

[2/] *See* AT&T at 8-12; *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of U S WEST Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, 14 FCC Rcd

prevent the ILECs from undermining nascent local competition and leveraging their local market dominance as they begin to provide long distance services.

A. The Comments Demonstrate that the ILECs Retain a High Degree of Market Power in the Provision of Special Access Services.

1. The Existence of Pricing Flexibility or Competitor Collocations Does Not Equate to Special Access Competition.

Notwithstanding the abundant record evidence that the ILECs are significantly dominant in the provision of special access, the ILECs claim that the Commission's *Pricing Flexibility Order* and subsequent grants of pricing flexibility pursuant to that decision represent a determination that their special access services face effective competition.[3/] This conclusion is wrong because, as many commenters note, the *Pricing Flexibility Order* does not find that special access services are competitive.[4/] To the contrary, the Commission merely determined the circumstances under which incumbents will be granted pricing flexibility, and the U.S. Court of Appeals for the D.C. Circuit has upheld that vary interpretation of the Commission's decision.[5/] There is a vast difference between a grant of pricing flexibility based upon the standards in the *Pricing Flexibility Order* and the essentially complete deregulation the ILECs seek here.[6/]

14221, 14300, ¶ 151 (1999) ("*Pricing Flexibility Order*"), *aff'd sub nom., WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

3/ BellSouth ¶¶ 30, 34-36; Qwest at 7-8; SBC at 10-11; Verizon at 2, 7-8.

4/ *E.g.*, AT&T Wireless at 11-14; Cablevision Lightpath at 5; Mpower at 9; Cable & Wireless at 11-12; Sprint at 5; WorldCom at 34-35; Time Warner and XO Communications at 10-11.

5/ *See Worldcom*, 238 F.3d at 460.

6/ Accordingly, special access services that are currently provided under a pricing flexibility regime must be included in the performance measurement and reporting system the Commission adopts here. *See* Cablevision Lightpath at 5; *see also Notice* ¶ 14 (seeking comment on whether the Commission should exclude certain special access circuits from inclusion in the performance standard plan).

Pricing flexibility may be triggered when a given area has a specified number of collocation arrangements and a competitive alternative exists for the dedicated transport services needed to reach the majority of IXCs' customers. As AT&T and other commenters explain, such a "collocation test" is not an accurate (or even reasonable) indicator as to whether competitors remain dependent on the ILECs' facilities.[7/] Indeed, if competitors could reach their end users by building their own facilities, they would have no need to collocate at incumbents' central offices at all. Competitors choose collocation at the ILEC end offices precisely because they need to access ILEC facilities, whether those facilities are provided as UNEs or as special access.[8/] The vast majority of commenters agree that, without those ILEC facilities, competitors have no other viable way to connect to their end users.[9/]

7/ AT&T at 7-8; Cable & Wireless at 12; Sprint at 5. Even non-DSL collocations cannot be viewed as sufficient evidence that competitors are no longer dependent on ILEC transport facilities. "Smart-build," or switch-based competitors often lease nearly 100% of their transmission systems and facilities (*i.e.* loops and transport). Such competitors typically install a switching platform in a central office and then lease backbone and local loop transport. AT&T's own experience shows that a substantial number of its collocations utilize ILEC inter-office transport facilities. *See* Declaration of Anthony Fea and William J. Taggart III on Behalf of AT&T Corp., ¶ 7 *appended to* Comments of AT&T Corp. on Use of Unbundled Network Elements to Provide Exchange Access Services, CC Docket No. 96-98 (filed Apr. 30, 2001) ("AT&T April 2001 Comments" and "Fea-Taggart Declaration").

8/ *E.g.*, Worldcom at 34-35.

9/ *E.g.*, American Petroleum Institute ("API") at 3; CompTel at 3; Focal, Pac-West and US LEC at 11-12; Mpower at 8; Sprint at 3. Competitors routinely use special access from the collocation site to the end user, and they frequently use special access to connect the collocation site to their own premises. In fact, they often use incumbent-provided special access even in their backbone networks. *See* Fea-Taggart Declaration ¶ 8. Accordingly, SBC fails to recognize the difference between collocating in an ILEC's end office and having facilities that connect to the end user. SBC at 15. Indeed, under SBC's analysis, if there are two CLECs in the end office, each CLEC should be able to look to the other to get facilities to the end user. This theory, however, fails because neither competitor typically has such facilities, so that *both* must rely on the ILEC to connect to the end user.

SBC is simply wrong that the D.C. Circuit Court of Appeals found that the number of competitor collocations "reasonably can predict competitive constraints on LEC behavior."[10/] A review of the court's reasoning shows that the court found that the Commission "chose to rely upon *an admittedly imperfect* measure of competition."[11/] Moreover, as Time Warner and XO Communications explain, the court upheld the Commission's finding that ILECs may "use pricing flexibility to deter efficient entry or engage in exclusionary pricing behavior" or "increase rates to unreasonable levels for customers that lack competitive alternatives."[12/]

In all events, the ILECs' continuing dominance in the special access market is confirmed by the fact that they have not used their pricing flexibility to lower special access prices. More often than not, according to the Ad Hoc Telecommunications Users Committee (representing the nation's largest corporate users of telecommunications services), the ILECs charge ***higher*** prices for special access circuits in areas in which they have obtained pricing flexibility.[13/] Sprint agrees, asserting that the ILECs "have done little with such regulatory relief other than to raise their special access prices -- hardly the behavior of carriers facing robust competition."[14/] Accordingly, as Ad Hoc notes, "if competition is insufficient to restrain the ILECs from raising

---

10/ SBC at 10.

11/ *WorldCom*, 238 F.3d at 459 (emphasis added). Ultimately, the court upheld the Commission's use of the collocation test under the broad "arbitrary and capricious" standard because the Commission reiterated its commitment to enforce the "just and reasonable" and nondiscrimination requirements of Sections 201 and 202 -- the very provisions competitors seek to have enforced through the adoption of federal special access performance measures. *See id.* at 459-60.

12/ Time Warner and XO Communications at 10-11; *see also Pricing Flexibility Order* ¶ 3; *WorldCom*, 238 F.3d at 460.

13/ Ad Hoc Telecommunications Users Committee ("Ad Hoc") at 4. Ad Hoc's research indicates that the pricing for DS-1 and DS-3 special access services is higher in "the supposedly more competitive" pricing flexibility areas than in areas in which the ILEC has not received pricing flexibility. *Id.* at 5.

14/ Sprint at 5.

the prices of special access services, the Commission cannot assume that [a grant of pricing flexibility] is sufficient to discipline ILEC behavior in terms of deployment and service quality."[15/]

2. The ILEC "Evidence" of Competition Is Unreliable.

Even though the record demonstrates conclusively that ILECs continue to dominate the special access market, as expected, the ILECs claim, based on already discredited "evidence," that the special access market is competitive.[16/] For example, Verizon relies on the USTA Report's assertion that in 2000 competitors earned more than $7.3 billion in special access revenues and that competitors' receive 36 percent of special access revenues.[17/] AT&T has proven that the illusion of competition Verizon attempts to create is just that. In fact, the opposite is true -- the competitive situation is essentially the same, if not worse, than it was when the Commission adopted its unbundling requirements.[18/] Indeed, the ILECs' overly-optimistic estimates, which are based on outdated data, show that CLECs' share of the special access market grew only three percent from 1999 through 2000 -- a statistically insignificant

---

15/ Ad Hoc at 6. Incredibly, Qwest asserts that the special access market is competitive because no parties opposed Qwest's pricing flexibility petition. Qwest at 8. As many competitors have realized, if the standards to receive pricing flexibility are mechanical and lawful (although flawed), then there is no point in opposing such a petition, because it would be futile. The key point, however, is that even when an ILEC meets the modest standard for pricing flexibility, that ILEC is still a dominant supplier of special access. *See* AT&T Wireless at 11-14; Cable & Wireless at 11-12; Sprint at 5; WorldCom at 34. Moreover, the response would clearly have been be different if Qwest had filed a petition for forbearance from Sections 201 and 202 of the Act, which it clearly could not have sustained.

16/ *E.g.*, Qwest at 7; SBC at 8-10; Verizon at 4-6; *see also Competition for Special Access Service, High Capacity Loops, and Interoffice Transport* ("USTA Report") *appended to* Comments of United States Telephone Association, CC Docket No. 96-98 (Apr. 5, 2001).

17/ Verizon at 4-5.

18/ Opposition of AT&T Corp. to Joint Petition, CC Docket No. 96-98, at 7 (June 11, 2001) ("AT&T Opposition").

percentage.[19/] Moreover, AT&T and several other commenters have thoroughly refuted nearly every other conclusion made by the USTA Report, as well as the statistical methodologies relied upon to reach those conclusions.[20/] The USTA Report does not even attempt to look at marketplace evidence regarding competitors' actual ability to deploy alternative facilities, has no basis in the realities of the competitive market, and is not an accurate or reliable indicator of competition in the special access market. Certainly, it is flatly inconsistent with the recent findings of the New York Public Service Commission that Verizon itself remains dominant in the provision of all special access services in New York, the most competitive state in the country.[21/]

BellSouth also submits a report in this proceeding prepared by the Eastern Management Group ("EMG Report"), which purports to demonstrate that the special access market in

---

19/ *Id.* at 7-8. Further, the recent economic downturn has had a dramatic negative impact upon competition in the special access market. An updated version of the information used to support the USTA Report and the ILECs' position notes the demise of twenty CLECs and the Chapter 11 filings of eight more. *See* An Economic and Engineering Analysis of Dr. Robert Crandall's Theoretical "Impairment" Study, at 1, *appended to* AT&T Opposition ("Crandall Rebuttal").

20/ *See generally* Crandall Rebuttal; *see also* Sprint at 2-4 (stating that special access is not competitive and the ILECs' study purporting to demonstrate competition is riddled with factual errors); WorldCom Comments on Joint Petition of BellSouth, SBC and Verizon for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport, CC Docket 96-98, at 24-30 (June 11, 2001).

21/ *See* NY PSC Case 00-C-2051, *Proceeding on Motion of the Commission to Investigate Methods to Improve and Maintain High Quality Special Services Performance by Verizon New York Inc.*, Opinion and Order Modifying Special Services Guidelines for Verizon New York Inc., Conforming Tariff, and Requiring Additional Performance Reporting, at 6 (June 15, 2001). What the NY PSC calls special services are "known as 'special access' when provided pursuant to federal tariffs. Special access services are provided pursuant to Federal Tariff if the customer advises that more than 10% of the traffic will be inter-state, regardless of where the facilities to serve the traffic are located. For reporting purposes, all special services are addressed by the Commission's Special Services Guidelines." NY PSC Case 00-C-2051, *Proceeding on Motion of the Commission to Investigate Methods to Improve and Maintain High Quality Special Services Performance by Verizon New York Inc.*, Order Denying Petitions for Rehearing and Clarifying Applicability of Special Services Guidelines, at 1 (Dec. 20, 2001).

BellSouth's territory is competitive.[22/] Based on the EMG Report's "findings," BellSouth insists that CLECs do not need special access to compete with ILECs because CLECs are free to use any combination of services and facilities.[23/] This assertion has no basis in reality because the EMG Report relies in part upon the perceived state of the market as it existed ten or more years ago.[24/] Given the fundamental industry restructuring that has occurred in recent years, conclusions based upon such outdated information are wholly irrelevant.

More importantly, the EMG Report's conclusions do not, as BellSouth claims, show that the special access market is competitive. For instance, the EMG Report claims that the number of competitive access providers ("CAPs") and CLECs grew by an average of 60 percent per year from 20 such providers in 1993 to 532 at the end of 2000.[25/] In 1993, those twenty CAPs/CLECs had a .02 percent revenue share, and by 2000 -- seven years later -- the 532 competitive providers had a combined 4.1 percent revenue share.[26/] On that basis, the average competitor share changed from .01 percent per competitor to .008 percent per competitor -- hardly a strong endorsement of the competitiveness of the market. Consistent with the evidence provided by the ILECs' carrier *and* end user customers here, the ILECs remain dominant in their provision of special access services, and the EMG Report offers no new insights that legitimately challenge that conclusion.

Indeed, the commenters offer a sharply contrasting view of the world. Both the Illinois Commerce Commission and the Minnesota Department of Commerce, for example, stress the

---

22/ *See* The Eastern Management Group, *Special Access Competition* (Jan. 22, 2002) *appended to* BellSouth Comments ("EMG Report").

23/ BellSouth ¶ 42.

24/ EMG Report at 2-4 (detailing data from the 1980s and 1990s).

25/ *Id.* at 4-5.

26/ *Id.*

need for special access performance standards given the ILECs' continuing control of the special access market and competitors' reliance on such services.[27/] Similarly, CompTel explains that the ILECs control over 90 percent of the loop/transport combinations market, with an even greater market share in more rural areas.[28/] In addition, DirecTV Broadband notes that the ILECs provide the vast majority of DSL access lines and often use that market power to discriminate in favor of their affiliated broadband service providers.[29/] Even Sprint, which makes a significant effort to self-supply special access circuits, continues to rely on ILEC-provisioned facilities for 93 percent of its special access needs.[30/] Because of this overwhelming dominance, competitive providers remain "at the mercy" of the ILECs' special access services.[31/]

B. Adoption of Federal Performance Measures, Standards, and Reporting Requirements Will Help Deter ILECs From Abusing Their Market Power.

In light of the ILECs' continuing control of the special access market, it is not surprising that the evidence in this and other proceedings consistently demonstrates that competitors do not receive timely and quality services on a nondiscriminatory basis. Nor is it surprising that the overwhelming majority of commenters urge the Commission to adopt performance measurements, performance standards, and reporting requirements to combat the ILECs' continued -- and in some cases growing -- abuse of their market power.[32/] As these commenters

---

27/ Illinois Commerce Commission at 2; Minnesota Department of Commerce at 3-5.

28/ CompTel at 2.

29/ DirecTV Broadband at 4-6.

30/ Sprint at 4-5.

31/ CompTel at 2, 3-5; *see also* Focal, Pac-West and US LEC at 12.

32/ Ad Hoc at 3; API at 2; ASCENT at 2; ALTS at 6-7; AT&T Wireless at 7; Cable & Wireless at 8-9; CompTel at 2; DirecTV Broadband at 3; Focal, Pac-West and US LEC at 10-11; Illinois Commerce Commission at 1; Mpower at 15; Minnesota Department of Commerce at 1-2; New York Department of Public Service at 1-2; PaeTec at 3; Sprint at 2; Time Warner and XO Communications at 17-18; VoiceStream at 2; WorldCom at 36; *see also* Letter from

note, the adoption of measurements and standards would go a long way toward aiding the Commission's ability to rectify the serious problems associated with ILEC-provisioned interstate special access services.[33/]

1. The ILECs Have Both the Means and Motivation To Discriminate Against Competitors.

One thing is clear from this record -- the ILECs continue to abuse their power in the special access market and fail to meet their legal obligations to provide special access services in a just, reasonable, and nondiscriminatory manner. This conclusion is reached by all interested parties other than the ILECs, including state commissions, competitors, and end user customers. For example, the New York State Department of Public Service, a state commission that has paid "considerable attention" to the provisioning of special access services, concludes that "the ILECs are still the dominant providers of these services" and that their "uneven performance threatens to undermine competition."[34/] Similarly, other state commissions in their own proceedings on special access deficiencies have previously found that ILECs fail to meet provisioning dates and regularly discriminate against competitors.[35/] More importantly, those state commissions found

---

Representatives Largent, Stupak, Cannon, McCarthy, Eshoo, and Pitts, to Michael K. Powell, Chairman, FCC (Jan. 16, 2002) ("We are writing to offer our strong support for these actions, and to encourage the Commission to work quickly to adopt and implement final rules that promote a robustly competitively market place.").

33/ *E.g.*, ASCENT at 2.

34/ New York Department of Public Service at 2-3.

35/ MPUC Docket No. P-421/C-99-1183, *Complaint of AT&T Communications of the Midwest, Inc. Against U S WEST Communications, Inc., Regarding Access Service*, 2000 Minn. PUC LEXIS 53, *34 (Aug. 15, 2000) (finding a "clear need for further investigation, careful monitoring, and, potentially, wholesale access service quality standards for U S WEST"); CPUC Docket No. 99F-404T, *AT&T Communications of the Mountain States, Inc. Complainant, v. U S WEST Communications, Inc., Respondent*, Decision No. R00-128, at II. D, F, G (Feb. 7, 2000) ("AT&T has experienced regular, frequent, widespread, and ongoing delays in obtaining access").

that the ILECs' sub-par performance jeopardizes competitors' provision of reliable, high-quality services.[36/]

End user customers present an even bleaker view of the special access market and the ILECs' continuing control over these essential services. For example, Ad Hoc states that even the most competitive markets have done little to constrain the ILECs' discriminatory behavior toward both carriers and end user customers, the ultimate beneficiaries of improved ILEC service.[37/] Moreover, as API explains, ILEC delays in provisioning special access service ultimately prevent end users from switching from one carrier to another.[38/] And, because the ILECs' poor service quality impacts carrier selection decisions, the ILECs have the ability to control market entry by others.

Competitors from all areas of the market, including CLECs, wireless carriers, IXCs, and broadband providers, concur with AT&T that the ILECs use their market power to avoid providing special access services in a just, reasonable, and nondiscriminatory manner.[39/] For example, Cablevision Lightpath asserts that Verizon consistently fails to meet installation deadlines and, in fact, has at times had four or more orders that were more than ten days overdue.[40/] Likewise, VoiceStream Wireless submits evidence that on average Verizon was 26

36/ MPUC Docket No. P-421/C-99-1183, *Complaint of AT&T Communications of the Midwest, Inc. Against U S WEST Communications, Inc., Regarding Access Service*, 2000 Minn. PUC LEXIS 53, *34 (Aug. 15, 2000); CPUC Docket No. 99F-404T, *AT&T Communications of the Mountain States, Inc. Complainant, v. U S WEST Communications, Inc., Respondent*, Decision No. R00-128, at II. D, F, G (Feb. 7, 2000).

37/ Ad Hoc at 4.

38/ API at 3.

39/ *E.g.*, AT&T at 3-4; AT&T Wireless at 6; ALTS at 7-8; ASCENT at 5; Focal, Pac-West and US LEC at 2-4; Time Warner and XO Communications at 15.

40/ Cablevision Lightpath at 3.

days late in meeting its Firm Order Confirmation ("FOC") dates in lower Manhattan[41/] -- unquestionably the most competitive telecommunications market in the country. WorldCom explains that the ILECs frequently issue "unsolicited" FOCs that notify the competitor that the ILEC has unilaterally rescheduled the FOC due date, the date on which the competitor expects the ILEC to install the requested facilities.[42/] Even more problematic, the ILECs often fail to follow their own established procedures, which makes it extremely difficult for competitors to manage their end user customer relationships.[43/]

AT&T's own industry-wide data present similar results. As the attached Declaration of Maureen A. Swift explains, AT&T has tracked performance trends over the last five years and is therefore able to provide a clear picture of the true nature of the special access market.[44/] AT&T's data indicate that, on a national basis,[45/] ILECs consistently failed to provision AT&T's DS-1 orders in a timely manner more than 10 percent of the time. And disturbingly, the data reflect a *downward* trend in on-time performance. Further, over the five-year period covered in AT&T's analysis, the ILEC-provisioned DS-1 failure-frequency rate was as high as 23 percent and was always above 10 percent. Moreover, as on-time performance has gone down, the failure rate has risen -- and restoration times remain unacceptable. Indeed, it takes ILECs more than three hours to restore failed circuits almost thirty percent of the time.[46/] The poor quality of the

---

41/ Affidavit of Richard Johnson at 2, *appended to* VoiceStream Wireless Comments.

42/ WorldCom at 14.

43/ WorldCom at 15.

44/ *See* Declaration of Maureen A. Swift on Behalf of AT&T Corp., ¶¶ 10-12 (Feb. 12, 2002) ("Swift Declaration").

45/ AT&T's agreements with individual ILECs preclude it from providing data on an individual ILEC basis. *See* Swift Declaration ¶ 9.

46/ Swift Declaration ¶ 11. Customer satisfaction is clearly linked to a carrier's ability to avoid outages and, in the event an outage occurs, to restore service quickly. Therefore, the

ILECs' services to competitive carriers can severely harm competitors' relationships with their customers as well as their reputation in the marketplace. WorldCom correctly points out that high-volume customers expect a significant degree of reliability and predictability in the services they receive -- the very factors frequently compromised by the ILECs' sub-par performance.[47/]

2. Performance Measures and Standards Will Correct, Not Distort, the Marketplace.

The ILECs also argue that performance standards are unnecessary today because there have never been performance standards for special access before.[48/] This argument is not only disingenuous, it fails to take into account the current state of the marketplace. As numerous commenters explain, UNE use restrictions and the ILECs' implementation of those restrictions force CLECs to rely on special access in many instances instead of UNEs, making performance standards critical to ensuring competition in the local exchange marketplace.[49/] Moreover, as CompTel demonstrates, the ILECs' incentive to harm retail competition through sub-par special access performance is expanding as they have a more intensified need to protect their monopoly over the local loop.[50/] In addition, as BOCs gain Section 271 approvals, they will have even

---

finding that more than 30 percent of outages last more than three hours is particularly troublesome since it tracks restoration time frames well in excess of AT&T's Direct Measures Of Quality ("DMOQ") of less than two hours (similar to the level incorporated in the JCIG Proposal). Even when measured against this much lower standard of performance, ILEC performance fails.

47/ WorldCom at 17-18.

48/ BellSouth ¶¶ 20-22; Qwest at 2; Verizon at 1-2.

49/ AT&T at 4-6; API at 3; CompTel at 3; Focal, Pac-West and US LEC at 11-12; Mpower at 8; Sprint at 3.

50/ CompTel at 3. There is no merit to Verizon's claim that its Circuit Provisioning Centers (the assets it uses to design special access services after it receives an order) "do not know the identity of the customer for whom the circuit is being provisioned." Verizon at 11. To design the proper facilities, the Circuit Provisioning Center must be aware of whether the customer has ordered one DS-1 circuit or twenty DS-3 circuits. As Verizon itself acknowledges (at 16-17), end user customers and carrier-customers typically order different types of circuits in different

greater incentives (and will be able) to leverage their market power over special access to disadvantage their IXC competitors.[51/] Thus, now more than ever, it is essential for the Commission to adopt performance measures, standards, and remedies to ensure that both the Commission's and Congress' goals are met.[52/]

Inexplicably, the ILECs assert that performance standards are unnecessary because competitors can simply negotiate with the ILECs to receive the types of services and commitments they desire.[53/] SBC, for example, contends that it provides a Managed Value Plan ("MVP") tariff that provides competitors with adequate performance standards and penalties.[54/] Qwest similarly suggests that the Commission should adopt performance standards and remedies that ILECs may "voluntarily" include in their contracts and tariffs.[55/]

---

quantities, and thus, the Circuit Provisioning Centers must have some indication of the type of customer ordering special access services. In addition, more often than not the Access Service Request that carrier customers send to Verizon to order services includes the carrier's Access Carrier Name Abbreviation, which distinguishes it from all other carriers and end users.

51/ AT&T at 16; CompTel at 3; Sprint at 6; WorldCom at 2, 7.

52/ Performance measures and standards for special access will become even more critical to those competitors remaining in the marketplace if the Commission agrees with the ILECs and declares them nondominant in the provision of broadband services -- a finding that AT&T believes is completely unjustified and unsupported by law. *See generally Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, CC Docket No. 01-337, FCC 01-360 (rel. Dec. 20, 2001).

53/ Qwest at 9; SBC at 12; Verizon at 8-9.

54/ SBC at 11-12. SBC's assertion that the commissions in Indiana and Ohio found that its MVP tariff provides sufficient protections for customers and carriers is at best misleading. *Id.* at 13. SBC fails to note that both determinations were made in the context of the state commissions' consideration of whether to include special access measures in Section 271 performance plans. In both cases, the state commissions found that that special access, unlike UNEs, was not covered by Section 271 and, therefore, should not be included in performance measurement plans adopted upon as part of the state's Section 271 review process.

55/ Qwest at 9. Under Qwest's "voluntary" approach the Commission would "encourage" the ILECs to use "uniform and meaningful definitions and measurement methodologies. *Id.*

The assumption that competitors have the sort of negotiating power that allows them to dictate terms to the ILECs is, at best, misguided. If this were the case, the commenters plainly would not be unanimous in their calls to have the Commission provide relief here.[56/] As Time Warner and XO Communications explain, the ILECs alone determine what performance standards will apply in tariffs and carrier contracts, so that the critical performance standards are often excluded or do not trigger any remedies.[57/] Similarly, WorldCom states that any tariff provisions purported to be in "response to growing competition" have been added unilaterally by the ILEC and are in no way the "product of negotiation between parties with similar bargaining power."[58/]

AT&T's experiences are the same. Although it is pleased to see SBC implement a scheme that links poor performance with monetary consequences, as explained in the attached Swift Declaration, these mechanisms have not remedied AT&T's problems with poor special access performance.[59/] WorldCom also notes that "the MVP tariff offers only the most meager of performance plans: it measures only three parameters, measures those parameters against

---

56/ Swift Declaration ¶ 12 (noting that, despite many hours devoted to negotiating for service improvements with the ILECs, the overall service quality continues to be mediocre).

57/ Time Warner and XO Communications at 47.

58/ WorldCom at 25 (citing Letter from W.W. Jordan, BellSouth, to Magalie Roman Salas, FCC (Aug. 22, 2001) and Letter from Brian J. Benison, SBC, to Magalie Roman Salas, FCC (Aug. 17, 2001)). Moreover, Time Warner and XO Communications maintain that the minimal requirements in tariffs "do little to remedy service quality problems" and "are insufficient to ensure that the ILECs will provide CLECs reasonable and nondiscriminatory service." Time Warner and XO Communications at 45-46; *see also* AT&T Wireless at 9-11; Cable & Wireless at 7-8; Voicestream Wireless at 5; WorldCom at 25-26. Further, Time Warner and XO Communications point out that service installation guarantees are meaningless because nothing binds the ILEC to that interval. *See* Time Warner and XO Communications at 46.

59/ Swift Declaration ¶ 13.

weak standards, does not apply them to all special access services (for example, it excludes DS-3 circuits), [and] provides minimal compensation if those weak standards are not met."[60/]

Moreover, as outlined in the attached Declaration of Deborah S. Waldbaum, AT&T has experienced circumstances in which it has placed an order for special access from an ILEC for a specific end user, and has waited for weeks or months to get a response from the ILEC.[61/] Later, AT&T has learned from its customer that the ILEC directly approached it and offered to provide the necessary services, often in a shorter time.[62/] As is obvious, these instances are difficult to document because most end users fear retaliation from the ILEC, which they must rely upon to provide other critical telecommunications services.

In any case, under AT&T's proposal, competitors will retain the right to negotiate with the ILECs if they choose to do so. Thus, contrary to the ILECs' contention, the Commission's adoption of baseline performance standards would not limit an ILEC's flexibility to respond to different customer requirements.[63/] If some competitors think that negotiation will work better for them, then they can try to establish their own performance plans and remedies and opt out of the national remedies plan. To the extent SBC and BellSouth are correct that each competitor cares about different service components,[64/] then competitors will often exercise this option. As the comments demonstrate, however, both large and small customers find themselves today at a

---

60/ WorldCom at 25.

61/ *See* Declaration of Deborah S. Waldbaum on Behalf of AT&T Corp., ¶¶ 5-6 (Feb. 12, 2002) ("Waldbaum Declaration").

62/ Waldbaum Declaration ¶ 6.

63/ BellSouth ¶¶ 31-33; SBC at 14; Verizon at 7-9.

64/ BellSouth ¶ 31; SBC at 14.

loss to negotiate agreements with the ILECs that provide them with the quality inputs they need to provide commercially acceptable service to end users.[65/]

Other ILEC concerns also lack merit. For example, because the JCIG Proposal compares disaggregated measures and standards, Verizon's concern with the possibility of comparing "unlike" services is alleviated.[66/] The JCIG Proposal contains appropriate disaggregation levels to ensure apples-to-apples comparisons, based on type of facility ordered (*i.e.*, DS-0, DS-1, DS-3, etc.) rather than the type of customer ordering service.[67/] The ILECs' concerns in this regard simply underscore the fallacy of their proposals to aggregate all performance measures as much as possible. Clearly, if measures are not compared at the product and geographic level, then there is a good chance that the standards would measure "unlike" services. Conversely, the product and geographic disaggregation contemplated by the JCIG Proposal assumes comparisons of "like" services. Moreover, ILEC arguments that they have to treat end user and carrier customers differently assumes incorrectly that end users do not also require the same type of reliable, timely service. And, in any event, this argument is contradicted by BellSouth's and Verizon's claims that they treat all special access purchasers the same, whether those purchasers

---

65/ In light of the ILECs' superior negotiating power, the Commission should find that any tariff or contract that does not incorporate the national standard and remedy plan is unjust and unreasonable, unless the competitive carrier explicitly relinquishes its rights for other valuable consideration.

66/ Verizon at 16-17.

67/ Verizon argues that any performance measures must delineate between different classes of local access customers, *i.e.* carriers vs. end-user customers, in order to be valid. Verizon at 15-16. However, Verizon's argument ignores the fact that the same facilities are used to provide the service regardless of the character of the customer. Therefore, the important distinction is between the *type* of facilities (*e.g.*, DS-0 vs. DS-1, design services vs. POTS services) -- exactly the distinctions provided in the JCIG Proposal. Thus, even if Verizon's assertion that it primarily provisions DS-0 circuits to its end users customers is correct, that performance would only be compared to the DS-0 service Verizon provides to its carrier customers -- not to the DS-1 or higher capacity service as it suggests.

are end users or carrier-customers, because "all special access customers subscribe to exactly the same service."[68/] The ILECs cannot have it both ways.

The scope of the data available under current reporting schemes is far too limited for carriers to ensure they receive performance from the ILECs that is consistent with market-based performance requirements of both carriers and end user customers.[69/] Specifically, the current voluntary reporting fails to provide a comprehensive view of overall performance quality needed to determine the extent of an industry-wide performance problem. Several commenters agree, stating that the ILECs' current tariff or contract terms are insufficient to meet competitors' needs and that significantly more clarity and transparency is needed.[70/] More importantly, carriers are often prohibited from sharing information with regulators, which makes it possible for the ILECs to obscure performance problems and limit competitors' and regulators' efforts to improve service quality. Indeed, the ILECs feel no outside pressure to improve service when guaranteed that poor performance will be hidden from regulatory oversight. Accordingly, the competitors' comments unanimously concur that only the adoption of federal performance measures and standards will provide the transparency needed to ensure that all competitors and end user customers receive the services they need in a timely, nondiscriminatory manner.[71/]

In addition, the positive relationship between the adoption of performance standards (and the increased regulatory awareness of service quality issues by regulators) and improved performance has been proven in states that have adopted special access performance plans. Notably, in Massachusetts, regulators established a docket to examine the need for special

---

68/ BellSouth ¶ 39; Verizon at 11.

69/ Swift Declaration ¶ 9.

70/ AT&T Wireless at 9-11; Cable & Wireless at 7-8; Voicestream Wireless at 5; WorldCom at 25-26.

71/ *See* ALTS at 6-7; PaeTec at 3; Time Warner and XO Communications at 45-46.

access performance standards, Verizon's service has already shown improvement.one of the few jurisdictions to establish performance standards (albeit, very limited) for special access, Verizon's service has slightly improved.[72/] In sum, ILECs retain the motivation and means to disadvantage their competitors, and the abundant evidence here makes clear that "market forces" are utterly insufficient to prevent them from doing so.

3. The Adoption of Performance Measures and Standards Will Not Be Burdensome on ILECs.

The ILECs' comments start from the faulty premise that the Commission's only goal should be to deregulate, and only deregulation can result in competition.[73/] That premise is flawed -- the Commission has *long* recognized that competition is a condition precedent to deregulation.[74/] Indeed, the Act acknowledges such a scheme in requiring the ILECs to open their local markets to competition before receiving Section 271 authority. In all events, it is not "regulatory" for the Commission to require ILECs to measure performance in a manner that would otherwise be required in a competitive market. In that vein, WorldCom argues that it is "fundamental to a company's business to know how long it takes to install and repair special access circuits -- not only for wholesale customers, but also for retail customers," and thus, the

---

72/ Since the initiation of the special access docket in March 2001, Verizon's overall performance to its wholesale customers has begun to improve. Although, Verizon's overall on-time performance initially dropped from its March 2001 level of 80.05 percent, to 75.14 percent in July 2001, by August 2001, on-time performance rose to 86.10 percent. *See* D.T.E. 01-34, *Investigation by the Department of Telecommunications and Energy on Its Own Motion Pursuant to G.G. c. 159, §§ 12 and 16, into Verizon New England Inc. d/b/a Verizon Massachusetts' Provision of Special Access Services*, Direct Testimony of Eileen Halloran on Behalf of AT&T Communications Of New England, Inc., Attachment A (filed Feb. 6, 2002). Notably, Verizon's average on-time performance to its retail customers for comparable services during the same period reinforces the need for wholesale performance standards: 99.15 percent on-time in March 2001, 99.28 percent in July 2001, and 99.84 percent in August 2001.

73/ BellSouth ¶ 30; Qwest at 3-4; SBC at 6-7; Verizon at 4.

74/ AT&T Comments at 32-33.

ILECs should already be measuring and collecting such data.[75/] In a competitive market, suppliers in fact go to great lengths to monitor their performance, collect the necessary data, and provide the results, especially to their biggest customers.[76/]

The evidence also shows that the Commission should reject the ILECs' contentions that the adoption of special access performance standards and reporting requirements would be overly burdensome.[77/] As a threshold matter, the fact that the majority of special access purchasers, including both carriers and end user customers, are in virtual unanimity on what should be measured lends support to the notion such that measurements are reasonable.[78/]

More significantly, however, the ILECs admit that they typically measure their performance and provide reports pursuant to tariff or contracts.[79/] In fact, both Verizon and SBC currently provide AT&T with performance reports, although performance continues to lag in many respects and improvements are often inconsistent and unsustainable.[80/] Therefore, as the New York Department of Public Service notes, because the ILECs already measure and report their performance, the adoption of performance measures would impose no novel requirements

---

75/ WorldCom at 44.

76/ AT&T at 23.

77/ BellSouth ¶ 28; Qwest at 6; SBC at 4.

78/ Letter from Joint Competitive Industry Group, to Michael K. Powell, Chairman, FCC, CC Docket No. 01-321 (filed Jan. 22, 2002) ("JCIG Proposal"); *see also* API at 5; ASCENT at 9; DirecTV Broadband at 9; VoiceStream at 11. In this context, the Commission should reject SBC's suggestion that the Commission concede defeat before it has even started to craft a plan because it may be difficult for the agency to establish the "right" measures. SBC at 14. This assertion ignores the fact that the competitive industry has presented a unified and comprehensive plan, as well as the fact that the states have managed to surmount the ILEC obstacles and establish effective and efficient standards and measurements for comparable UNE performance.

79/ BellSouth ¶ 27; SBC at 11-12; Verizon at 10.

80/ Swift Declaration ¶ 13.

on the ILECs.[81/] Indeed, WorldCom notes that the JCIG Proposal employs a limited number of metrics, most of which are identical or similar to the metrics already ordered by existing regulatory requirements (*i.e.*, ARMIS reports and state reporting requirements) or encompassed in the ILECs' reports to carrier-customers.[82/] Moreover, as some commenters suggest, the reporting scheme envisioned by the JCIG Proposal may even allow the Commission to eliminate some of the special access reports contained in the ARMIS reports, thus reducing ILECs' regulatory obligations.[83/]

4. The Comments Do Not Support the Notion that Nondominant Carriers Should be Subject to Performance Measures, Standards, and Reporting Requirements.

There is no merit to the ILECs' self-serving argument that all special access providers, even competitors, need to be subject to the same performance standards and remedies imposed on the ILECs.[84/] Indeed, the overwhelming majority of commenters point out that the ILECs, not the competitors, are the problem here.[85/] While the ILECs offer their usual arguments about "parity" and "disparate treatment," they fail to acknowledge that the Commission and Congress have routinely differentiated among carriers based on competitive considerations, particularly their market power.[86/] In addition, in AT&T's experience, in those rare instances in which

---

81/ New York Department of Public Service at 3.

82/ WorldCom at 43.

83/ AT&T at 24; WorldCom at 42-43; Sprint at 8.

84/ SBC at 4-5; USTA at 6; Verizon at 12.

85/ Cable & Wireless at 13; DirecTV Broadband at i; Focal, Pac-West and US LEC at 33; Sprint at 9; Time Warner and XO Communications at 28-29; VoiceStream at 13; WorldCom at 47.

86/ *See generally Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 91 F.C.C.2d 59 (1982), 98 F.C.C.2d 1191 (1984) ("*Competitive Carrier*") (subsequent history omitted); 47 U.S.C. § 251(f) (creating separate classes for ILECs). *Compare* 47 U.S.C. §§ 251(a), (b) (obligations of all

AT&T is able to obtain special access facilities from a competitive provider, it receives significantly better performance than that given by the ILECs.[87/] Accordingly, there is no reason to impose such requirements on competitors that lack market power, and thus, cannot avoid meeting their customers' demands for quality service.

Despite the overwhelming dominance of ILECs as a group, AT&T and other commenters recognize that not all ILECs are created equal, and thus, the need for performance measures, standards, and reporting requirements may reasonably vary by the size of the incumbent carrier.[88/] Accordingly, AT&T agrees with commenters such as Time Warner, XO Communications, and the Independent Telephone & Telecommunications Alliance that performance standards and reporting requirements should generally be prescribed only for Tier 1 ILECs,[89/] which collectively control more than 90 percent of all access lines.[90/]

5. There Is No Evidence To Support the Adoption of an Automatic Sunset Date.

All commenters other than the ILECs agree that the adoption of an automatic sunset date for the federal performance standards and reporting requirements adopted by the Commission

---

telecommunications carriers and all local exchange carriers) *to* 47 U.S.C. § 251(c) (obligations applicable only to ILECs).

87/ Swift Declaration at n.6; Fea-Taggert Declaration at 19-20 (explaining that third-party providers often have significantly better performance at attractive prices).

88/ AT&T at 34; Focal, Pac-West and US LEC at 33; New York Department of Public Service at 3; NTCA at 2-3; NECA, NRTA and OPASTCO at 3; Small Independent Telephone Companies at 5-6.

89/ Time Warner and XO Communications at 28-29; Independent Telephone & Telecommunications Alliance at 3.

90/ Tier 1 local exchange carriers, also known as Class A local exchange carriers, are companies having annual revenues regulated telecommunications operations of $100 million or more. Tier 1 local exchange carriers have been defined using criteria used to define Class A companies. *See* 47 C.F.R. §§ 32.11(a), (b), (e); *see also Commission Requirements for Cost Support Material to be Filed with 1990 Annual Access Tariffs*, 5 FCC Rcd 1364, 1364, ¶¶ 3-5 (1990).

here would be inappropriate at this time.[91/] Only *after* competition is firmly established in the special access market should the Commission revisit the need for standards and reporting requirements. As Sprint notes, the Commission should not set a date certain for the sunset of such requirements because it is impossible to "determine the date on which the market for special access services may be found to be competitive."[92/] Nor should the Commission's rules sunset based on Section 271 approval or upon the grant of pricing flexibility because, as discussed above, neither demonstrates that the market is fully competitive.[93/] Indeed, even more monitoring will be required as the ILECs enter the long distance market, in order to prevent backsliding and to curb their incentives to harm their IXC competitors. Thus, establishing a sunset date at this time would only undermine the effect of the Commission's efforts.

II. THE COMMISSION HAS THE AUTHORITY AND OBLIGATION TO ADOPT A NATIONAL PERFORMANCE PLAN.

A. The Commission's Jurisdiction To Adopt Performance Measurements, Standards, and Reporting Requirements Is Clear.

AT&T and numerous other commenters demonstrate that the Commission is in the ideal position to address with ILEC special access problems.[94/] Special access services are overwhelmingly classified as interstate, and thus subject to the Commission's jurisdiction.[95/] As

---

91/ *E.g.*, API at 8; ASCENT at 10; Cablevision Lightpath at 5; Focal, Pac-West, and US LEC at 38-39; Minnesota Department of Commerce at 5; Sprint at 10; Time Warner and XO Communications at 32; WorldCom at 44.

92/ Sprint at 10.

93/ Cablevision Lightpath at 5; Focal, Pac-West, and US LEC at 39.

94/ AT&T at 17, 20, 23; Cable & Wireless at 8; CompTel at 5; DirecTV Broadband at 8; Focal, Pac-West and US LEC at 10-11. Indeed, Cable & Wireless notes that the ILECs are supporting the Commission's jurisdiction in those few states that have initiated special access proceedings. Cable & Wireless at 8-9.

95/ The Commission's own jurisdictional rules define special access services as "interstate" if more than 10 percent of the traffic on those facilities is interstate. *See MTS and WATS Market Structure Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board,*

WorldCom notes, the Commission "clearly has jurisdiction over all interstate special access circuits, and is therefore in the best position to establish a comprehensive plan to address special access performance by incumbent LECs."[96/] More importantly, because the ILECs' poor special access performance violates the core principles of the Act, which require the provision of just, reasonable, and nondiscriminatory service, the Commission has the obligation -- not just the authority -- to resolve these issues.

As the comments explain, the Commission has extensive jurisdiction to establish national performance measurements, standards, and reporting requirements for such interstate services.[97/] The Commission has long used Sections 201 and 202 to remedy complaints regarding carriers' provision of unjust, unreasonable, and discriminatory service. Section 201 provides a broad grant of authority: "[t]he Commission may prescribe such rules and regulations as may be

---

4 FCC Rcd 1352, 1352, ¶¶ 1-4 (1989); 47 C.F.R. § 36.154(a) (stating that "lines carrying both state and interstate traffic" are interstate "if the interstate traffic on the line involved constitutes more than ten percent of the total traffic on the line").

96/ WorldCom at 35. Although AT&T believes that state commissions have a substantial interest in assuring satisfactory service quality, a number of states believe their jurisdiction over special access is limited. The Massachusetts Department of Telecommunications and Energy, for instance, found that the vast majority of Verizon's special access services (99.4 percent) are provisioned under federal tariffs, and are thus considered interstate. *See* D.T.E. 01-34, *Investigation by the Department of Telecommunications and Energy on Its Own Motion Pursuant to G.G. c. 159, §§ 12 and 16, into Verizon New England Inc. d/b/a Verizon Massachusetts' Provision of Special Access Services*, Order on AT&T Motion to Expand Investigation, at 2 (Aug. 9, 2001). In addition, the Colorado Public Utilties Commission declined to rule on the merits of an AT&T complaint regarding ILEC special access performance because it believed the jurisidiciton to handle this matter rested entirely with the Commission. *See* CPUC Docket No. 99F-404T, *AT&T Communications of the Mountain States, Inc., Complainant v. U S WEST Communications, Inc., Respondent*, Decision No. R00-128, at IV(A) (Feb. 7, 2000). Accordingly, it is essential that the Commission exercise its jurisdiction in this area.

97/ ALTS at 13-14; Cable & Wireless at 8; Cablevision Lightpath at 5 n.13; Sprint at 1. Even, Qwest acknowledges that the Commission cannot defer such matters to the states because the Commission's duty to execute and enforce the Act cannot be deferred or ignored. Qwest at 18.

necessary in the public interest to carry out the provisions of this Act."[98/] Notably, in *AT&T Corp. v. Iowa Util. Bd.*, the United States Supreme Court reviewed the language of Section 201 and found "the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act.'"[99/] Thus, BellSouth's assertion that the Commission has only limited rulemaking authority under Section 201 is clearly wrong.[100/]

Given the Supreme Court's holding, there is also no question that these statutory provisions likewise empower the Commission to adopt performance measures, performance standards, and reporting requirements for ILEC-provisioned special access services. Moreover, these provisions also establish a corresponding responsibility for the Commission to ensure that ILECs comply with the Act's and the Commission's mandates. As demonstrated by the commenters, the ILECs' current practices of failing to provision special access services upon request, failing to maintain reasonable ordering and provisioning practices, and discriminating unreasonably against competing carriers and their customers violate the requirements of both Sections 201 and 202.[101/]

Similarly, as Time Warner Telecom and XO Communications state, the Commission can also rely on the broad grant of authority found in Section 4(i) to adopt performance measures and standards.[102/] ALTS notes that the Commission has used Section 4(i) "numerous times in the past [to adopt] regulations designed to increase the ILECs' incentives to act in accordance with

---

98/ 47 U.S.C. § 201(b).

99/ 525 U.S. 366, 378 (1999).

100/ BellSouth ¶¶ 13, 49.

101/ API at 6; ASCENT at 6-7; CompTel at 5-6; Focal, Pac-West and US LEC at 9, Time Warner and XO Communications at 33-35; WorldCom at 26-32.

102/ Time Warner and XO Communications at 33-35; *see also* AT&T at 18-20.

the requirements of the Communications Act."[103/] Similarly, ASCENT explains that Section 4(i) bolsters the Commission's authority "to address deteriorating and discriminatory incumbent LEC provisioning of special access services."[104/] Indeed, the Commission has repeatedly invoked Section 4(i), along with Sections 201 and 202, as the bases for the Commission's major common carrier initiatives, such as *Competitive Carrier* and *Computer II*.[105/]

Finally, BellSouth itself admits that the Commission can rely on Section 205 to prescribe performance measures, performance standards, and reporting requirements for ILECs.[106/] Under Section 205, the Commission can compel ILECs to include performance standards and corresponding remedies in their special access tariffs and contracts.[107/] While BellSouth claims that the Commission must conduct an ILEC-specific analysis before using its Section 205 authority,[108/] the Commission does not need to examine every ILEC tariff individually, and

---

103/ ALTS at 16 (citing *MTS and WATS Market Structure*, 97 F.C.C.2d 834, ¶ 84 (1984), which established a substantial discount for access purchased by carriers that did not have the benefit of equal access, and *New England Tel. and Tel. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987), in which the court upheld the Commission's refunds to carriers when rates resulted in a rate of return excess of the prescribed rate of return).

104/ ASCENT at 6.

105/ *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, ¶ 286 (1980) ("*Computer II*"), *modified on recon.*, 84 F.C.C.2d 50 (1980), *further modified*, 88 F.C.C.2d 512 (1981), *aff'd sub nom.*, *Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 91 F.C.C.2d 59, 73-74, ¶¶ 29-31 (1982), 98 F.C.C.2d 1191, 1209, ¶¶ 1, 28 (1984) ("*Competitive Carrier*") (subsequent history omitted).

106/ BellSouth ¶¶ 49-52. In the *Notice*, the Commission focuses on the use of its Section 205 authority in the enforcement area, but Section 205 similarly provides the Commission with jurisdiction to prescribe performance measures, standards, and reporting requirements. *See Notice* ¶ 14.

107/ ALTS at 14-15; Focal, Pac-West and US LEC at 23.

108/ BellSouth ¶ 52.

indeed it has not done so in the past.[109/] As explained in greater detail below, the Commission may prescribe tariff or contract terms under Section 205 if it finds, pursuant to a rulemaking proceeding, that the ILECs' current tariffs or contracts permit them to engage in unlawful behavior.[110/]

B. The Commission Should Adopt a Virtually Automatic Remedy Procedure Both To Compensate Injured Carriers and To Deter Anticompetitive Behavior.

Contrary to the ILECs' contentions,[111/] so-called "marketplace" penalties have proven entirely insufficient to protect carriers and consumers from anticompetitive and discriminatory ILEC performance. Numerous commenters agree with AT&T that the performance measurements the Commission adopts would be meaningless unless they are accompanied by a strong enforcement regime that both compensates injured carriers and deters future ILEC non-compliance.[112/] The Minnesota Department of Commerce similarly demonstrates that ILECs often are willing to pay certain levels of penalties rather than strive to meet their service quality obligations.[113/]

109/ *See Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd 7369, 7372 (1992) (requiring Tier 1 local exchange carriers to file tariffs offering interstate special access expanded interconnection service to all interested parties).

110/ *See infra* Section II.B.1.

111/ BellSouth ¶ 24; Qwest at 6-7; SBC at 11-12; Verizon at 20-21.

112/ *E.g.*, AT&T at 36-38; ASCENT at 8; AT&T Wireless Services at 15; ALTS at 11; Cable & Wireless at 17; Cablevision Lightpath at 6; DirecTV Broadband at 13-14; Focal, Pac-West and US LEC at 23, 31-32, Minnesota Department of Commerce at 5; Sprint at 14-15; Time Warner and XO Communications at 25-26; WorldCom at 9.

113/ Minnesota Department of Commerce at 5 (stating that, rather than comply with performance standards, U S WEST was willing to pay the associated remedies for violating those standards).

The first tier of an effective enforcement regime should address an ILEC's deficient performance delivered to an individual competitor and require the ILEC to pay damages to the injured carrier. The second tier should focus on deterrence, and assess penalties that are based on the ILEC's overall performance in the marketplace. Because the focus of these "Tier 2" remedies is on injury to competition, not individual competitors, and their purpose is to change behavior, not compensate for injury, these remedies would be payable to the U.S. Treasury. Critically, as the Commission, Congress, and a majority of commenters have recognized, the penalties for failure to meet defined performance standards for the competitive industry as a whole must be more than the cost of doing business and must act as a disincentive to continued anticompetitive behavior.[114/]

Just as important, the Commission's enforcement plan must be as self-executing as possible. The ILECs have managed to delay the implementation of every pro-competitive

---

114/ *E.g.*, ASCENT at 7-8; AT&T Wireless at 15-16; Sprint at 14-15; *see also* Michael K. Powell, Chairman, FCC, Remarks at the Association for Local Telecommunications Services (Nov. 30, 2001) ("We recognized quickly that much of the authority that we had in this area was inadequate. The level of fines we could impose in many cases was paltry. For many large carriers the penalties could be absorbed as the cost of doing business."); Letter from Michael K. Powell, Chairman, FCC, to Leaders of the Senate and House Commerce and Appropriations Committees (May 4, 2001) (stating that current forfeiture amounts are "insufficient to punish and to deter violations in many instances"); Rodney L. Pringle, *Bell Backers Support FCC Call for Bigger Bell Hammer*, COMMUNICATIONS TODAY, May 21, 2001 (quoting Representative W.J. "Billy" Tauzin that new legislation before his House Commerce Committee that "will increase the penalties that the FCC may impose on common carriers to a level that is far beyond just the cost of doing business."); Hearing before the Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce, House of Representatives, 107th Congress, First Session, Statement by Representative Markey on H.R. 1765, at 3 (May 17, 2001) (stating that "[i]t is very clear that the current forfeitures and penalties available to the Federal Communications Commission are woefully inadequate to act as a deterrent to multi-billion dollar enterprises"); Merrill Lynch Global Securities Research, *RBOCs Continue to Pay Fines, Highlighting Difficulties for Competitors, But Are Improving* (Dec. 28, 2001) ("the cost of violating merger agreements is below the cost of allowing competitors to enter the market [and] it continues to be cheaper [for ILECs] to pay the government for violating certain performance targets versus completely opening up the local markets to competitors").

provision of the 1996 Act -- usually through litigation or outright refusal to abide by the terms of merger conditions or arbitration orders -- and they are now attempting to force competitors who suffer the harms of their inadequate performance into a complaint process that is inefficient, unreliable, and too costly.[115/] Numerous parties support AT&T's showing that the slowness and uncertainty of the Commission's formal complaint process plays into ILECs' hands, and even deters competitors from filing complaints.[116/] Moreover, the timing and types of remedies presently available to carriers under Section 208 cannot address special access problems with the speed that customers demand.[117/] As a result, even if a complainant prevails, its commercial opportunity will have long since evaporated. Thus, a more streamlined, automatic enforcement process is necessary to ensure that the ILECs comply with the Commission's mandates and that competitors and their customers receive quality services.[118/]

115/ *E.g.*, BellSouth ¶ 24, Verizon at 20-21; NTCA at 2-3; NECA, NRTA and OPASTCO at 4.

116/ AT&T at 22; Cable & Wireless at 18; Focal, Pac-West, and US LEC at 33; Sprint at 7; WorldCom at 37. There is no support for BellSouth's contention that the absence of special access complaints indicates that the ILECs do not engage in discriminatory conduct. BellSouth at n.10. Rather, the fact that only one special access complaint has been filed in recent months even though the evidence shows the ILECS have failed to comply with their statutory duties in providing interstate special access is proof that the current complaint process is not efficient for injured carriers.

117/ For competitors that seek to use the formal complaint process (in the limited circumstances in which such an approach may be useful) those competitors should have an expedited process to pursue that remedy. Such a process should include a presumption of liability if the ILEC's own performance data show the ILEC failed to comply with the Commission's performance standards. Focal, Pac-West and US LEC at 33 (arguing that the Commission should streamline its current formal complaint process); *see also* Remarks of Commissioner Kevin J. Martin, FCC, to the Federal Communications Bar Association, Washington, DC (Feb. 1, 2002) ("Martin Speech") (stating that the Commission generally takes more than a year to resolve formal complaints and that "[s]uch delays make it difficult to provide regulatory certainty, as market conditions may change before the Commission has acted").

118/ Indeed, Commissioner Martin stated that "[t]he Commission has an important role to play" in the complaint process and that the Commission "can -- and should -- do a better job on

Accordingly, AT&T generally agrees with the key tenets set forth in the JCIG Remedies Proposal and urges the Commission to apply those principles to ensure the adoption of a meaningful enforcement scheme.[119/] In particular, the JCIG Remedies Proposal correctly concentrates on the need for a two-tiered enforcement structure that provides a streamlined process for assessing carrier-specific damages as well as imposing forfeitures. Moreover, the JCIG Remedies Proposal appropriately supports the adoption of a mechanism for increased penalties depending on the magnitude, duration, and severity of a performance failure.[120/]

As discussed more fully below, the Commission has ample legal authority to assess both compensatory damages and forfeitures to the U.S. Treasury on an expedited basis when ILECs fail to comply with interstate special access performance measures adopted by the Commission. AT&T's and other carriers' proposals for a truncated notice of apparent liability ("NAL") process accommodate both the ILECs' concerns about due process and the competitors' need for swift action.

1. The Commission's Enforcement Regime Should Permit Competitors To Recover Carrier-Specific Damages.

Given competitive carriers' heavy reliance on ILEC-provisioned special access services, injured carriers must have the right to be fully compensated for damages caused by poor ILEC service quality. As several parties, including BellSouth, acknowledge, the Commission has broad authority under Section 205 to compel ILECs to incorporate Tier 1 compensatory damages

---

enforcement," and, as a result, Commissioner Martin argued that the Commission must act faster in resolving formal complaints. *See* Martin Speech.

119/ Letter from Joint Competitive Industry Group, to Michael K. Powell, Chairman, FCC, Attachment A: Essential Elements of a Special Access Provisioning Enforcement Plan, CC Docket 01-321 (filed Feb. 12, 2002) ("JCIG Remedies Proposal").

120/ *Id.*

in their interstate special access tariffs and their carrier-to-carrier special access contracts.[121/] For decades, the Commission has used its authority to mandate that dominant carriers include appropriate terms and conditions in their tariffs and contracts. Importantly, this approach would be essentially self-executing, thereby eliminating the problems of cost and delay associated with the complaint process.[122/]

Upon a finding that a carrier's practices are in violation of any provision of the Act, Section 205(a) of the Act permits the Commission to prescribe tariff or contract terms "after full opportunity for hearing."[123/] The Commission has held that Section 205 does not require a detailed oral hearing, but rather may be satisfied through a general rulemaking proceeding with opportunity for notice and comment.[124/] Once the Commission finds that an ILEC -- based on its

---

121/ BellSouth ¶¶ 50-52; ASCENT at 8; ALTS at 14; Focal, Pac-West and US LEC at 9. Section 205 provides the Commission with broad authority to require ILECs to incorporate terms and conditions in contracts. Pursuant to that section, the Commission may examine "any charge, classification, regulation, or practice of any carrier or carriers" to determine whether that carrier "is or will be in violation of any of the provisions of [the] Act." 47 U.S.C. § 205(a).

122/ In the course of establishing federal Tier 1 consequences, competitors' rights to pursue their complete damages must be retained. *E.g.*, WorldCom at 51 (explaining that competitors should retain the right to pursue private remedies when injured by poor performance or discrimination). However, if a competitor pursues such a claim through litigation or other means, it would be reasonable to reduce any damage award by the amount of any Tier 1 payments it received from the ILEC for the conduct during the same period.

123/ 47 U.S.C. § 205(a).

124/ *See Western Union Tel. Co. v. FCC*, 665 F.2d 1126, 1151 (D.C. Cir. 1981) (finding that the FCC's policy decisions that impact rates may be made in informal rulemaking proceedings rather than in adjudicatory rulemaking proceedings); *AT&T v. FCC*, 572 F.2d 17, 21-23 (2d Cir. 1978) (affirming that "after a hearing" means the type of hearing (either a rulemaking or an adjudicatory hearing) appropriate to the particular case), *cert. denied*, 439 U.S. 875 (1978). In addition, the Commission has broad discretion to use different procedural vehicles to prescribe tariff terms or order carriers to file tariff revisions. *See American Telephone and Telegraph Company Petition to Rectify Terms and Conditions of 1985 Annual Access Tariffs*, 3 FCC Rcd 5071, 5071 (1988) ("AT&T Petition to Rectify") (stating that "the Commission has broad discretion in choosing the procedures the Commission will use to perform its statutory duties"). The FCC may use its investigative authority, its complaint resolution authority, its rulemaking authority, or its authority to issue a declaratory ruling to mandate modifications to unlawful or

own undisputed performance data -- has failed to provide service in a lawful manner, it has several options available, including using its discretion to prescribe reasonable tariff or contract provisions pursuant to Sections 205(a) and 201 or taking any other action as may be necessary under Section 4(i).[125/] The use of Section 205 is an administratively and jurisdictionally simple way for the Commission to implement a broad remedy scheme to cover the ILECs' unjust, unreasonable, or discriminatory provision of special access services.

In the past, the Commission has ordered modifications to tariff provisions specifying standards of performance and remedies/penalties for failure to meet those standards. For example, soon after the divestiture of the Bell companies, the Commission adopted an access charge regime and ordered carriers to file tariffs implementing that regime. The ILECs' tariffs, however, especially in the provisions dealing with special access, presented "significant issues of lawfulness," and accordingly, the Commission initiated a tariff investigation.[126/] In light of the potential for substantial revenue loss to customers subjected to service interruptions, the Commission ordered that the ILECs' tariffs be amended so that any interruption of more than thirty minutes would receive a credit and that credit allowances would be permitted for lost service caused by other services provided by the ILEC.[127/]

---

unreasonable tariff provisions. *See MTS and WATS Market Structure; Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, 1985 FCC LEXIS 3819 (1985) (ordering carriers to file alternative tariffs and adopting substantive requirements for those tariffs via a rulemaking proceeding); AT&T Petition to Rectify, 3 FCC Rcd at 5071 (finding that "a petition for declaratory ruling can, and frequently should, be used as a substitute for a Section 208 complaint if the facts are undisputed").

125/ *See Investigation of Access and Divestiture Related Tariffs; MTS and WATS Market Structure*, 97 F.C.C.2d 1082, 1110 (1984) ("*Tariff Investigation Order*").

126/ *See id.* at 1084.

127/ *See id.* at 1174-75.